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Improving Alternative Dispute Resolution

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Improving Alternative Dispute Resolution

Scottish proverb: ‘Law’s costly … tak’ a pint and ‘gree’

1. INTRODUCTION

Relatively few civil disputes are resolved by judicial decision. Various other methods are used to resolve most disputes, including those which have led to litigation in Victoria. Improving alternative dispute resolution (ADR) is part of government policy at both state and federal levels. Many of the proposals in this report aim to facilitate greater and earlier use of ADR in the civil justice system generally and in Victorian courts in particular.

Our review has revealed:

- a range of ADR initiatives that can and should be introduced and expanded to enhance the court system, including new ADR options, compulsory referral, court-conducted mediation and
- a need for additional resources, education and research.

1.1 WHAT IS ADR?

ADR is defined in various ways. The National Alternative Dispute Resolution Advisory Council (NADRAC) has defined ADR as an ‘umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’. Some methods, such as mediation, involve seeking resolution by agreement reached between the parties. Other methods for resolving disputes, such as arbitration, may involve binding determination by a third party. There are also a variety of ‘alternative’ means by which judicial officers may involve independent third parties to assist in the resolution of cases that are being litigated. ADR techniques may be used to determine some or all of the legal and factual issues in dispute. Some ‘hybrid’ ADR methodologies may involve a combination of different techniques or processes. In cases which are the subject of litigation in courts, ADR may be employed by agreement between the parties, at the suggestion of the court or by direction or order of the court. Sometimes the term ADR includes approaches that enable parties to manage and resolve their own disputes without outside assistance.

Although there is widespread support of the use of ADR there is controversy about a number of issues, including whether litigants should be compelled to participate in ADR, particularly in processes which may have a non-consensual binding outcome. There are also divergent views about both the policy question of whether judicial officers should directly participate in ADR processes and the practical issue of the resources required to facilitate this.

ADR is increasingly referred to as ‘appropriate dispute resolution’, in recognition of the fact that such approaches are often not just an alternative to litigation, but may be the most appropriate way to resolve a dispute.

NADRAC has classified dispute resolution processes as facilitative, advisory, determinative or hybrid.

Facilitative processes: the dispute resolution practitioner assists the parties to a dispute to identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute. Facilitative processes include negotiation, facilitation, conferencing and mediation.

Advisory processes: the dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.

Determinative processes: the dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative dispute resolution processes are arbitration, expert determination and private judging.
Hybrid processes:

the dispute resolution practitioner plays multiple roles. For example, in conciliation and in conferencing, the dispute resolution practitioner may facilitate discussions as well as provide advice on the merits of the dispute. In hybrid processes, such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).\(^\text{5}\)

1.2 POSITION IN VICTORIA

The Victorian courts refer cases to mediation, pre-hearing conferences, conciliation and arbitration;\(^\text{16}\) however, mediation is the main form of ADR used. Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role concerning the issues in dispute or the outcome. The mediator will, however, usually advise on or determine the process of mediation. Mediation may be undertaken voluntarily, by a court order, or under an existing contractual agreement.\(^\text{11}\)

The Supreme, County and Magistrates’ Courts have the power to order a proceeding or any part of a proceeding to mediation, with or without the consent of the parties.\(^\text{12}\)

1.3 THE OUTCOME OF ADR

Settlement or agreement rates are a widely used performance measure for ADR processes.\(^\text{13}\) Settlement rates for ADR are often very high, usually between 50% and 85%.\(^\text{14}\) Settlement rates are not the only performance measure used. Other measures include, for example, agreement quality, participant satisfaction, participant empowerment, and time and cost savings.

The Supreme Court

The Court’s 2005/2006 Annual Report noted that:

Mediation has been another feature of the case management process with the consequence that the parties in upwards of 70% of mediated cases were able to achieve settlement and thereby to relieve the parties and the court of the burden of trial.\(^\text{15}\)

The County Court

According to the Court’s 2006/2007 Annual Report:

- of the Building Division cases, 20% settled at mediation
- of the Defamation Division cases, 10% settled after mediation and
- of the Medical Division cases, approximately 60% settled at mediation.\(^\text{16}\)

The Magistrates’ Court

The court’s 2005/2006 Annual Report states that of the 9360 defended civil claims, 3687 were finalised at a pre-hearing conference or mediation (about 39%); 2488 cases were finalised at arbitration (about 26%); and the remaining 3185 cases (about 34%) were finalised at hearing.\(^\text{17}\)

The resolution rate for pre-hearing conferences held at the Court in Melbourne from the start of the year to 31 October 2007 was 68.35%. The resolution rate for mediations at the Court in Melbourne was 64.42% from the start of the year to 22 November 2007.\(^\text{18}\)

The Magistrates’ Court 2005/2006 Annual Report notes that in approximately 70% of mediated cases, the matter is finalised at mediation.\(^\text{19}\) Judicial registrars of the court regularly mediate cases in the industrial division and over 50% of such cases were resolved at mediation in 2006–07.\(^\text{20}\)

Other studies

Various studies have shown significant benefits in using ADR. The Dispute Settlement Centre of Victoria reported a settlement rate of 84% for mediations conducted.\(^\text{21}\) An evaluation of the NSW Settlement Scheme, where appropriate matters in the District Court were referred to mediation, reported a 69% settlement rate.\(^\text{22}\)

The Federal Court in its 2006/2007 Annual Report noted that the settlement rates of cases referred to mediation since the commencement of the program in 1987 has averaged 55%.\(^\text{23}\)
Another study undertaken by the Centre for Effective Dispute Resolution (CEDR) in the United Kingdom found that mediators in commercial mediations claimed approximately 73% of their cases settled on the day, with another 20% settling shortly afterwards, an aggregate settlement rate of 93%.24

NADRAC produced a compendium of statistics on ADR in Australia in 2003; however, the statistics are of limited use for this review because the Supreme Court and Magistrates’ Court statistics were not published.25

1.4 BENEFITS AND DISADVANTAGES OF ADR

Benefits

Some of the benefits of ADR include:

- **ADR can allow access to justice.** For example, as there can be cost and time savings in ADR, it can be more accessible to those of limited financial means.26
- **ADR can be faster.** A dispute can often be resolved in a matter of months, even weeks, through ADR, while a legal proceeding can take years.
- **ADR can save time and money.** Court costs, lawyers’ fees and experts’ fees can be saved. There can also be savings for the courts and government.27
- **ADR can permit more participation.** The parties may have more chances to tell their side of the story than in court and may have more control over the outcome.
- **ADR can be flexible and creative.** The parties can choose the ADR process that is best for them. For example, in mediation the parties may decide how to resolve their dispute. This may include remedies not available in litigation (e.g. a change in the policy or practice of a business).
- **ADR can be cooperative.** The parties may work together with the dispute resolution practitioner to resolve the dispute and agree to a settlement that makes sense to them, rather than work against each other in an adversarial manner. This can help preserve relationships.
- **ADR can reduce stress.** There are fewer court appearances. In addition, because ADR can be speedier and save money, and because the parties are normally cooperative, ADR is less stressful.
- **ADR can remain confidential.** Unlike the court system where everything is on the public record, ADR can remain confidential. This can be particularly useful, for example, for disputes over intellectual property which may demand confidentiality.
- **ADR can produce good results.** Settlement rates for ADR processes are often very high, generally between 50% and 85%.28
- **ADR can be more satisfying.** For the above reasons, many people have reported a high degree of satisfaction with ADR.29

Disadvantages

Some of the disadvantages of ADR include:

- **Suitability.** ADR may not be suitable for every dispute—for example, if a party wishes to have a legal precedent or it is a public interest case, judicial determination may be more appropriate.30
- **Lack of court protections.** If ADR is binding, the parties normally give up most court protections, including the right to a decision by a judge or jury, based on admissible evidence, and appeal rights; also, in the case of judicial decisions, the right to reasons for the decision.
- **Lack of enforceability.** The durability of ADR agreements can be an issue if they lack enforceability.31
- **Disclosure of information.** There is generally less opportunity to find out about the other side’s case with ADR than with litigation. ADR may not be effective if it takes place before the parties have sufficient information about the strengths and weaknesses of their respective cases.
• **Cost of ADR.** Dispute resolution practitioners may charge a fee for their services. If a dispute is not resolved through ADR, the parties may have to put time and money into both ADR and a court hearing.

• **Delay.** ADR adds an extra step, which may increase delay.

• **Fairness.** ADR processes may not be as fair as court proceedings. Procedural rules and other laws governing the conduct of court proceedings contain many safeguards to ensure the fairness of the process and the outcome. These are not necessarily included in ADR.\(^{32}\) In addition, there may be power imbalances if a party is not represented.

• **Delaying tactics.** ADR processes can be used as a delaying tactic or to obtain useful intelligence on an opponent before proceeding with litigation.

• **Inequality.** Effective ADR requires that parties have the capacity to bargain effectively for their own needs and interests. A party may be vulnerable where there is an unequal power relationship, particularly if the party is not represented.

### 1.5 GOVERNMENT COMMITMENT TO ADR

Victorian Government policy aims to reduce litigation where possible. Government agencies are seeking to incorporate ADR into the conduct of their everyday business. Both Commonwealth and state legislation increasingly provide for ADR to be used by various agencies.\(^{33}\)

One obvious method of enhancing use of ADR would be for the Victorian Government to utilise ADR for all disputes, including those resulting in litigation, and to require the insertion of ADR clauses in all government contracts.

ADR is one of a number of strategic priorities for the Victorian Department of Justice.\(^ {34} \) In the Justice Statement, the Attorney-General identified the following principles for ADR: fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability.\(^ {35} \) The Justice Statement notes that:

- **ADR techniques have developed to minimise the costs of disputing, to provide faster dispute resolution, and to provide non-adversarial processes and remedies that are adaptable to the needs of the disputants; and**

- **ADR is often used in industry-specific complaints schemes, such as the various ombudsman schemes, which have expanded dramatically in the last 10 years ...**\(^ {26} \)

The Attorney-General also noted in the Justice Statement that: *Despite their growth, ADR services are poorly coordinated and resourced, and the development of each new initiative has usually occurred in the absence of a strategic view of where services are needed.*


\(^{27}\) For further discussion of ADR and cost savings see ibid 58–9. The discussion refers to an evaluation of the Woolf reforms, the results of the Magistrates’ Court intervention order diversion project and results of the diversion of small claims to mediation review by the Civil Justice Council in the United Kingdom—all of which show that ADR can lead to time and cost savings.


\(^{29}\) This summary was largely based on the information on the Amador County Superior Court of California’s website: <www.amadorcourt.org/adr/adr.html> at 14 December 2007. However, this section, and the chapter generally, has been revised in light of the helpful comments made by Professor Hilary Astor of the Faculty of Law, University of Sydney.

\(^{30}\) See parts 6.1.3 and 9 of this Chapter for discussion of when ADR may not be appropriate.

\(^{31}\) NADRAC has noted that the legal enforcement of ADR agreements can involve separate and time-consuming contract litigation: NADRAC (2006) above n 1, 13.

\(^{32}\) For example, even where procedural fairness is maintained in ADR, there is no third party decision maker who ensures any agreement made between parties constitutes a substantively just outcome; and where either party is dissatisfied with an element of the process, there is no fundamental right of judicial review. See the discussion in NADRAC, *Issues of Fairness and Justice in Alternative Dispute Resolution* (a discussion paper, Canberra, November 1997) 16–17.

\(^{33}\) See, for example, the compendium of Victorian Acts prepared by the Department of Justice in 2006 regarding the different types of ADR legislated for in Victoria. The compendium lists 73 separate pieces of Victorian legislation that refer to ADR. This is not an exhaustive list.


\(^{35}\) Department of Justice (2004) above n 3, 35.

\(^{36}\) Ibid 34.
most needed. If ADR is to become accepted as the most appropriate form of resolving some disputes, the Government must assist it to move to a new level of organisation and coordination.37

According to the Department of Justice Strategic Priorities 2006:

There has been a growth in demand for alternative dispute resolution, which offers a cost-effective and non-adversarial environment for resolving disputes. Better coordination and integration of alternative dispute resolution across the justice system will ensure disputes are resolved at the most appropriate stage.38

The Department of Justice established an ADR strategy team in 2006 to achieve one of the outcomes identified in the department’s Strategic Priorities 2006; that is, ‘fair and efficient dispute resolution’. The ADR strategy team conducts research and formulates policy proposals and initiatives to achieve the department’s priority outcome. The work of the ADR strategy team is overseen by a project board comprising the executive directors of Consumer Affairs, Courts, Legal & Equity and Corporate Services, and is chaired by the Executive Director of Consumer Affairs.39

The Department of Justice has recently produced the following reports:

- Alternative Dispute Resolution in Victoria—Community Survey Report
- Alternative Dispute Resolution in Victoria—Small Business Survey Report
- Alternative Dispute Resolution in Victoria—Supplier Survey Report
- Alternative Dispute Resolution in Victoria—Supply Side Research Report
- Online Alternative Dispute Resolution Research

The Community Survey found that:

- In the previous year, 35% of Victorians were involved in at least one dispute, with the total number of disputes in Victoria estimated at 3.3 million.
- The cost to Victorians of attempts to resolve these disputes was $2.7 billion, in expenses such as legal and expert advice and personal time.
- The top three factors that encourage people to use ADR are perceptions that it is cheaper, easier and quicker than going to court.
- The success of ADR in recent times has meant that ADR processes are now accepted as being an important part of the court system.40

The Attorney-General commissioned the Victorian Crown Counsel review of the Office of Master and Costs Office in the Supreme Court, which included an assessment of mediation by masters.41

The Victorian Parliamentary Law Reform Committee is currently undertaking a review of ADR. This will address:

- the reach and use of ADR mechanisms so as to improve access to justice and outcomes in civil and criminal court jurisdictions and to reduce the need, where possible, for contact with the court system, particularly in marginalised communities;
- whether a form of government regulation of ADR providers is appropriate or feasible to ensure greater consistency and accountability for Victorians wishing to access ADR.42

This review covers criminal and civil court jurisdictions and deals with more than just the court system.43

1.6 ADR AND THE COMMISSION’S RECOMMENDATIONS

ADR is an important element of many of the commission’s recommendations in this report. In particular, ADR is an integral part of the proposals on:

- pre-action protocols
- the overriding obligations on participants
- the overriding purpose proposed for the courts and
- case management.
These matters are dealt with in Chapters 2, 3, and 5 of this report.

**ADR and pre-action protocols**

In Chapter 2, the commission recommends that pre-action protocols be introduced for to set codes of sensible conduct which persons in dispute are expected to follow when there is a prospect of litigation. Through a variety of procedural requirements and costs and other sanctions, such pre-action procedures seek to encourage (a) early and full disclosure of relevant information and documents; (b) settlement; and (c) where settlement is not achieved, identification and narrowing of the real issues in dispute with a consequential reduction in the costs and delays arising out of subsequent litigation. As noted in Chapter 2, pre-action protocols in England and Wales have been associated with a substantial decrease in the number of civil proceedings commenced in recent years.

**ADR and the overriding purpose**

The commission’s proposed overriding purpose places emphasis on ADR:

> The overriding purpose of this Act and the rules of court, in their application to civil proceedings, is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute by (i) the just determination of the proceeding or (ii) the agreement of the parties.

The overriding purpose also provides:

> To further the overriding purpose, the court in making any order or giving any direction in a civil proceeding—

> (b) may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant: …

> (ii) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute; …

The proposed overriding purpose is based to some extent on recent civil procedure reforms in other jurisdictions, including England and Wales. The decision of the English Court of Appeal in *Dunnett v Railtrack* emphasised that the parties’ obligation to promote ‘the Overriding Objective’ imports a duty for them to consider pursuing ADR, where appropriate.44

**ADR and the overriding obligations**

ADR is also an important component of the proposed overriding obligations, which provide:

> Each of the persons to whom this part applies has a paramount duty to the Court to further the administration of justice. Without limiting the generality of this obligation, in respect of all aspects of the proceeding (including any ancillary dispute resolution processes such as negotiation and mediation), each of the participants: …

> (d) has a duty to cooperate with the parties and the court in connection with the conduct of a civil proceeding;

> (e) has a duty not to engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive or knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive;

> (f) shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes;

> (g) where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute; …

The commission proposes that overriding obligations should apply to negotiations and ADR processes undertaken in relation to proceedings which are pending in a Victorian court. The commission also proposes that various sanctions should be available for failure to comply with these obligations. This matter is dealt with in detail in Chapter 3.
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ADR and case management

ADR is increasingly being viewed as a valuable and integral part of the case management process. In case management, one of the functions of the judge or registrar is to promote settlement. One way to achieve this is by referring cases to some form of ADR. 45 This is discussed in Chapter 5. The Federal Court noted in its 2006–07 Annual Report that:

Since the introduction of the Court's Individual Docket System, there has been a greater emphasis on the early identification of cases suitable for ADR and court-ordered mediation is increasingly viewed by the Court and by the profession as an integral and valuable part of the judicial case management process. The Court continues to encourage the parties to any litigation to adopt more efficient ways of managing a case and reducing the costs associated with litigating and mediation is one response to this issue.46

Similarly, all civil courts in Victoria now actively encourage and facilitate ADR, at both trial and appellate levels. In the Supreme Court, a new Mediation Centre was launched by Rob Hulls, Deputy Premier and Attorney-General, on 4 March 2008.

1.7 DISCUSSION

In response to the criticisms of the length and cost of legal proceedings, there has been an emphasis on ADR, particularly in the past decade. Initially, the focus was on processes outside the court system, including arbitration, conciliation and mediation. Over time, a number of these approaches have been integrated into the court system or developed as an adjunct to court processes.47 Victoria is well advanced in its adoption of ADR approaches to civil dispute resolution. The importance of ADR in the modern civil justice system is generally accepted. Much of the current discussion focuses on what sort of ADR processes should be developed and on what role traditional dispute resolution bodies such as courts should play.48

The commission’s view is that the appropriate role of the courts is more than simply providing an adjudication service based on the traditional adversarial process. Courts should (and do) accommodate various means of resolving civil disputes. The commission’s ADR recommendations reflect this view, as do many of its other recommendations.

Major issues at present include (a) the desirability of judicial facilitation of ADR processes and (b) the appropriateness of, and resources required for, direct judicial participation in ADR. Another controversial issue is whether parties should be compulsorily referred to ADR. These issues are addressed in this chapter.

This chapter also addresses the desirability of new ADR initiatives and options, including:

- early neutral evaluation
- case appraisal
- mini-trial/case presentation
- the appointment of special masters
- court-annexed arbitration
- greater use of special referees
- conciliation
- conferencing
- hybrid ADR processes
- collaborative law
- industry dispute resolution schemes.

This chapter also examines the need for court assistance with ADR, the need for education about ADR and the need for better data and further research on ADR.
2. THE NEED FOR ADDITIONAL ADR OPTIONS

In Victoria, historically the means by which disputes in the court system have been resolved other than by trial have been somewhat limited. Many disputes are of course resolved between the parties without the necessity for third-party involvement. The costs, delays, uncertainties about the likely judicial outcome, the prospect of appeals and a range of other factors contribute to the settlement of disputes by litigants. Some disputes are referred to conciliation or arbitration, including pursuant to court rules. However, mediation is the most common ADR method used. There is a variety of other ADR options available. The commission considers that additional ADR options would assist the courts to more efficiently and effectively manage the diverse types of disputes in the court system. In other words, the existing limited menu of ADR options should be expanded to a more comprehensive smorgasbord.

However, the commission appreciates that the challenge is to facilitate greater use of such options, by the courts and by the profession. The more effective use of such options is likely where parties, professionals, referral agents and judicial officers have a proper understanding, and preferably experience, of the various processes. This requires confidence in such processes and a detailed knowledge of their comparative strengths and weaknesses. For example, early neutral evaluation was introduced in NSW but was little utilised and eventually abandoned.

In the submissions there was considerable support for additional ADR options. For example, the Law Institute stated:

> The LIV would also support a widening of the range of ADR options available to litigants and allow greater individual targeting of the range of processes. In reality, the present system requires disputes of widely differing types to follow the same track to an ultimate trial often with mediation the only process available to virtually all disputants.49

The additional processes the commission believes should be available are:

- early neutral evaluation
- case appraisal
- mini-trial/case presentation
- the appointment of special masters
- court-annexed arbitration
- greater use of special referees to assist the court in the determination of issues or proceedings
- conciliation
- conferencing
- hybrid ADR processes.

The commission also considers there is a need for greater use of ‘collaborative law’ and industry dispute schemes. Each of these options is described in detail in this chapter.

The commission supports more use of ADR for a number of reasons. ADR offers a range of benefits to people when compared with litigation in the courts. ADR is usually cheaper than litigation. The non-adversarial nature of ADR processes may be more likely than litigation to promote and preserve long-term relationships and goodwill. The process of ADR ‘can also be successful in establishing dialogue between parties who have become estranged or non-communicative’. It can enable the parties to have a better understanding of each other’s position and underlying interests.50 In most ADR processes the parties have control over the timing and can usually choose the identity of the person to assist in the resolution of the dispute. Externally induced delay is less than in courts, which are required simultaneously to process a large volume of cases.

The report Going to Court identified the benefits of expanding the range of ADR options. The authors of the report felt that a modern, responsive court system should be able to offer the community a number of forms of assistance for resolving disputes. They suggested that if the courts’ public function is, in significant part, to help people resolve disputes, then in performing that function the courts should provide people with access to whatever processes are appropriate to the case. This may be a trial, an early ruling on a legal issue, an early neutral evaluation and so on.51 They also suggested that there is a practical reason for doing so:
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The authority, prestige and sheer ‘clout’ of courts and judicial officers are still regarded in the community as very important and influential in persuading and assisting people to resolve their differences. The report’s authors considered that the use of other means of ADR is likely to assist in the early definition of issues and thus eliminate some cases from the courts and clear the path for others. The commission agrees.

Chapter 1 discusses the challenges courts currently face, including growing caseloads, increasing complexity of issues to be tried and demand for the speedier disposal of matters. The provision of additional ADR options, and the greater use of current options, are important means by which more disputes may be resolved with greater expedition, at less cost to the parties, and with greater mutual satisfaction in the outcome.

2.1 EARLY NON-BINDING NEUTRAL EVALUATION

Early non-binding neutral evaluation is a process in which the parties, at an early stage, present arguments and evidence to a dispute resolution practitioner, who evaluates the key elements in dispute and the most effective means of resolving it, without a binding determination of the dispute. Neutral evaluation was pioneered in the United States and has been adapted in Australia, the United Kingdom and other jurisdictions.

In submissions to the commission, the Supreme Court considered that there is scope to explore other types of ADR, including early neutral evaluation. In its ‘new approach’ to building cases, the Supreme Court has outlined that the court may give a variety of directions to address the future progress of the proceeding, including that, with the consent of the parties, the case or any questions in issue be referred for non-binding evaluation.

The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators also supported the use of neutral evaluation.

2.1.1 Position in Victoria

There are currently no Victorian provisions expressly empowering the courts to refer parties to neutral evaluation.

2.1.2 Other models

The Administrative Appeals Tribunal

Some Australian courts and tribunals have express power to refer parties to neutral evaluation. One example is the Administrative Appeals Tribunal (AAT). The Administrative Appeals Tribunal Amendment Act 2005 commenced on 16 May 2005, broadening the AAT’s ADR powers. The AAT then developed ‘process models’ for different forms of ADR including neutral evaluation. The AAT defines neutral evaluation as

An advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their expert knowledge of the subject matter, investigates the dispute and provides a non-binding opinion on the likely outcomes. Neutral evaluation is used when the resolution of the conflict requires an evaluation of both the facts and the law. The opinion may be the subject of a written report which may be admissible at the hearing.

Where there is a direction to attend neutral evaluation and it is conducted by a tribunal member or officer, there is no charge to the parties.

‘In other models, the views expressed by the evaluator may bind the parties if they are adopted by the parties or the court’.

California

‘Early neutral evaluation has been used in the United States for some time’.
least 15 years. Written submissions are provided to the evaluator in advance of the session. Evaluators volunteer their preparation time and the first four hours of the session, with a fixed hourly rate of $150 after that.62

The RAND Institute for Civil Justice evaluated the neutral evaluation program in the Southern District of California as part of a study of mediation and neutral evaluation programs introduced under the Civil Justice Reform Act 1990. Under this program, magistrates conducted early neutral evaluations about four months after filing. It was estimated that 36% of cases reaching the neutral evaluation stage were settled as a result.63 The study also found high levels of satisfaction with the neutral evaluation program (about two thirds) and that most dissatisfaction related to the particular lawyer acting as the evaluator. Further, most participants surveyed believed it reduced the time to disposition.64

2.2 CASE APPRAISAL

Case appraisal is also known as expert appraisal. Case appraisal provides for an objective, independent and impartial assessment of disputed facts or issues by an expert appointed by the parties. Parties may agree for the appraisal to be binding.65 The National Alternative Dispute Resolution Advisory Council (NADRAC) has identified a number of ways in which disputants may use the services of a third party expert.66 In its submission, the Supreme Court considered that there was scope to explore other types of ADR including case appraisal.67 The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators also supported the use of case appraisal.

2.2.1 Position in Victoria

There are currently no provisions that expressly provide for court referral of parties to case appraisal in the Magistrates’, County or Supreme Courts.

2.2.2 Other models

Queensland

Some Australian courts and tribunals have the power to refer parties to case appraisal.68 For example, case appraisal is widely used in Queensland.69 The Uniform Civil Procedure Rules 1999 (Qld) provide a procedure for court referral to a case appraiser. The case appraiser’s decision is deemed to be final unless a party elects to go to trial. If a party elects to go to trial, they will incur costs penalties if they do not achieve a more favourable outcome.70 This process differs from the informal nature of other neutral evaluation schemes.71

The Administrative Appeals Tribunal

The Administrative Appeals Tribunal has developed a process model for case appraisal. Case appraisal is defined by the Tribunal as

an advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, assists the parties to resolve the dispute by providing a
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non-binding opinion on the facts and the likely outcomes. The opinion is an assessment of facts in dispute. The opinion may be the subject of a written report which may be admissible at the hearing. 72

Where there is a direction to attend a case appraisal and it is conducted by a tribunal member or officer, there is no charge to the parties. However, they are responsible for their own costs of participating in the case appraisal. Where the parties request an external appraiser, they are responsible for any associated costs. 73

2.3 MINI-TRIAL

Mini-trial is a process in which the parties present arguments and evidence to a dispute resolution practitioner or a judge, who provides advice as to the facts of the dispute and regarding possible, probable and desirable outcomes and the means whereby these may be achieved. 74 A judicial mini-trial is conducted by a judge or retired judge and is similar to early neutral evaluation but is more formal. After an abbreviated presentation of the respective case of each party a non-binding determination is given, rather than an evaluation. 75 A mini-trial may be conducted in respect of the case as a whole or may be limited to one or more factual or legal issues. The mini-trial can also be used to ‘test’ whether a person should commence litigation. 76

In its submission, the Supreme Court considered that there was scope to explore other types of ADR including mini-trials but that judicial non-binding determinations (judicial mini-trials) are problematic and not appropriate. 77

2.3.1 Position in Victoria

There are currently no provisions expressly enabling court referral of parties to a mini-trial or case presentation in the Magistrates’, County or Supreme Courts.

2.3.2 Other models

The judicial mini-trial is more common in Canada and the United States than in Australia. 78

Canada

Rule 35 of the British Columbia Supreme Court Rules provides for judicial mini-trial before a judge or master, who gives a non-binding opinion on the probable outcome of a trial without hearing witnesses. If the matter does not resolve, the judge or master is precluded from presiding at trial. Alberta also offers litigants a judicial mini-trial procedure. 79

United States

Rule 16(c)(7) of the US Federal Rules of Civil Procedure permits a judge to direct or suggest that the parties arrange a private mini-trial.

2.4 SPECIAL MASTERS

In the United States, rule 53 of the Federal Rules of Civil Procedure authorises judges to appoint special masters. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;
(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
   (i) some exceptional condition, or
   (ii) the need to perform an accounting or resolve a difficult computation of damages; or
(C) address pre-trial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Reference to a special master is the exception and not the rule. 80

The decision to appoint a special master involves a consideration of whether it will impose extra expense on the parties and whether the special master is neutral. 81 Rule 53(a)(2) requires that a master not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 445 unless the parties consent with the court’s approval to appointment of a particular person after disclosure of any potential grounds for disqualification.
The clerk and deputy clerks of court may not be appointed as special masters ‘unless there are special reasons requiring such appointment which are recited in the order of appointment’.  

An order of reference to a special master must specify the scope of the reference, the issues to be investigated, the circumstances under which ex parte communication with the court or a party will be appropriate, the time and format for delivering the master’s record of activities, the fees payable to the special master, and the delegated powers.  

Subject to the terms of that order, a special master may take all appropriate measures to perform the special master’s duties, including requiring production of tangible evidence and examining witnesses under oath. The special master may, unless the appointing court otherwise directs, exercise the power of the appointing court to compel, take and record evidence and other witnesses may be subpoenaed by the parties. Under rule 53(b), the order of reference may direct a special master to make findings of fact, but due process requires that the findings be based on evidence presented at an adversarial hearing. Unless otherwise directed by the order of reference, the special master may evaluate and rule on the admissibility of evidence. Unlike a court-appointed expert, however, a special master is not authorised to conduct a private investigation into the matter referred.  

The order should also provide arrangements to ensure that the special master’s fees will be paid. The fees payable to the special master must be paid either (a) by a party or parties; or (b) from a fund or subject matter of the action within the court’s control. In determining who should pay the fees of the special master the court is required to allocate payment of the master’s fees after considering (a) the nature and amount of the controversy, (b) the means of the parties and (c) the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.  

Ordinarily, the special master must produce a report on the matters submitted by the order of reference, including any findings of fact or conclusions of law. In acting on a master’s order, report or recommendation the court must afford the parties an opportunity to be heard and may receive evidence. The court may adopt or affirm, modify, wholly or partly reject or reverse the master’s conclusions, or resubmit a matter to the master with instructions. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties agree, with the court’s consent, that:  

(A) the [master’s] findings will be reviewed for clear error; or  

(B) the findings of a master appointed under rule 53(a)(1)(A); or  

(C) will be final.  

The court must decide de novo all objections to conclusions of law made or recommended by the master.  

Unless the court appointing the master nominates a different standard of review, the court may set aside a master’s ruling on a procedural matter only for an abuse of discretion. Special masters have increasingly been appointed for their expertise in particular fields, such as accounting, finance, science and technology.  

2.4.1 Position in Victoria  

There is no direct equivalent of special masters in Australia. There are provisions for evidence to be taken before an appointed examiner and for the referral of questions to a special referee. Also, in complex litigation there has been some use of independent facilitators or mediators in connection with pre-trial issues including discovery.  

2.5 CONCILIATION  

Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may advise on the content of the dispute or the outcome of its resolution, but not determine the dispute. ‘The conciliator may advise on or determine the process of conciliation… may make suggestions for terms of settlement, give expert advice on likely settlement terms and actively encourage the participants to reach an agreement’.  


73 AAT, ADR Guidelines, above n 59.  


75 Submission CP 58 (Supreme Court of Victoria).  

76 Sourdin (2005) above n 6, 33.  

77 Submission CP 58 (Supreme Court of Victoria).  


81 Ibid.  

82 Ibid.  


84 Fed. R. Civ. P. r 53(c).  

85 See Fed. R. Civ. P. r 53(d).  

86 Fed. R. Civ. P. r 53(c) & (d).  


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There are different types of conciliation, including:

- informal discussions held between the parties in dispute and a third party to resolve or manage a dispute
- processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the issues in dispute, makes proposals for settlement or participates in the drafting of terms of agreement.

2.5.1 Position in Victoria

Certain proceedings cannot be commenced in the County Court or the Magistrates’ Court unless the dispute between the parties has been referred for conciliation and the conciliation officer has issued a certificate. The conciliation officer will issue a certificate when satisfied that all reasonable steps have been taken by the claimant to settle the dispute.

2.5.2 Other models

Many courts and tribunals have provision for a conciliation conference as part of their legislative framework. Conciliation has had a long history in the industrial area. There is considerable variability in the nature and form of the processes so described. Conciliation was once used widely in the Family Court and is still used in matters where financial issues are in dispute. Conciliation is also used in the Land and Environment Court of NSW for merits review appeals. Consumer Affairs Victoria offers specialised conciliation services for disputes involving estate agents or building contracts, and credit disputes are conciliated within Consumer Affairs Victoria’s general conciliation service.

The Administrative Appeals Tribunal

In the AAT, conciliation is defined as

a process in which the parties to a dispute, with the assistance of a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with the requirements of the statute.

In the AAT, where there is a direction to attend conciliation and it is conducted by a tribunal member or officer, there is no charge to the parties. However, they are responsible for bearing their own costs of participating in the conciliation. Where the parties request an external conciliator, they are responsible for any associated costs.

2.6 CONFERENCING

NADRAC has described conferencing as follows:

Conference/conferencing is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

In the AAT, the President is empowered to refer matters to a conference. Some regard conferencing as a mediation process. Others distinguish it from mediation on the basis that the major focus is on resolving conflict rather than single-issue disputes.

2.7 ONLINE ADR

Online dispute resolution (ODR), eADR and cyber-ADR are processes whereby a substantial part, or all, of the communication in the dispute resolution process takes place electronically. This is usually via email. There are also ‘automated dispute resolution processes’, which are processes conducted with the assistance of a computer program rather than a ‘human’ practitioner.

Consumer Affairs Victoria, the Dispute Settlement Centre Victoria, the Victorian Equal Opportunity and Human Rights Commission and the Victorian Civil and Administrative Tribunal recently launched an online dispute resolution site, which provides information regarding the different options for resolving disputes such as neighbourhood and tenant disputes.
The Law Council of Australia has established an online mediation platform. The system provides separate ‘rooms’ for which password-protected access is available to various combinations of parties and lawyers. The system is currently running as a pilot program during which it is free for all users, with no registration or training charges required for participation. A basic case room fee per party (administrative cost) is payable by the legal representative when opening a case. The pilot began in February 2007; after a short trial, the Law Council will evaluate the feedback and make a decision as to whether to continue with online dispute resolution.

There has been an increase in use of technology to provide a broad range of services, including ADR. Chapter 5 of this report deals with case management and technology. The Victorian Parliamentary Law Reform Committee is reviewing online ADR as part of its current review of alternative dispute resolution. The commission has not made any recommendations regarding online ADR. However, it notes that online ADR is an important development with considerable potential for wider use, including by parties who may be distant from each other and the court.

2.8 COURT-ANNEXED ARBITRATION

‘Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination’.111

‘Arbitration has a long history in Australia and overseas, and many different dispute resolution frameworks have been developed with arbitration as a central element’.112

Court-annexed arbitration has a close connection with a particular court. It may be either consensual or compulsory. Court-annexed arbitration may be used by courts as a method of reducing caseload by diverting appropriate cases to arbitration. The court may have the power to determine which cases are sent to arbitration and may be able to refer particular aspects of a case . . . to arbitration. The court may also be given power to review arbitrators’ awards, and there may be a provision that an award may be enforced as if it were an order of the court. By contrast, many private arbitrations have no particular connection with a court, except where interaction with a court is ancillary to the arbitration.113

2.8.1 Position in Victoria

The Supreme Court, the County Court and the Magistrates’ Court all have the power to make rules for referral of civil proceedings to arbitration.114

The County Court has an express power to order arbitration either with or without the consent of the parties.115 The Supreme Court rules provide for arbitration only with the consent of the parties.116 In the Supreme Court and the County

95 Ibid.
96 For example, WorkCover matters.
97 Accident Compensation Act 1985 s 49(1)(b).
98 See, eg, The Administrative Appeals Tribunal Act 1975 (Cth) ss 34A(1)(a), 3(1), Federal Magistrates Act 1999 (Cth) s 26; Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) s 54(1), Health Care Complaints Act 1993 (NSW) ss 12(1), 13(3); Superannuation (Resolution of Complaints) Act 1993 (Cth) s 27; Workplace Injury Management and Workers Compensation Act 1998 (NSW) ss 78, 306; Local Court Rules 1998 (NT) r 7.12 and O 32; Magistrates Court (Civil Division) Rules 1998 (Tas) ss BS(2), 87.
103 Consumer Affairs Victoria’s power to conciliate disputes is found in s 104 of the Fair Trading Act 1999. This power is subject to certain provisos, including a requirement that the dispute is ‘reasonably likely to be settled’: s 104(1). See, for a good discussion of the Credit Dispute Conciliation Service: Conflict Resolution Research Centre, The La Trobe University, The Dispute Resolution Processes for Credit Consumers, Background Paper (2005) 8–9.
105 AAT, ADR Guidelines, above n 59.
107 Administrative Appeals Tribunal Act 1975 (Cth) ss 34A, 3.
109 NADRAC (2006) above n 1, 100.
111 NADRAC (2006) above n 1, 100.
113 Ibid 16.
114 Supreme Court Act 1986 s 25(1)(a), County Court Act 1958 s 7B(1)(ca), Magistrates Court Act 1989 s 16(1) (fb).
115 County Court Act 1958 s 47A; County Court Rules of Procedure in Civil Proceedings 1999 r 34A.21 provides that at a directions hearing the court may, with or without the consent of any party, refer the whole or any part of the proceeding to arbitration in accordance with r 50.08.
116 Supreme Court (General Civil Procedure Rules) 2005 r 50.08(1).
Court, provision is made for arbitrations to be conducted in accordance with the Commercial Arbitration Act 1984.\textsuperscript{117} There is no formal scheme of court-annexed arbitration in either the Supreme or County Court.

Under the Commercial Arbitration Act 1984, arbitrators are required to give a statement of reasons for their award.\textsuperscript{118} Depending on the circumstances of the matter, reasons may be required of a judicial standard and ‘as with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision’.\textsuperscript{119} The Magistrates’ Court offers a form of court-annexed arbitration. The Magistrates Court Act 1989 sets out a scheme for mandatory arbitration of small claims. Section 102(1) of the Act provides that all complaints for amounts of monetary relief of less than $10,000 must be referred to arbitration, subject to a number of exclusions found in section 102(3), such as where the complaint involves complex questions of law or fact. A magistrate conducts hearings, or a judicial registrar for matters under $5000.\textsuperscript{120} They are not bound by the rules of evidence\textsuperscript{121} and proceedings are not conducted in a formal manner.\textsuperscript{122} However, arbitrators are still bound by the rules of natural justice,\textsuperscript{123} must determine the matter in accordance with law,\textsuperscript{124} and may still exercise any powers that the court may exercise in hearing and determining a complaint.\textsuperscript{125}

The parties are not permitted by the rules to serve a request for further and better particulars, a reply, a notice to admit, a notice for discovery, interrogatories or an expert witness statement.\textsuperscript{126} Awards must be in writing, but the reasons for the award need not be in writing. If a statement of reasons was not included in the award, one must be furnished on request within a reasonable period.\textsuperscript{127}

Arbitrations are conducted at the court premises by magistrates or registrars and are financed out of court funds.\textsuperscript{128} In the 2005–06 financial year, 3680 matters were finalised at arbitration.\textsuperscript{129} The scheme provides for simple, flexible, and cheap resolution of uncomplicated matters with a relatively small monetary value. In doing so, it helps the Magistrates’ Court to deal with large volumes of cases in an expeditious and efficient manner.\textsuperscript{130}

2.8.2 Other models

The Family Court

The current provisions for court-annexed arbitration are set out in Division 4 of the Family Law Act 1975 (Cth), in particular section 13E (financial matters).\textsuperscript{131} Section 13E arbitration can only be ordered where there are proceedings on foot and a court is exercising jurisdiction under Part VIII of the Act, and is limited to issues arising under that part.\textsuperscript{132} The scheme provides for consensual arbitration by appropriately qualified legal practitioners. The decision of the arbitrator, once registered in the court, is binding and an appeal from the decision is only available on points of law. Part 5 Division 2 of the Family Law Regulations 1984 sets out how the arbitration must be conducted.

New South Wales

Arbitration was adopted as a preferred form of alternative dispute resolution by the Supreme, District and Local Courts of New South Wales from the late 1980s. The form of the process was said to follow a ‘Philadelphia’ style arbitration,\textsuperscript{133} described below. The process is informal and appeal and review rights are fairly wide. Referral to arbitration is by a court official or judicial officer and the arbitration is conducted by appointed expert lawyers who ordinarily carry out the arbitration on court premises.\textsuperscript{133}

Under the Civil Procedure Act 2005 (NSW), the jurisdiction conferred on an arbitrator in referred proceedings is part of the jurisdiction of the court.\textsuperscript{134} The functions conferred on an arbitrator may be exercised only for: a) the purpose of determining the issues in dispute in referred proceedings, b) for the purpose of making an award in referred proceedings and c) for related purposes.\textsuperscript{135} Before making an order referring the proceeding (or question) to arbitration, the referring court is to give such directions for the conduct of the proceedings before the arbitrator as appear best adapted for the just, quick and cheap disposal of the proceedings.\textsuperscript{136}

The arbitrator must record the determination, and reasons, by an award in writing signed by the arbitrator, and must immediately send that award to the referring court.\textsuperscript{137} Subject to certain exceptions,\textsuperscript{138} an award is final and conclusive, and is taken to be a judgment of the referring court.\textsuperscript{139}
Sections 42–47 of the Civil Procedure Act 2005 (NSW) specifically provide for rehearing of proceedings determined by an arbitrator. In particular, section 42 provides that a person aggrieved by an award may apply to the referring court for a rehearing of the proceedings.\(^{139}\) The award is suspended from the time the application is made until an order for rehearing is made. The referring court must order a rehearing if an application for rehearing is made before the award takes effect.\(^{140}\)

If an order is made for a full rehearing, the award ceases to have effect and the proceedings are to be heard and determined in the referring court as if they had never been referred to an arbitrator.\(^{141}\) The court has power to order costs in respect of the rehearing.\(^{142}\)

Specific rules complementing Part 5 of the Civil Procedure Act are contained in rules 20.8–20.12 of the Uniform Civil Procedure Rules. The main features of the rules are that proceedings in which there is an allegation of fraud may not be referred to arbitration,\(^{143}\) and on an application for rehearing the court must make a determination as to whether the proceedings are to be a full rehearing or a limited rehearing.\(^{144}\)

In NSW, the rules relating to court-annexed arbitration under the Uniform Civil Procedure Act appear to co-exist with the Commercial Arbitration Act 1980 (NSW).

The experience in the NSW District Court has been to refer cases out to Philadelphia-style arbitration once the interlocutory steps in a proceeding have been completed. In this way, the parties are assured of a hearing date (usually 1–2 days) well in advance of the hearing date that they would otherwise expect to receive in court. The court provides the venue for the arbitration and some administrative support services.

The Institute of Arbitrators and Mediators and Chartered Institute of Arbitrators supported court-annexed arbitration in their response to the Consultation Paper. According to their submission, since about 1989 more than 20 000 cases have been referred to arbitration in the District Court alone in NSW. The majority of these cases were personal injury cases. However, the submission contended that there is no reason why relatively straightforward commercial cases could not also be referred out to arbitration.\(^{146}\)

**United States**

‘Court-annexed arbitration has become widely accepted since its inception in 1952 and has been implemented by state and federal legislation and court rules’.\(^{147}\) For instance, Philadelphia has a sophisticated system of compulsory arbitration for civil claims, other than real estate or equitable actions, which are less than US$50 000. A panel of three court-certified arbitrators who are legal practitioners within the Philadelphia region hears the case. The proceedings are held in a permanent arbitration centre. An award must be made ‘promptly’ and is usually made on the day of the hearing.\(^{148}\)
neither party has appealed the award after 30 days, judgment on the award is entered. The appeal is by way of a new hearing. The compulsory arbitration program in Philadelphia County conducts more than 20,000 arbitrations each year.

2.8.3 Arguments for and against court-annexed arbitration

The advantages of court-annexed arbitration are similar to the advantages of ADR generally. For example, court-annexed arbitration may provide a cheaper, faster alternative to the court system. The parties are more likely to have a positive experience of arbitration in circumstances where a high-quality arbitrator conducts the arbitration.

In the Access to Justice: an Action Plan report, Justice Sackville supported the use of court-annexed ADR. The report noted:

*There are strong arguments in favour of court-annexed ADR. They include the reduction of costs associated with the early resolution of a dispute and the increased capacity of a court to cope with its caseload. In short, it is argued court-annexed ADR provides an opportunity to make better use of existing services, to speed decision-making and to enhance the acceptability and quality of decisions, all in a forum where disputes are traditionally resolved.*

As well as benefits for the court and the parties, there are benefits for the government in providing a reliable system of arbitration, such as savings in judicial and court costs where suitable matters can be resolved by arbitration.

The Victorian Bar, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators were supportive of court-annexed arbitration. The latter considered that court-annexed arbitration should be implemented in Victoria in the same way as it has been in New South Wales because:

- the numbers of cases disposed of have increased
- there have been more expeditious determinations
- an available pool of expert arbitrators has been fostered
- even when the arbitrator’s award is not accepted, it has led to further negotiations between the parties resulting in pre-trial settlement.

In their submission, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators argued that given the County Court now has unlimited civil jurisdiction, this may result in an increase in the number of civil cases and court-annexed arbitration may assist the court in better managing its caseload.

Common concerns regarding court-annexed arbitration are similar to the concerns expressed about ADR more generally. Of particular concern is that the rehearing rates in the NSW District Court appear to be relatively high. ‘An examination of the rehearing rates in the NSW jurisdiction (apart from 2004 in the District Court) shows that in civil cases the rehearing rate for court-ordered arbitration was typically in the range of 12–15% of cases referred to arbitration’. In such cases, court-annexed arbitration may simply be adding a further layer to the process, resulting in increased costs and delay.

Astor and Chinkin argue that:

*the evidence does not suggest that the use of court-connected ADR produces significant overall savings for courts and tribunals. Reducing costs to courts by case management and ADR may have the effect of increasing costs to parties. And yet, the effects of early case management and ADR do appear to have beneficial effects in allowing courts to settle efficiently those cases that are going to settle, allowing resources to be focused on those cases that go to trial.*

The Family Law Council in its report recommended that:

*To reduce ill-founded applications to review the arbitrator’s decision, there should be some cost implications for applicants who are not successful in bettering their position on review ... The filing fee for an application for a rehearing could also be set at a level that would give a party reason to pause before deciding to seek a review of the award.*
2.8.4 Conclusions and recommendation

The commission believes it would be appropriate to implement court-annexed arbitration by way of court rules in the Victorian County and Supreme Courts. The NSW District Court experience demonstrates that arbitration can be flexibly used when workload varies. Similarly, arbitration could be of benefit to the County Court and Supreme Court in suitable cases, such as personal injury cases and less complex commercial cases. Many cases could be determined expeditiously. Court-annexed arbitration may allow the courts to process cases more efficiently, thereby reducing delay and saving costs, particularly in cases that settle. Further, the inclusion of new rules would highlight court-annexed arbitration as an option. This may facilitate greater use of this alternative.

As in the Victorian Magistrates’ Court and the NSW District Court, the court could provide the venue for the arbitration and some administrative support services. Such services would improve access to services by limiting the cost to the parties of a suitable venue and administrative expenses.

2.9 GREATER USE OF SPECIAL REFEREES

The commission is of the view that there should be a variety of methods available to courts and litigants to resolve disputes. One method available is to appoint a special referee. Although there is presently provision for this, the commission is of the view that there is scope for greater use of special referees and that the traditional view of the role of a special referee should be broadened.

Historically, provisions for the appointment of special referees were incorporated in arbitration legislation. Conventionally, special referees have been appointed to investigate and report to the court on technical questions in dispute; for example, in building cases or patent cases. In appropriate circumstances, the commission considers that it may be desirable for a person who would otherwise conduct an ADR process (for example as mediator or arbitrator) to be appointed as a special referee, even without the parties’ consent. The issue of compulsory referral to various ADR processes is discussed further below. The commission believes there is scope for greater use of special referees to assist the court in the determination of issues or proceedings.

2.9.1 Position in Victoria

The County Court Act 1958 expressly empowers the court to refer some or all of a proceeding to a special referee for inquiry and report. The court may direct how such reference shall be conducted and may remit any report for further inquiry and report. The Act provides that on consideration of any report the court may give judgment or make any order in the proceeding ‘as may be just without prejudice to any right of appeal’.

The Supreme Court and the County Court have the power to make rules for reference of any question to a special referee or court officer for decision. The Magistrates’ Court does not have the express power to refer a proceeding or question to a special referee. However, the court is currently updating the rules to bring them more into line with the Supreme and County Court Rules. Thus the Magistrates’ Court Rules may provide for special referees in the near future.

The rules of the Supreme and County Courts authorise the courts to appoint special referees. Rule 50.01 of the Supreme and County Court Rules provides for referral of questions to a special referee either to decide the question or to give an opinion on it. The court must state the question referred and direct that the special referee report in writing to the court, and may also direct that the special referee give further information in the report.

The court may give directions as to the procedure for the reference including for discovery, interrogatories, attendance of witnesses and production of documents. The court is also empowered to determine how much and how the special referee is to be paid. A special referee has the same protection and immunity as a judge of that court.

The referee’s powers are provided for by court rules. A referee has similar powers to those vested in an arbitrator by the Commercial Arbitration Act 1984. For instance, a referee has the power to enforce the attendance of any witness at any investigation. The parties to the reference have some say in defining the procedure to be followed during the inquiry.
In the course of the inquiry, the referee may submit a question to the court or state facts to the court, asking the court to draw such inference as it thinks fit.174 This enables the referee to obtain assistance on a question of law:175

Once the investigation is complete, the referee must prepare a report to submit to the court. Once the referee’s report is submitted, the court must give notice to the parties and can:

- vary the report
- require the special referee to provide a further report explaining any matter mentioned or not mentioned in the report
- remit the reference or any part of it for rehearing or further consideration to the same or another referee.176

‘The court may as the interests of justice require adopt the report or decline to adopt the report in whole or in part, and make such order or give such judgment as it thinks fit’.177 In practice, however, a court will be reluctant to set aside the referee’s report if the parties have had sufficient opportunity to present their respective cases and if the report demonstrates a thorough and well-reasoned approach to the reference. If it appears that the referee has made a major error, has reported perversely or acted beyond the terms of reference, the court will reject the report.178

Special referees must comply with the requirements of procedural fairness.179 Procedural fairness requires ‘fairness between the parties”180 but its content will vary with the circumstances. It includes an opportunity to respond to new material. Reasons are required to be given. The referee must be impartial and not receive material from one party in the absence of the other. Procedural fairness is required even though the special referee does not make a determinative decision:

[TI]he referee makes no decision: he [or she] expresses an opinion to the court. But if it appears to the court that the parties have had a fair opportunity to place their evidence and arguments before the referee, and if his opinion discloses the application of reason to the material before him, even if the court may have been disposed to come to a contrary conclusion, there will be a disposition in the court to adopt and rely upon the report. In this manner, the referee is, although himself not making any decision, potentially caught up in the decision-making processes of the court. It follows that he must observe concepts of natural justice in preparing his opinion. For if he does not so, the court, being obliged to apply concepts of natural justice, must reject his report.181

Appellate courts in recent years have considered (a) the standards to be applied by the trial judge in the exercise of discretion in determining whether to adopt the report of a special referee and (b) the nature of an appeal from a decision of the judge to accept or reject a referee’s report.

According to the Victorian Court of Appeal:

It may be accepted that a judge ought not to adopt and act upon a special referee’s decision on a question of law unless it appears to be correct. On the other hand, a decision as to a matter of fact is not to be reconsidered afresh, and in general should only be rejected if it is patently unreasonable or contrary to or against the weight of the evidence. Otherwise, the reference will be no more than a rehearsal for the trial of the same issue before the Court.182

The court stated that it did not intend to catalogue the grounds on which a court may refuse to adopt a special referee’s report and noted that the court’s discretion is confined only by the ‘interests of justice’, which will depend on the circumstances of each case.183

As Gleeson CJ (then) of the NSW Court of Appeal has observed:

The purpose of [the rule providing for the appointment of a special referee] is to provide, where the interests of justice so dictate, a form of partial resolution of disputes alternative to orthodox litigation, and it would frustrate that purpose to allow the reference to be treated as some kind of warm-up for the real contest. On the other hand, if the referee’s report reveals some error of principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence, that would ordinarily be a reason for rejecting it … So also would perversity or manifest unreasonableness in fact-finding.”184
An appeal from a decision on adoption of a report of a special referee is an appeal from the decision of the trial judge, not an appeal from the referee’s determination. The approach to be adopted by appellate courts in an appeal from a decision of a trial judge to adopt, or not adopt, the findings of a special referee has received recent appellate consideration.185 Referees are required to give reasons for their determinations and the principles governing whether such reasons are adequate do not differ significantly from those applicable to judicial officers. Where there is competing expert evidence the referee is required to examine and analyse this in resolving the issue in dispute. Where experts are in dispute on questions of methodology, it is necessary for the referee to apply an ‘intellectual process of examination and analysis’ to resolve the matter.186

The appointment of a special referee is distinct from other options available to the court:

1. **Court appointed experts**—are appointed by the court to report on an issue. The expert is appointed to provide the judge with neutral specialist advice.187 The power to appoint such an expert is contained within different court rules.188 The commission has proposed various changes to the rules concerning court appointed experts. Chapter 7 deals with expert witnesses.

2. **An expert determination**—is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of specialist qualifications or experience in the subject matter of the dispute (the expert) and who makes a determination.189 Unlike an arbitrator, the person making the expert determination is not required to conduct a quasi-judicial hearing.190 “Construction contracts often contain dispute resolution clauses that provide for expert determination as an alternative or precursor to litigation or arbitration”.191

3. **Court appointed arbitrators**—although the County Court Rules provide that an arbitration must be conducted in accordance with the Commercial Arbitration Act 1984, the County Court Act 1958 confers on the court the power to facilitate arbitration by agreement as well as arbitration that is conducted by the court ‘if it thinks it is fit to act as arbitrator’.192

4. **Assessors**—The Supreme Court and the County Court can call in the assistance of one or more specially qualified assessors. The court can hear the proceeding with their assistance, either in whole or in part, but is not bound by their opinion or findings.193 The Magistrates’ Court does not have an equivalent express power to call in the assistance of an assessor.

174 Supreme Court (General Civil Procedure) Rules 2005 r 50.03; County Court Rules of Procedure in Civil Proceedings 1999 Rule 50.03.
176 Supreme Court (General Civil Procedure) Rules 2005 and County Court Rules of Procedure in Civil Proceedings 1999 Rule 50.03(2)(b). The parties can also apply to the court requesting an order as to one of the three options above: r 50.03(3).
177 Supreme Court (General Civil Procedure) Rules 2005 and County Court Rules of Procedure in Civil Proceedings 1999 Rule 50.04.
179 Xuereb v Viola (1989) 18 NSWLR 453. For details on the accepted principles for referrals to special referees in NSW, see Seven Sydney Pty Ltd v Fuji Xerox Australia Pty Ltd (2004) NSWCC 902.
183 Plumley v Adgado Pty Ltd [1998] VSCA 70 Buchanan JA [13].
185 See Ryde City Council v Tourtouras (2007) NSWCA 218 (Santow, McColl and Basten JJA) [24]–[26]. See also Ellis v New Age Constructions (NSW) Pty Ltd [2005] NSWCA 165 (Handley, Hodgson and Brownie JJA).
186 See Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3) [2006] NSWCA 282 [140] (Beauley, Lpp and Tobias JJA).
188 See for instance Supreme Court (Intelectual Property) Rules 1996 O 10.
189 NADRAC (2006) above n 1, 103.
190 Submission CP 35 (Institute of Arbitrators and Mediators Australia and Institute of Chartered Arbitrators).
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There was support for the use of special referees in the submissions. The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators considered that there should be more use of the ‘reference out’ procedure. The Supreme Court submission in response to the Consultation Paper suggested that the court should adopt the approach of the NSW Supreme Court and refer parties to a special referee, even without their consent.

The rules also make provision for the Supreme Court or County Court to make an order for the taking of any account or the making of any inquiry. However, this is a more limited power and according to the Supreme Court, the rule is rarely used. The Magistrates’ Court does not have an equivalent express power to refer a question for an inquiry and report.

2.9.2 Other models

Australia

All state and territory jurisdictions make provision for questions to be referred to special referees, except where parties have a right to jury trial.

In the Northern Territory, Queensland, Tasmania and Western Australia, the reference may take either of the following two forms:

1. the proceeding, or a question of fact arising in the proceeding, may be tried by the referee;
2. the referee is to inquire into and report on any question arising in the proceeding.

In the ACT, the court may, on application of a party or of its own motion, make an order for a referee to inquire into and report on, or to hear and determine, the whole of the proceeding or any question arising therein.

In NSW, the court may at any stage of a proceeding refer the proceeding or any question in the proceeding to a referee for inquiry and report. In South Australia, there are provisions for reference of any question in a proceeding to a referee for inquiry and report.

California

The California Code of Civil Procedure sets out extensive provisions regarding the appointment of a referee, including when and how a referee is appointed and how referees are paid.

When the parties to a contract have voluntarily agreed that any dispute between them will be resolved by judicial reference, the court will appoint a referee ‘[t]o hear and determine any or all of the issues in an action or proceeding, whether of fact or of law’ and to issue a decision. A referee may also be appointed by agreement between the parties or, if they cannot agree, by the court. A referee may be chosen by the parties. If chosen by the parties, the referee can be any person mutually acceptable to them and does not need to be a judge or a lawyer. If the court is required to select a referee, it must obtain up to three nominees from each party and then choose from among those nominees one that a party has not objected to.

When the parties do not consent, the court may appoint a referee, either by application of any party or on the court’s own motion, in the following circumstances:

1. When the trial of an issue of fact requires the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.
2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.
3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.
4. When it is necessary for the information of the court in a special proceeding.
5. When the court … determines that it is necessary to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.
All appointments of referees are by written order and include:

1. A statement of the reason the referee is being appointed.
2. The exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case.
3. The subject matter or matters included in the reference.
4. The name, business address and telephone number of the referee.
5. The maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. The court may modify the maximum number of hours. The parties share the cost of the referee unless they can show an ‘economic inability’ to pay.

The referee’s fees are paid as agreed by the parties to the contract.

If the parties do not agree on the payment of fees and request that the matter be resolved by the court, the court may order the parties to pay the referee’s fees … in any manner determined by the court to be fair and reasonable including an apportionment of the fees among the parties.

The appointed referee is required to disclose to the parties any personal or professional relationships with any of the parties. The parties then have the opportunity to object to the appointment of the referee on certain specified grounds.

Once a referee is appointed, the rules provide that the referee must disclose to the parties any personal or professional relationships with any of the parties to the contract.

The referee’s fees are paid as agreed by the parties to the contract.

After all testimony and evidence have been taken, the referee must issue a written statement of decision. The court may adopt the referee’s decision, just as if the action had been tried by the court itself. Review of the referee’s decision can be obtained through a motion for a new trial or by appeal to the court of appeal.

For all matters pending before privately remunerated referees, the litigants must provide to the clerk of the court inter alia a notice indicating the case name and number as well as the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. The judge, on request of any person or on the judge’s own motion, may order that a case before a privately remunerated referee must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings.
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The California Code of Civil Procedure also provides that: ‘The Judicial Council shall, by rule, collect information on the use of these referees [and] shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those fees is reported to the court. The Judicial Council shall report thereon to the Legislature.’

Parties who are referred out to a referee under the California Code of Civil Procedure retain their place in the court queue and retain the right of appeal.

2.9.3 Arguments for and against the use of special referees

Commentators and submissions have identified various benefits in using special referees:

- It is not cost-effective for a judge to investigate and inquire into technical factual matters. A person with expertise in the subject can produce a report more quickly and at less cost.
- A reference can be heard in private while court proceedings generally take place in public, which is particularly advantageous where the matters raised are commercially sensitive.
- Proceedings before a special referee are less formal than court proceedings. This means relevant issues can be isolated and addressed more quickly than in court.
- The parties to the reference, as a matter of practice, have some say in the procedure used during the inquiry, which gives them some control over the process.

The power to refer matters to a referee may facilitate the resolution of an issue expeditiously by persons with appropriate expertise.

Justice Byrne identified some of the benefits of the Victorian special referee procedure in *Abigroup v BPB*:

> A special referee in Victoria is not necessarily required to conduct the reference ‘in the same manner as nearly as circumstances will admit, as trials conducted before a judge’. Indeed, the particular value of the procedure in Victoria is often that the special referee may not be so constrained. From the point of view of efficient trial management, it is very difficult to justify referring a question to a special referee where the investigation is to be conducted in the same manner as a trial in court, with the one difference that it is to be conducted before a lay person who may lack the authority and standing, and experience of a judge.

One concern is that the hearing before a referee may be more expensive because the parties pay the referee, the transcription costs and room hire. However, as noted by Justice Smart in *Park Rail Developments v RJ Pearce Assocs Pty Ltd*:

> In the overall context of the legal fees, those of the expert consultants, and the costs of the lost executive time, this extra expense is usually not significant. It is often offset by the factors mentioned earlier, and if, as is often the case, the amount at issue is large, it loses any importance …

As arbitrations and references usually take place promptly the parties are not encumbered with the costs of proceedings extending over several years awaiting a hearing. Because of the technical knowledge of the arbitrators or referees, the hearing may be quicker.

2.9.4 Conclusions and recommendation

The commission is of the view that there will be benefits from greater use of special referees to assist the court in the determination of issues or proceedings. The power to refer questions to a referee can clearly be exercised more frequently than has been the case to date. Use should not be confined to ‘technical’ questions requiring ‘specialist’ expertise. Although it is clearly desirable for parties to consent to the proposed use of a special referee the commission’s view is that the exercise of the power should not be constrained by any requirement that the parties consent. The compulsory use of ADR processes is discussed further below.
2.10 HYBRID DISPUTE RESOLUTION PROCESSES

The commission believes ‘hybrid’ dispute resolution processes should be included in the list of ADR options available to the parties. The US experience suggests that hybrid processes can be very effective in the right circumstances and offer parties another alternative to conventional dispute-resolution approaches.

**Med-Arb** is an abbreviation for mediation-arbitration. It is in use in two distinct forms in the United States. In the first, the mediator, by agreement, acts as both the mediator and the arbitrator pursuant to a binding arbitration agreement. If there are still unresolved issues after the mediation, the matter goes to arbitration. The second and more standard process is the pre-selection of a separate arbitrator, who deals with the unresolved dispute if mediation is not successful.228

Areas where Med-Arb has developed in the United States include labour disputes, international arbitration and corporate disputes.229 According to one commentator, it can be particularly useful where the parties have a desire to continue a relationship or resolve the matter in a timely fashion.230

**Arb-Med** is an abbreviation for arbitration mediation. It commences by the conduct of an arbitration hearing. The neutral person prepares an award on the issues with reasons, which is not issued to the parties. The parties then conduct a mediation. If the dispute does not resolve, the arbitrator then issues the award and the parties are bound by the decision.231 In larger cases, the parties may select an arbitration panel consisting of three arbitrators.232

Arb-Med has been used in various types of matters, including police and fire fighter disputes in the United States, and in union management relations in the auto and steel industries in South Africa and the United States.233

**MEDALOA** is sometimes referred to as ‘baseball arbitration’ because it is used to resolve salaries of major league baseball players.234 MEDALOA is an abbreviation for ‘mediation and arbitration mediation’.235 At the conclusion of an unsuccessful mediation, the mediator considers each party’s ‘last offer’ then makes a decision as to which offer is the most reasonable and should be accepted as the settlement.236 The mediator is not able to split the difference or propose a different result.237 MEDALOA is a useful technique for resolving an impasse in a variety of circumstances.238

‘Night time baseball mediation’ is a variation of ‘baseball arbitration’ where the parties do not disclose their final offers to the mediator but seal them in an envelope. The mediator makes a decision regarding how the dispute should be resolved and the offer closest to the mediator’s decision is the offer that prevails. This process can best be used in financial disputes where there will usually be little difficulty in determining which party’s offer is closest to the mediator’s determination.239

217 Consultation with Professor Deborah Herder (US academic) (21 August 2007).
220 Ibid.
221 Ibid 1056.
222 Ibid.
223 Abigroup Contractors Pty Ltd v BPB Pty Ltd [2000] VSC 261.14 (Byrne J).
224 See Bold Park Senior Citizens Centre & Homes Inc v Bollig Abott & Partners (Gulf) Pty Ltd (1998) 19 WAR 281; 284 (lpp. ii) referring to O 35 r 3 of the WA Rules. See, also, Uniform Civil Procedure Rules 1999 (Qld) r 502(3).
225 Abigroup Contractors Pty Ltd v BPB Pty Ltd [2000] VSC 261.14 (Byrne J).
226 (1987) 8 NSWLR 123.
227 Ibid at 126.
236 For instance, if one party offers to settle by paying $200 000 and the other party offers to settle by accepting a sum of $1 million, the mediator may only choose between the two competing offers: Golvan (2007) above n 231.
Chapter 4

2.10.1 Position in Victoria

Currently, Victorian courts do not refer parties to ‘hybrid’ processes. The courts’ legislation and rules do not confer express power to refer parties to hybrid processes.

2.10.2 Other models

Australia

Commercial Arbitration Acts

There are instances of hybrid processes in Australia. Legislative provisions and court rules often make provision for various forms of ADR. Sometimes these are identified as separate alternatives; in other instances they may be used in combination. For example, section 27 of the Commercial Arbitration Act 1984 provides that the parties to an arbitration agreement may seek settlement of a dispute by mediation, conciliation or other means. There are similar provisions in Queensland and NSW.

The Land and Environment Court of NSW

Combined conciliation and adjudication hearings can be conducted in the Land and Environment Court of NSW. The dispute resolution practitioner first uses conciliation and then, by agreement of the parties, adjudication.

NSW Workers Compensation Commission

Conciliation and arbitration are used in the workers compensation jurisdiction in NSW. The arbitrator can conduct combined conciliation and arbitration hearings. The arbitrator first attempts conciliation and, if that fails to settle all outstanding issues, proceeds to arbitrate the matter.

The compensation commission’s annual review for 2005 shows that only 2% of determinations were overturned on appeal. This appeal rate and percentage settlement rate is different to that experienced in the arbitration system conducted in the NSW Supreme, District and Local Courts. Although there are difficulties in comparing different types of disputes, the difference is said to primarily relate to the combined use of conciliation and arbitration.

Family Court

The Law Council launched a mediation and arbitration project in November 2007 aimed at helping the Family Court cut its backlog of cases. The scheme, known as the Melbourne Project, involves family law arbitrators using innovative techniques, including a combination of mediation and arbitration, ‘to cut down the costs, time and emotional strain associated with resolving disputes’. When matters are referred by the court to arbitration, the arbitrator may also use mediation during the arbitration, with the consent of all parties.

Overseas

The use of multifaceted ADR techniques is common in some overseas jurisdictions. For instance, in the United States, various state statutes contemplate arbitration and conciliation. Forms of Med-Arb exist in Germany, in Switzerland and in the context of international arbitrations. Brazil, China and Hong Kong have enacted arbitration laws that contain hybrid provisions. In Japan, the Arbitration Act 2004 allows all parties to consent, in writing, to the arbitral tribunal attempting settlement of civil disputes submitted to arbitration. Canada and Singapore also use hybrid processes. The rules of the World Intellectual Property Organisation (WIPO) ‘encourage a mediator to promote settlement of the dispute and if unsuccessful, to propose procedures including arbitration by the mediator’.

2.10.3 Arguments for and against the use of hybrid processes

Med-Arb

The following advantages of Med-Arb have been identified:

1) Finality: the dispute will be resolved by either mediation or arbitration.

2) Flexibility: the process offers the opportunity to move from mediation to arbitration and back to mediation (even in the arbitration phase the arbitrator can step back to his or her mediator’s role to mediate a discrete part of the award).

3) Med-Arb can result in cost and time efficiencies, compared to separate mediation and arbitration proceedings.
4) There is an incentive to settle: the presence of the neutral party and the threat of an arbitrated decision creates an incentive for the parties to successfully mediate their dispute.253

5) Med-Arb creates an incentive for the parties to participate in the mediation phase genuinely and in good faith because they know that if they fail to reach agreement, they lose control over the outcome.254

6) There is a good success rate: relatively few cases in Med-Arb actually proceed to arbitration.255

7) The neutral party can gain insights during mediation that may contribute to a more appropriate arbitration award (if the same person is used).

Studies conducted overseas regarding hybrid processes have shown positive results. Research conducted in Canada into the use of Med-Arb in Crown employee grievances in Ontario concluded that:

- Med-Arb seemed to reduce costs and increase efficiency. Med-Arb is more likely to be used when the hearing is extremely long and when there are many interrelated issues.256
- The success of Med-Arb is evident in the fact that only a small percentage of cases progressed to the arbitration stage.
- The research failed to support the usual criticisms of Med-Arb.257

The following disadvantages of Med-Arb have been identified:

1) A neutral party who mediates and then arbitrates may be perceived as biased and may be aware of information conveyed informally and confidentially in mediation.258

2) Private sessions, which are confidential, may violate due process because the other party may not have the opportunity to challenge what is said to the neutral person.259

3) The fear of arbitration could make mediators too forceful, resulting in a decision that unduly represents the position of the mediator.260

4) The neutral party may not have the skills to function effectively as both a mediator and arbitrator.261

5) The parties may be inhibited in their discussions with the mediator and reveal less if they know that the mediator might be called on to act as arbitrator in the same dispute.262

6) ‘A party to Med-Arb can force the transition from mediation to arbitration to occur by simply refusing to participate or negotiate’.263

7) The mediation phase could be used as preparation for a possible arbitration, making it more likely the dispute will go to arbitration.264

239 See, eg, Workplace Injury Management and Workers Compensation Act 1988 (NSW) ss 354–355, which provides for conciliation and arbitration; Administrative Appeals Tribunal Act 1975 (Cth), which expands the use of ADR processes and allows a member who has conducted an ADR process to subsequently sit on a hearing in the same matter; Land and Environment Court Act 1975 (NSW) s 34, which provides for conciliation followed by adjudication.


241 Land and Environment Court Act 1979 (NSW) s 34.


244 Family Law Council (2007) above n 112, 29.


246 Consultation with Maureen Schull, Director Family Law Section, Law Council of Australia (5 December 2007).


254 Ibid.


256 Arbitrators referred to cases they mediated in 3 days or less that would have taken 15 days to hear in arbitration.

257 Telford (2000) above n 229, 13–14. However, a significant limitation of this study is that only medi-arteries were surveyed, not parties or their lawyers.


260 Ibid.


262 Blankenship (2006) above n 231; Limbury (2005) above n 238, 11 citing D Jones, Chartered Institute of Arbitrators (Australian Branch) Entry Course Materials on Australian Domestic Commercial Arbitration, 2002 32. Blankenship notes that there is little research indicating that parties are more reluctant to be open in med-arb; there appears to be research indicating that the parties are more likely to be honest and open.


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Arb-Med
The following advantages of Arb-Med have been identified:
1) Finality: the dispute will be resolved by either mediation or arbitration.
2) It has ‘superior cost and time efficiency over separate mediation and arbitration proceedings’. 265
3) The impending threat of an imposed decision can have a positive impact in helping disputants reach their own negotiated agreement.266
4) The parties have good reason to disclose all pertinent information to the arbitrator as the arbitrator’s decision may ultimately decide the dispute.

A 2002 US study found that parties in the Arb-Med procedure settled in the mediation phase more frequently and achieved settlements of higher joint benefit than did parties in the Med-Arb procedure.267

The following disadvantages of Arb-Med have been identified:
1) The cost and time of participating in the arbitration may be unnecessary if the dispute settles at mediation.268
2) Compared to Med-Arb, it is likely to be a less expedited process because it always involves both an arbitration phase and a mediation phase.269
3) A neutral person who participates in both arbitration and mediation may be perceived as biased when information in one process has been conveyed confidentially.270
4) Suggestions by the mediator at mediation may be interpreted as hints regarding the sealed arbitral award, inappropriately coercing or pressuring the parties into settlement.271

MEDALOA
The following advantages of MEDALOA have been identified:
1) It is informal, quick and low cost.
2) The competing offers can incorporate lateral and interest based features.272
3) Finality: the dispute will be resolved once and for all.273
4) The incentive is on parties to put a reasonable offer (to attract the mediator) rather than rely on an offer which is unreasonable (because the mediator is unlikely to select that offer).274
5) The mediator’s discretion is significantly reduced.275

The following disadvantages of MEDALOA have been identified:
1) There is no ability to split the difference between the offers.276
2) The mediator might decide that neither offer is acceptable—the matter would then proceed and there would be no finality.277
3) It is not suited to disputes with multiple issues.278

Concerns about hybrid processes and procedural fairness
One of the primary concerns raised with respect to Med-Arb is procedural fairness.279 The arbitrator may appear to be and may actually be biased if the arbitrator received private representations from the parties when acting as mediator. Procedural fairness in the arbitration may require full disclosure to the parties of any such private representations.280

In the UK, the requirement of procedural fairness has given rise to some difficulties. One issue is whether the Human Rights Act 1998 may preclude waiver of the right to procedural fairness.281 The Charter of Human Rights and Responsibilities 2006 may raise similar issues in Victoria.

As the Duke Group282 case illustrates, the mere holding of private sessions in the mediation phase may create the appearance of bias. In that case, some 10 years earlier in a related action a Supreme Court judge had been appointed as mediator for certain pre-trial issues. Despite the fact that Justice Debelie had no memory of the details, he disqualified himself on the basis that:
A reasonable bystander might apprehend that, in the course of meeting the directors separately, I might have received information which would cause me to have a view about the merits of the claim against the directors which might affect the exercise of my discretion.283

At common law an objection on that ground may be waived by the parties.284 If the mediator does not hold private sessions issues of procedural fairness may not arise but the disclosure of confidential or ‘without prejudice’ information may give rise to problems. Such difficulties may result in parties not being as open as may be desirable. One way around the problem is to appoint a different arbitrator who was not privy to the information disclosed in a private session. However, this would reduce the efficiency of the process and add to costs.

One commentator suggests that confidential information acquired in a Med-Arb process creates no more a problem than when an arbitrator or a judge has to consider the admissibility of evidence. Even if the evidence has already been heard, if it is deemed inadmissible, a competent judge or arbitrator knows how to disregard it. Similarly, a competent med-arbiter will be able to disregard what was learned in a failed mediation when deciding a case.285

Other methods suggested to reduce potential problems include:

- appointing a professional body such as the Institute of Arbitrators and Mediators to administer the processes and if requested, nominate a different person to conduct the second stage286
- introducing a code of ethics for neutral parties to assist them in handling confidential information obtained in private sessions287
- training neutral parties to ensure that any confidential information is only considered in the context of mediation and that any arbitration decision is based directly on the evidence presented.288

2.10.4 Conclusions and recommendation

The commission is of the view that despite the concerns raised, hybrid processes should be included in the ‘shopping list’ of ADR options. Using a hybrid process provides parties with flexibility and finality in the resolution of their dispute. The processes may involve less time, expense, aggravation and inconvenience compared with litigating a dispute in court. Given the concerns about hybrid processes, particularly in relation to procedural fairness, it is desirable to obtain the fully informed consent of the parties before referrals are made. The issue of compulsory referral to ADR processes is discussed further below.

The proposed Civil Justice Council should have responsibility for the ongoing review of ADR processes, in conjunction with the courts, lawyers, litigants and ADR providers.

269 To the extent a neutral party is paid on an hourly basis, it is likely to be more costly than Med-Arb: Conlon et al (2002) above n 267, 979.
271 Limbury (2005) above n 238, 12.
273 Ibid.
274 Ibid.
275 The process removes many of the concerns about the mediator having the power to make a decision: ibid.
276 But in reality, the neutral party could, in consultation with the parties, go back to the parties and request further reasonable offers: ibid.
277 Ibid.
278 Ibid.
279 See below under compulsory referral to ADR for a discussion of the meaning of procedural fairness.
281 Ibid.
282 The Duke Group Ltd (In Liq.) v Alamain Investments Ltd & Ors [2003] SASC 272 (‘Duke Group’). See the discussion below under court-conducted mediation for more information on this case.
285 A more controversial position is that Med-Arb fosters better arbitrated decisions. The view is that understanding all the merits of the case, including confidential information obtained in private sessions, helps the neutral person fashion a decision which meets the real needs and interest of the party. Telford (2000) above n 229, 4-5.
286 The drawback with this approach is that the parties lose the benefit of having both the arbitration and mediation conducted by the same neutral person, who is already familiar with the issues and argument. An example of a hybrid process using a different person is the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, which allow for the parties to conduct a mediation conference under the Commercial Mediation Procedures to facilitate settlement. The mediator must not be an arbitrator in the case: r 8.
287 Minus (2007) above n 228, 14.
2.11 SUBMISSIONS
In their submissions in response to the Consultation Paper, the Law Institute, the Supreme Court, State Trustees, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators were supportive of increased ADR options for courts and litigants.289

In consultations, members of the Supreme Court expressed the view that there is a need to maximise the resources of the courts to assist ADR and that ADR should be encouraged and supported.290

The Human Rights Law Resource Centre and the Law Institute supported the introduction of further ADR options and contended that further options would assist the courts to more efficiently and effectively manage civil disputes.291

The Mental Health Legal Centre contended that outcomes from ADR processes ‘would not be fair for disempowered parties who cannot participate in ADR processes from an equal position’. It suggested that self-represented litigants should have access to legal advisers for ADR processes.292 The commission’s recommendations on additional assistance for self-represented persons are discussed in Chapter 9.

2.12 CONCLUSIONS AND RECOMMENDATIONS
As noted in Chapter 1, the civil courts in Victoria deal with an enormous range of matters. Although there are many different types of ADR, the method most commonly proposed by courts is mediation. Other forms of ADR might be more appropriate than mediation for a particular dispute. While referral to various types of ADR may be within the existing powers of judicial officers, the commission believes there should be express provision for different forms of ADR. The availability of different ADR options will better enable the courts to ‘fit the forum to the fuss’.293 Different dispute resolution mechanisms may be suitable for different matters, depending on their size, complexity and importance. The enhanced use of ADR and the more widespread availability of different options will enable the courts to manage certain litigious disputes more efficiently and effectively.

Further ADR options should include:

- early neutral evaluation
- case appraisal
- mini-trial
- the appointment of special masters
- court-annexed arbitration
- special referees, with or without the consent of the parties
- conciliation
- conferencing
- hybrid ADR processes.

Some of these options, such as special masters or court-annexed arbitration, may be more appropriate in the higher courts. The proposed Civil Justice Council should have responsibility for the ongoing review of ADR processes, in conjunction with the courts, lawyers, litigants and ADR providers.

Court rules should make more detailed provision for referral to various ADR alternatives and for the conduct of ADR by judicial officers. The issue of whether there may need to be legislative amendments to give the courts additional express powers to make rules is discussed in Chapter 12. Practice notes could be used to provide further information for litigants and lawyers.

In light of the concerns expressed about judicial ‘mini-trials’, the commission considers that each court should decide whether judicial mini-trials are appropriate.

The commission is of the view that there should be additional education for participants in the civil justice system regarding the different ADR options available. This is further discussed below.
3. MORE EFFECTIVE USE OF INDUSTRY DISPUTE RESOLUTION SCHEMES

Although industry ADR schemes were not expressly included in the commission’s terms of reference, such dispute schemes are an important alternative to the court system. They facilitate the resolution of large numbers of disputes.

In many cases, complainants have a choice about whether to commence legal proceedings or to seek resolution of their complaint through an industry scheme. Dispute schemes have fulfilled a need for cost-free, accessible, expeditious and effective resolution of disputes. A further advantage of such schemes is that they are specialised.

3.1 HOW SCHEMES OPERATE

Industry specific dispute resolution schemes deal with complaints and disputes between consumers (including some small business consumers) and a particular industry. Member institutions fund the schemes and industry and consumer representatives govern them.

Some schemes are required to meet standards established by ASIC [the Australian Securities and Investments Commission]. If the industry member and consumer do not reach agreement, most schemes have the power to make a determination. The determination is binding on the industry member, but not on the consumer who can choose to accept or reject the determination. Depending on the scheme, the power to make the determination lies with an Ombudsman, panel or referee.

Since 1990, various schemes have been set up by industries seeking to provide a cost-free, effective and relatively quick means of resolving complaints about the products or services provided by them. Schemes of this type play a vital role as an alternative to expensive legal action for both consumers and industry.

In order to encourage and support the development of schemes, the Federal Government helped develop a set of benchmarks to guide industry in developing and improving such schemes, called ‘Benchmarks for Industry-Based Customer Dispute Resolution Schemes’. Most schemes operate in accordance with these benchmarks. The benchmarks set out key ADR practices, that are intended to give effect to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness.

There are a number of schemes currently operating in Australia at a national or state level. These include the Financial Industry Complaints Service (FICS), the Insurance Ombudsman Service (IOS), the Banking and Financial Services Ombudsman (BFSO), the Energy and Water Ombudsman (Victoria) (EWOV), the Telecommunications Industry Ombudsman (TIO) and the Credit Union Dispute Centre (CUDC).

Scheme members agree to submit their consumer disputes to the applicable industry scheme for resolution. Scheme membership may be voluntary or mandatory. Membership of a scheme may also be a legislative requirement or a requirement for licensing.

The schemes can be large. For example, the BFSO has a membership of 33 banks that represent all of the major banking institutions in Australia, and 54 ‘non-bank’ members. FICS has 2562 members.

The schemes handle many thousands of consumer complaints each year. For example, last year the BFSO opened 6326 new cases; the IOS had 1870 cases referred for determination; and FICS dealt with 54 'non-bank' members. 296 The monetary values of the disputes handled by these services are not trivial. Both the BFSO and IOS can determine disputes where the amount claimed is up to $280 000.289 FICS can determine disputes for life insurance complaints up to $250 000, and up to $100 000 for other complaints.

Some of the schemes publish reasons for their determinations. These are not binding precedents but the effect of such publication on industry and on the scheme decision makers is to develop consistent patterns of decision making which influence industry conduct. The schemes that do not publish reasons (such as the BFSO) produce detailed and comprehensive guidelines, which are drawn from previous decisions and indicate the likely course of future decisions, as well as selected summarised case studies.

The use of lawyers is restricted in some of the schemes.

289 Submissions CP 18 (Law Institute of Victoria), CP 58 (Supreme Court of Victoria), CP 23 (State Trustees); CP 35 (Institute of Arbitrators and Mediators and Chartered Institute of Arbitrators).
290 Consultation with the Supreme Court of Victoria (2 August 2007).
291 Submissions EDI 19 (Human Rights Law Resource Centre), EDI 31 (Law Institute of Victoria).
292 Submission EDI 11 (Mental Health Legal Centre).
296 NADRA (2006) above n 1, 104.
303 BFSO, Banking and Financial Services Ombudsman Terms of Reference (as from 1 December 2004) cl 5.1(e); IOS Insurance Ombudsman Service Terms of Reference (as at 1 June 2007) cl 1.2 (see definition of ‘determination’).
304 Financial Industry Complaints Service Rules r 12.2 (as at 1 June 2007).
305 Submission EDI 23 (Banking and Financial Services Ombudsmen).
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Generally, before most schemes will investigate a complaint, it is necessary for the consumer to have attempted to resolve the complaint directly with the scheme member. Many businesses have developed their own private internal dispute resolution arrangements to deal with complaints. Consumers who are unable to resolve their complaints directly may lodge a complaint with the scheme.307 The scheme will facilitate investigation of the complaint. The complaints that the schemes investigate almost always involve issues to do with contracts between the industry members and their consumer customers.308 The schemes use various forms of ADR, including mediation and conciliation, to resolve disputes prior to exercising their determinative powers. Where resolution cannot be reached using ADR processes, most schemes provide for a determination to be made.309

The binding nature of decisions on industry participants is an important feature of the schemes. The consumer is able to accept or reject a decision of a scheme.310 Consumers who reject the decision can pursue court action.311 Although consumers are free to reject a scheme determination and take the matter up with the courts, it seems that few do so.312 Enforcement of scheme decisions is by a combination of regulatory and industry self-regulation mechanisms. Failure to comply with a scheme decision can lead to industry based sanctions such as expulsion from the relevant industry association.313

3.2 Arguments for and Against Referring Disputes to Schemes

Arguments for referring disputes to schemes

A clear advantage to consumers is that the schemes offer quick and cheap justice. While they do not offer any guarantee that the consumer will win, they allow consumers the opportunity to have their complaint resolved independently and fairly. Further, the schemes do not leave the consumer open to costs if the complaint proves unsuccessful.314

The specialised nature of schemes offers benefits to customers seeking redress. As decision-makers are already familiar with how the industry operates, there is less need for the consumer to provide extensive background material to accompany the complaint.315

Schemes also offer a more flexible approach to dispute resolution than the courts. They are able to consider a broader range of factors, including the law, applicable industry codes or guidelines, good industry practice and what is ‘fair and reasonable’ in the circumstances. Unlike a court, decision makers are generally not bound by the rules of evidence or previous decisions.316

Schemes also have the capacity to improve business practices and standards of scheme members and industry.317 Although decisions by schemes are not binding precedents, the specific industry focus of the scheme facilitates communication between scheme members, industry and the decision maker. Decisions generate rules that may guide industry behaviour and assist in preventing further disputes.318 Research conducted into FICS found that disputants were often satisfied with the services offered by the scheme.319

Submissions to the commission identified the following advantages of industry schemes:

- The Public Interest Law Clearing House (PILCH), the Consumer Action Law Centre, IOS and BFSO contended that industry schemes are more accessible, more user-friendly, use more flexible procedures, are more efficient and less formal, less intimidating and less costly for litigants than courts, particularly for self-represented litigants.320
- IOS noted that the decision-making criteria are broader than for courts.321
- IOS also noted that schemes have a ‘level playing field’ philosophy—they can assist consumers in ways courts cannot; for example, by being able to conduct ‘inquisitorial’ style oral examinations.322
- IOS pointed out that oral examinations are very effective for clarifying issues and resolving disputes.323
- IOS noted that scheme members are required to disclose documents. Sharing information leads to the quicker resolution of disputes.324
- BFSO advised that schemes can consider disputes that are outside their jurisdiction.325
Arguments against referring disputes to schemes

One criticism, raised by the Mental Health Legal Centre and other commentators, is that because the schemes are industry funded they lack independence from industry.326 Other disadvantages identified are that schemes may not be effective in ensuring consumers know where to lodge a complaint, and the scheme may not have the jurisdiction to resolve it.327 Another concern is that the schemes are limited in their ability to impose sanctions. Stuhmcke contends that ‘an adverse court finding against an industry member will influence industry behaviour through its precedent value; however, an adverse finding by a scheme does not have the same legal force’.328

Some schemes may be neither well known nor accessible. For example, research conducted into public awareness of the FICS found that it was not particularly well known as an ADR body.329 Another study conducted by Ipsos found a significant gap in public awareness of the functions (and to a smaller extent the existence) of ADR service providers.330 Other studies have found that ‘vulnerable consumers’331 experience barriers to accessing ADR schemes.332 Sourdin suggests that financial services dispute resolution schemes may not be equitable because consumers with certain demographic backgrounds appear to be unlikely ever to lodge complaints or pursue disputes.333

3.3 INITIAL PROPOSAL

In submissions and consultations there was considerable support for industry schemes provided they operated fairly. FICS and IOS identified that scheme services, if used more by the legal industry, would leave the courts with more time and resources to deal with other cases.334 The Victorian WorkCover Authority noted that such schemes are less formal than the court system and are generally cost and time efficient as well as user-friendly.335 The Consumer Action Law Centre suggested that there should be a policy of referring appropriate matters, including matters involving self-represented litigants, to industry schemes for resolution outside the court system.336 The centre noted that this would require changes within the schemes because their terms of reference provide that they cannot deal with disputes once proceedings are issued.

The commission considered whether in some circumstances it might be appropriate for a court to stay legal proceedings and refer a dispute to an industry scheme. The commission also considered whether or not there is a need to remove the existing restriction on access to the schemes where litigation has been commenced and whether the schemes might be an appropriate venue where the complainant is a self-represented litigant.337

As noted above, in some circumstances, if legal proceedings have commenced, a complainant may be prevented from making a complaint to a scheme. For example, under clause 5.1(c) of the BFSO’s Terms of Reference, the Ombudsman cannot consider a dispute

311 Ibid.
312 O’Shea (2006) above n 308, 71. Also, apparently most cases settle before court with over 90% of their cases resolved within 4 months: Consultation with IOS (5 September 2007).
316 Ibid.
317 In a consultation with the commission on 5 September 2007, IOS identified that scheme members get the advantage of schemes’ decisions and that the decisions are used for training purposes, which leads to improved industry behaviour.
320 Submission ED1 20 (The Public Interest Law Clearing House), Consultation with IOS (5 September 2007), Submissions ED2 12 (Consumer Action Law Centre), ED1 23 (Banking and Financial Services Ombudsman).
321 The schemes’ decision-making criteria usually refer to the law, the relevant industry code and what is fair and reasonable in the circumstances. See for instance IDS’ Terms of Reference 1 June 2007, cl 11.15: ‘In arriving at a determination a Panel . . . shall have regard to what is fair and reasonable in all the circumstances; regard must also be had to good insurance practice, the terms of the policy, and established legal principle’ (consultation with IOS, September 2007).
322 Consultation with IOS (5 September 2007).
323 Consultation with IOS (5 September 2007).
324 Consultation with IOS (5 September 2007). See also: ASIC’s PS 139.105; IOS’ Terms of Reference 1 June 2007 cls 7.1, 8.2, 8.3, 8.5 and 8.15.
325 Submission ED1 23 (Banking and Financial Services Ombudsman).
326 Submission ED1 11 (Mental Health Legal Centre); Stuhmcke (2003) above n 295, 50.
328 Ibid.
331 Consumers who live in typically low socioeconomic, geographical regions or rural areas: Sourdin (2007) above n 329, 27.
334 Submission CP 54 (Financial Industry Complaints Service and Insurance Ombudsman Service).
335 Submission CP 48 (Victorian WorkCover Authority).
336 Submission CP 43 (Consumer Action Law Centre).
337 See for example BFSO Terms of Reference from 1 December 2004 cl 5.1(c); IOS Terms of Reference as at 1 June 2007 cls 6.2, 8.7(e); FICS’ Rules as at 1 June 2007 r 23; EWOV’s Charter as at 30 May 2006, cl 4.2(d).
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...if a dispute is based on the same event and facts and with the same disputant as any matter which is, was, or becomes, the subject of any proceedings in any court ... unless the parties consent.

Thus, the BFSO can consider a dispute where legal proceedings have commenced, provided both parties consent. Often this may require a stay of court proceedings until the dispute is determined. However, the BFSO noted in its submission that the current guidelines to the terms of reference provide that where it appears that legal proceedings have commenced, the BFSO will only ask the financial services provider whether it will consent to stay the proceedings if the proceedings have not been served.338

Clause 6.2 of the IOS Terms of Reference provides:

IOS or a member need not respond to a dispute if court proceedings have been commenced in respect of the same subject matter.

In addition, clause 8.7(e) provides:

A Chair, Referee or Adjudicator may decide that a dispute referred to the Service shall not be determined on any of the following grounds: the dispute is, or is likely to be, the subject of proceedings before any court, tribunal, board … or any other judicial or administrative enquiry.

Clause 4.2(d) of EWOV’s Charter is in similar terms.

Submissions in response to initial proposal

Telstra, the Australian Corporate Lawyers Association, IOS and the Victorian Bar expressed concerns about courts staying proceedings and referring a dispute to an industry scheme. It was contended that a defendant should not be required to deal with the matter through two mechanisms which may lead to a waste of time and money.339 It was argued that if a civil action has commenced, a party should not be able to have the matter referred to a scheme, unless all parties agree to stay the action.340 The BFSO considered that staying court proceedings would lead to delays in the resolution of disputes and confusion for consumers.341 The BFSO saw it as inappropriate and inefficient to refer self-represented litigants to a scheme if their claim had no merit: ‘They will exhaust the scheme’s resources only to be referred back to court when the decision of the scheme is not in their favour.’342 Telstra and the Australian Corporate Lawyers Association and IOS argued that court intervention is required to bring certainty and finality to the dispute and to put in place court orders.343

The BFSO contended that some disputes might not be appropriate for referral from the court to an industry scheme in certain circumstances: for example, where it is solely on an issue of credit;344 if there is a question of fraud or criminal conduct;345 or where legal proceedings were commenced to foreclose on a property.346 The banking ombudsman also submitted that courts should only be able to refer disputes to schemes in appropriate circumstances: for example, where a self-represented litigant is one of the parties; the case has merit; or the dispute is within the scheme’s jurisdiction. In addition, schemes should be able to refuse a court referral if they consider the dispute is not appropriate: for example, if it is not within the scheme’s jurisdiction. The banking ombudsman felt that participants in the civil justice system should be educated regarding how industry schemes operate, including their jurisdictions and limitations.347

The Consumer Action Law Centre contended that where the plaintiff is a member of an industry scheme, attempting to conciliate the claim through the scheme process should be made a precondition to filing a complaint.348

An anonymous submission drew attention to the fact that each scheme’s jurisdiction is limited and noted that ‘when the claim amount is higher than the relevant scheme’s jurisdiction, the only avenue to achieve a resolution of the dispute is to take the matter to court’.349

The Australian Bankers’ Association expressed the view that given the current regulatory and self-regulatory requirements for banks to provide ADR services to customers, further obligations from within the civil justice system would not be consistent with sound regulatory policy.350

3.4 AMENDED PROPOSAL

Industry schemes offer many advantages. However, the commission is persuaded that referring parties from court to such a scheme may be problematic. It may give consumers an unfair advantage
if they are able to pursue the dispute through two venues concurrently. In some circumstances, both parties might desire a referral from the court to an industry scheme, and in such cases the court may stay proceedings and refer the dispute to a scheme. At present complainants are required to elect between court proceedings and an industry scheme if the dispute is within the parameters of such a scheme. This is intended to prevent complainants from pursuing two options simultaneously. They are presently able to pursue court proceedings if they elect to reject the determination made through the scheme.

3.5 CONCLUSIONS AND RECOMMENDATIONS

Industry dispute schemes are an important alternative to the court system. Costs and delays have reduced access to the court system for many consumers. The commission considers that industry dispute schemes help fulfil a need for cost-free, accessible and effective resolution of disputes. They can produce resolutions more quickly and flexibly than the courts.

The schemes serve as an alternative to expensive legal action for both consumers and industry. Diversion from the formal court system also offers financial benefits to the government-funded justice system.

The commission agrees with the view expressed in the submissions that the schemes, if utilised more by the legal industry, would leave the courts with additional time and resources to deal with other cases, thereby reducing delay. The commission considers that more widespread use should be made of industry dispute resolution schemes. If proceedings have commenced, the dispute should not be able to be referred to an industry scheme unless the parties agree to stay the proceedings. This would appear to be the present position under most, if not all, industry schemes.

The submissions also addressed the need for judicial officers, registry staff and lawyers to be educated on how industry schemes operate, including their jurisdictions and limitations. The commission considers that there should be further education programs for lawyers, judicial officers and administrators regarding the existence of the various industry schemes and how they operate.

4. EXTENSION OF COLLABORATIVE LAW

‘Collaborative law’ is a relatively recent development in the ADR field. Collaborative law is a non-adversarial dispute resolution process, usually facilitated by lawyers, which aims to achieve a settlement in cases that may otherwise result in litigation. It also ‘aims to assist in developing [and] maintaining an ongoing relationship between the parties. It started in the US in 1990 and is widely used there and in Canada and the UK’. In Australia, it is principally being used in the resolution of family law disputes. It has been described variously as:

- a diplomatic process of joint problem solving
- an interest-based negotiation model

338 Submission ED1 23 (Banking and Financial Services Ombudsman).
339 Submissions ED1 16 (the Australian Corporate Lawyers Association), ED1 17 (Telstra), ED1 24 (Victorian Bar), Consultation with IOS (5 September 2007).
340 Submissions ED1 16 (the Australian Corporate Lawyers Association), ED1 17 (Telstra), Consultation with IOS (5 September 2007).
341 Submission ED1 23 (Banking and Financial Services Ombudsman).
342 Submission ED1 23 (Banking and Financial Services Ombudsman).
343 Submission ED1 17 (Telstra) and Consultation with IOS (5 September 2007).
344 The BFSO argued that the evidence should be given by oath and tested by cross-examination in court.
345 The BFSO submitted that the matter should be considered by a court or tribunal.
346 Deferring the proceedings could mean that the equity in the property reduces and the disputant’s debt increases, the BFSO argued.
347 Submission ED1 23 (Banking and Financial Services Ombudsman).
348 Submission ED2 12 (Consumer Action Law Centre).
349 Confidential Submission ED1 5 (permission to quote granted 17 January, 2008).
350 Submission ED1 29 (Australian Bankers’ Association).
351 Consumer Affairs Division (1997), above n 294, 4.
352 Field (2006) above n 299, 97. Also, as industry schemes are funded by industry they offer cost savings to the taxpayer-funded court system: Field (2007) above n 34, 4B.
353 See for example Submission CP 54 (Financial Industry Complaints Service and Insurance Ombudsman Service).
354 For example, the BFSO cannot make decisions that are binding on consumers or compel evidence from third parties: Submissions ED1 23 (Banking and Financial Services Ombudsman), CP 54 (Financial Industry Complaints Service and Insurance Ombudsman Service).
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- emphasising ‘client empowerment’
- a non-adversarial dispute resolution process facilitated by lawyers with the objective of achieving an ethical and enduring settlement for the clients.

Collaborative law has a number of key features:
- the clients and lawyers sign a contract agreeing to negotiate in ‘good faith’ to resolve a dispute without resort to litigation
- if the dispute is unable to be resolved by negotiation the lawyers acting for all parties will withdraw and not act for their clients in any court proceedings
- the negotiation process consists of a number of four-way meetings involving the parties and their lawyers together
- advice is to be given with the aim of achieving a fair process and just outcomes for both parties
- the parties and lawyers commit to ongoing communication and full disclosure
- the parties and lawyers aim to ensure costs are not incurred unreasonably.

The collaborative contract will usually impose obligations on lawyers to withdraw from the collaborative process if they become aware that their client has acted contrary to the agreement. It may also require that the negotiations take place within a particular time and in a certain way.

Lawyers participating in the process are required to be trained. In particular, the process relies on trust and cooperation between lawyers, as disclosure of all documents and information is not subject to the control of court processes.

‘Lawyers other than family law specialists are showing an interest in the collaborative process. New South Wales has established a working group to look at the use of collaborative law in areas of legal dispute other than family law’. The Law Institute has established a committee that is currently examining appropriate protocols for collaborative law practitioners and is running both introductory and advanced collaborate law training sessions.

A number of studies have been conducted on collaborative law. In 2005, Dr Julie Macfarlane published the results of a three-year, qualitative study of collaborative family law cases in Canada and the United States. Dr Macfarlane drew the following conclusions about collaborative law:

- Lawyers and clients engage in collaborative law for different reasons. Lawyers offer collaborative practices because the principles of collaborative law match their personal values and ideals more closely than litigation. Clients, on the other hand, are generally attracted by the prospect that collaborative law is faster and less costly than litigation.
- Collaborative law reduces the posturing and competitiveness that characterises traditional lawyer-to-lawyer negotiations, as well as the tendency to make highly inflated or unrealistically low opening proposals.
- Collaborative law maintains a strong ideological commitment to cooperative negotiation, which encourages open communication and information sharing between the parties and which has a significant impact on the bargaining environment. Like other consensus-building processes, it requires lawyers to pay attention to meeting the interests of all parties.

In 2004, William Schwab surveyed approximately 100 collaborative lawyers and clients. In 2006, Canadian researchers released the preliminary results of their study into the emergence of collaborative law in Saskatchewan. The conclusions of both of these studies are generally favourable to the practice of collaborative family law.

4.1 ARGUMENTS FOR AND AGAINST THE EXTENSION OF COLLABORATIVE LAW

Arguments in favour of expanding the use of collaborative law

Collaborative law not only provides:

an alternative to traditional litigation but also a different approach to negotiation, mediation and settlement. Out-of-court negotiations in family law matters can easily be influenced by adversarial attitudes due to the highly emotional context of the dispute.
and the entrenched positions of the parties. Collaborative law encourages the parties to communicate more effectively to arrive at a mutually acceptable long-term solution that will not polarise the parties even further. 370

While the use of collaborative law in Victoria has largely been in family law matters, it is a process that could be used to resolve all kinds of civil disputes. 371

The Law Institute supported a widening of the range of ADR options available to litigants, including collaborative law. 372 The Institute endorsed the use of collaborative law in all kinds of civil disputes, such as wills and property. 373

A recent report prepared by the Family Law Council for the Federal Attorney-General found that a great deal of anecdotal evidence suggests collaborative practice is both quicker and cheaper than litigation. 374 The report also concluded that in cases where the collaborative process works well it provides significant advantages:

In common with other dispute resolution models such as mediation, it offers parties the opportunity to manage both the process and outcome of dispute resolution. It also offers parties the support of traditional legal advocacy, with the difference that legal advisers focus exclusively on a negotiated outcome. 375

The report concluded that collaborative practice is a ‘valuable addition to the range of dispute resolution options available, particularly in relation to property matters’. 376

The former Commonwealth Attorney-General, Phillip Ruddock, is reported as having expressed support for collaborative practice in family law: ‘the government hopes to change the culture of separation—away from adversarialism, towards respect and, so far as it is possible, cooperation’. 377

The Chief Justice of the Family Court has also reportedly endorsed collaborative law. 378

 Arguments against expanding the use of collaborative law

Some concerns have been raised about collaborative law:

- Collaborative law may not be suitable for all disputes, particularly in cases:
  - where the parties ‘feel extreme hostility towards one another or have particularly poor communication skills’; or
  - which involve ‘incidents of family violence, mental illness, extreme power imbalances or substance abuse’. 379

- ‘The collaborative process is not subject to normal judicial time limits since it is based on the collaborative contract between the parties’, therefore there may be delays. 380

- If there are many sessions, this could have a ‘substantial effect on the costs of the process and may undermine the goals of speedy, inexpensive and informal resolution’. 381

- ‘There is no empirical evidence that collaborative practice is less costly or time consuming than litigation’. 382

- Collaborative law may be undermined if lawyers are not trained properly.

- Practitioners and litigants may be confused and not understand the process and as a result, the whole collaborative law process could fail.

- In their submissions, Telstra, the Australian Corporate Lawyers Association and Clayton Utz expressed concern that in a commercial setting, if the matter does not resolve by negotiation, there are distinct cost disadvantages associated with retaining new legal advisers for court proceedings. 383

4.2 CONCLUSIONS AND RECOMMENDATIONS

Notwithstanding the concerns raised above, the commission believes that collaborative law is a valuable addition to the range of dispute resolution options available. Although collaborative law in Victoria has largely been confined to family law matters, it is a process that could be applied to other kinds of civil disputes, including wills and probate disputes, property and construction disputes and other types of disputes. It could be particularly useful for disputes where the parties have a relationship that they wish to continue. It is a less adversarial option that may assist parties to resolve their

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359 Ibid.
360 Ibid.
362 Ibid.
363 Submission CP 18 (Law Institute of Victoria).
364 Julie Macfarlane, The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases, research report presented to the Family, Children and Youth Section, Department of Justice, Canada, (2005): A total of 150 standardized interviews were conducted with the lawyers, clients and independent experts involved in the 16 cases. The interviews sought reflective data about interviewees' attitudes towards and practical experiences of collaborative law.
365 Ibid. viii.
366 Ibid ix.
367 Ibid.
371 Collaborative Professionals Victoria (n.d.) above n 358.
372 Submission CP 18 (Law Institute of Victoria).
373 Submission CP 31 (Law Institute of Victoria).
375 Ibid 59.
376 Ibid.
380 Ibid, 56.
383 Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra), CP 18 (Clayton Utz).
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disputes in a more satisfactory and cost-effective manner. Clearly, training and education are critical for ensuring the success of collaborative law in resolving civil disputes. The commission therefore commends and encourages the initiatives undertaken by the Law Institute in this regard.

5. THE DESIRABILITY OF COURT-CONDUCTED MEDIATION

5.1 INTRODUCTION

Chodosh has described judicial mediation as

"a confidential, consensual form of dispute resolution facilitated by a sitting or retired judge who is trained in conflict resolution … They may proceed with private meetings between the mediator and each party. The judicial mediator or the ‘neutral’, attempts to narrow the disagreements between the parties and to encourage final agreement on settlement. The neutral also explores aspects of the dispute beyond the legal positions of the parties or the permissible scope of judicial relief. Mediation allows the neutral to examine the parties on aspects of the dispute that most litigation systems must ignore … Judicial mediation may be voluntary or compulsory."

From the conventional perspective of most modern legal cultures, judicial mediation is a contradiction in terms. Judges are supposed to judge (not mediate), to apply law (not consider interests), to evaluate (not facilitate), to order (not accommodate) and to decide (not settle). Some commentators suggest this view of judicial mediation falsely assumes that the functions of judging and mediation are mutually exclusive and that it is out of touch with the modern realities of national court systems, which are characterised by increased caseloads, delays and higher costs. They suggest that judicial or court-conducted mediation is one of several remedies for this problem and that the judicial promotion of settlement is vital to the functioning of the court system.

Judge-led mediation is already a government priority in Victoria. The Victorian Attorney-General has studied a Canadian model whereby Supreme Court judges not engaged in a hearing are asked to mediate. The Attorney-General has endorsed judicial mediation and is reported to have said:

"Well over 80% of matters that go before judge mediators are resolved and resolved very quickly. Why? Because you have the imprimatur of a judge resolving these matters."

With active case management already occurring in Canada, the United States, the United Kingdom, Australia and in other jurisdictions, the use of judicial mediators can be seen as merely the next logical step in a process that charges the courts to find just, quick and cheap resolutions to disputes. In this respect, judicial or court-conducted mediation is consistent with the overriding purpose proposed by the commission. Court officers in Victorian courts can and do play an important role in facilitating the resolution of pre-trial issues and the early settlement of cases, including through court-conducted mediation and conferences. This presently occurs at both the trial and appellate levels.

5.2 POSITION IN VICTORIA

Judicial mediators are appointed judges or other court officers assigned the task of mediating instead of adjudicating cases before the court. Judicial mediators are rare in the County and Supreme Courts but more common in the Magistrates’ Court, where magistrates can and do conduct mediations. In the Supreme Court, masters and retired judges may conduct mediations. In the County Court, case conferences are conducted by judges. In the Magistrates’ Court, pre-hearing conferences are conducted by registrars, deputy registrars or judicial registrars. A better description for all of these activities is ‘court-conducted mediation’ because it recognises the important contribution made by persons other than judges.

The Supreme Court

In 2005, the Supreme Court introduced a pilot program of mediation by court masters pursuant to a new rule. Under the rule, at any stage of a proceeding a master may, with or without the consent of any party, order that a master mediate the whole or any part of the proceeding. The new rule appears to complement the court’s power to order a proceeding, at any stage, to be referred to mediation with or without the parties’ consent. Masters undertaking mediations are required to assist the parties to reach a settlement of the proceeding, or that part of the proceeding referred, and are otherwise subject to the general mediation rules, including reporting to the court.
Masters undertaking mediations are protected by the general immunity from suit contained in section 27A of the Supreme Court Act 1986. Conduct and statements by parties at mediation are not permitted to be the subject of evidence unless all the parties who attended the mediation agree.\textsuperscript{396} The types of cases in which masters conduct mediations are limited to:

- cases where there is financial hardship for one or more of the parties
- urgent cases
- cases where there has already been an unsuccessful external mediation and a further mediation is considered necessary
- cases where there is the potential for issues to be narrowed or resolved by mediation.\textsuperscript{397}

In early 2007, the Court of Appeal implemented a pilot program of ‘front-end’ management of civil appeals.\textsuperscript{398} The objectives of the pilot program were:

- to ensure early identification of the scope and nature of appeals, so that they can be appropriately managed
- to encourage mediation of and earlier settlement of appeals and
- to increase flexibility and reduce delay in listing.\textsuperscript{399}

As part of the program, the parties must consider the applicability of mediation to the appeal. In appropriate cases, the master may order the parties to attend mediation including, in some cases, by a master.\textsuperscript{400}

Court-conducted mediation in the Supreme Court is also consistent with the requirement that the court, in exercising any power under the rules, endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined.\textsuperscript{401} As discussed in Chapter 3 regarding the overriding objective, the Supreme Court is considering whether rule 1.14(a) might be expanded and strengthened to make explicit aspects of the court’s inherent power to control its own proceedings; to encourage proportionality; and to foster a culture of just and efficient dispute resolution.\textsuperscript{402}

Mediation by masters is additional to the pre-trial conferences which for many years have been conducted in personal injury cases by the prothonotary and senior members of that office and are much valued by practitioners in that area.\textsuperscript{403}

As noted earlier, the Supreme Court opened a Mediation Centre on 4 March 2008.

The County Court

In certain circumstances, the County Court may order a case conference.\textsuperscript{404} Judicial officers conduct case conferences in the court. This is further discussed in Chapter 5. County Court registrars and judges do not conduct mediations.


\textsuperscript{385} Ibid.

\textsuperscript{386} Ibid.


\textsuperscript{388} Spencer (2006) above n 387, 130.

\textsuperscript{389} See the discussion below for more information on the Canadian model.

\textsuperscript{390} Matthew Drummond, ‘Vic push to use judges more in mediation’, The Australian Financial Review (Sydney), 1 February 2008, 71.

\textsuperscript{391} Spencer (2006) above n 387, 134.

\textsuperscript{392} See Chapter 3 for more information.

\textsuperscript{393} Supreme Court (General Civil Procedure) Rules 2005 r 50.07.1;

\textsuperscript{394} Submission CP 58 (Supreme Court of Victoria).

\textsuperscript{395} Supreme Court (General Civil Procedure) Rules 2005 r 50.07(1).

\textsuperscript{396} Supreme Court Act 1986 s 24A;

\textsuperscript{397} Submission CP 58 (Supreme Court of Victoria).

\textsuperscript{398} Supreme Court (2006) above n 15, 15.
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The Magistrates’ Court

The Magistrates’ Court offers two forms of alternative dispute resolution: pre-hearing conferences and mediation. The former are conducted almost exclusively by registrars and deputy registrars. They are offered without additional cost to the parties at the court’s premises.405

Under the court rules, a magistrate or a registrar may refer a civil proceeding or part of a civil proceeding for a pre-hearing conference.406 A magistrate or registrar must conduct the pre-hearing conference.407 Pre-hearing conferences can be conducted by telephone where it is inconvenient for parties to attend in person.408

If the proceeding is not resolved, the matter is referred back to court or, with the consent of the parties, to arbitration.409 If the proceeding is resolved, it may be referred back to the court for orders formalising the settlement.410

Pre-hearing conferences are confidential and answers given or admissions made at a conference cannot be used or referred to at the hearing without the consent of all parties.411

For mediation, the court selects which proceedings are suitable.412 It contacts the parties and invites them to choose an acceptable mediator, who may be a registrar or deputy registrar. The parties usually prefer mediations conducted by registrars or deputy registrars, in part because they are cost free. However, the court is unable to satisfy the demand for mediation because of the limited number of registrars available. Services are offered on a ‘first come, first served’ basis.413

Registrars and deputy registrars are trained to conduct pre-hearing conferences and mediations. The court considers this an important part of its function, and reported that the practice is well established and has a good success rate.414

The court’s role in conducting pre-hearing conferences in mediations is supported by its overriding objective and case management rules, which are substantially the same as the Civil Procedure Rules in England and Wales.415 The overriding objective is expressed as a paramount concern for the conduct of the court’s business. The rules also provide that the court must further the overriding objective by actively managing cases.416 This is discussed further in Chapters 3 and 5.

5.3 OTHER MODELS

Australia

There are many examples of court-conducted mediation in Australian courts and tribunals.

The Victorian Civil and Administrative Tribunal

In the Victorian Civil and Administrative Tribunal (VCAT), members and principal registrars can conduct compulsory conferences in more complex matters.417 Section 83 of the Victorian Civil and Administrative Tribunal Act 1998 provides that the functions of a compulsory conference are to:

- identify and clarify the nature of the issues in dispute in the proceeding
- promote a settlement of the proceeding
- identify the questions of fact and law to be decided by the Tribunal and
- allow directions to be given concerning the conduct of the proceeding.

Evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing, except in certain circumstances.418

If a member conducts the compulsory conference, a party may object to that member presiding over the hearing. If an objection is made, the member must take no further part in the hearing.419 Attendance at the conference is compulsory and there can be serious consequences for failure to attend.420

Members also can and do conduct mediations. However, private mediators also conduct mediations. A member who conducts a mediation cannot preside over the hearing of the matter.421 Evidence of anything said or done in the course of mediation is not admissible in a hearing, unless all parties agree.422

There are other examples from around Australia of court-conducted mediation and other forms of court-conducted ADR:
In the United States, judicial involvement in the settlement process is widespread. Litigation and negotiation are often viewed as continuous interrelated processes. One commentator notes:

**Most American judges participate to some extent in the settlement of some cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work.**

There are legislative imperatives for American judges to settle matters that do not require a trial. Judges have also been involved in facilitating settlements in mass tort litigation in the US. The **Code of Conduct for United States Judges** also provides that judges may confer separately with the parties and their counsel in an effort to mediate or settle pending matters, with the parties’ consent.

**The United States**

In the Federal Court, usually mediation is conducted by registrars, although judges also conduct mediation conferences. Federal Court judges have also acted as evaluators. Judges and registrars can also conduct case conferences. Independent mediators are also frequently used in Federal Court matters.

In the Administrative Appeals Tribunal (AAT), generally only members conduct directions hearings and mediations. Where a matter fails to resolve at mediation, if a party objects to the member hearing the matter, the member is not permitted to hear the matter. In the AAT, registrars may also conduct conference hearings and conciliation conferences.

In the Family Court, registrars may conduct conciliation conferences.

In the NSW Consumer Trader and Tenancy Tribunal and in the Native Title Tribunal, members may conduct mediations, conciliations, case conferences, neutral evaluations and hearings.

In the Western Australia Supreme Court, registrars may act as mediators.

In South Australia, court registrars conduct mediation and there are court expert appraisals. Independent evaluation by a magistrate is available as a pre-trial process in the South Australian Magistrates Court. Rule 3 of the **Supreme Court Civil Rules 2006 (SA)** provides that one of the objects of the Rules is to ‘facilitate and encourage the resolution of civil disputes by agreement between the parties’.

Retired judges are also used to conduct mediations and can be very effective.

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A study conducted in the United States found that of 1900 litigators practising in US federal courts, 85% believed that judicial involvement was likely to improve the chances of settlement, with 72% believing that settlement conferences before judges should be mandatory.439

Canada
Judicial mediators have been operating in the Canadian provinces of British Columbia and Ontario for at least 10 years. Quebec’s Court of Appeal has a conciliation service program.440 If a dispute does not resolve at mediation, the mediating judge is automatically barred from the bench that subsequently hears the appeal.441 Mediation has been embraced by the judiciary in other provinces of Canada for some time and is generally referred to as ‘judicial dispute resolution’ (JDR).442 A study of the Ontario judicial dispute resolution model found that its advantages included savings in time and money because it avoids the complex procedural and evidentiary provisions that make litigation so lengthy and therefore expensive.443 Another study conducted in Canada found 82.5% of the lawyers surveyed thought that judicial involvement in settlement conferences was likely to significantly improve the prospects of success and 58.5% thought that settlement conferences should be mandatory.444

The United Kingdom
Judicial mediation is not a feature in the United Kingdom. However, judges are involved in case management conferences.445 Case management conferences are discussed in Chapter 5.

Europe
Under various European civil code procedures, it is typical for the judge managing the case to explore options for settlement. For example, the German code of civil procedure ‘obligates the court to attempt to negotiate a settlement’.446 In the Netherlands, ‘a preliminary injunction procedure has been adapted to allow parties to obtain a judicial assessment of the likely outcome of the case on what can be described as affidavit evidence’.447 In Finland, as part of the pre-trial procedure, preliminary hearings are presided over by judges, who have a duty to promote settlement between the parties. The judge may also make a proposal for conciliation.448

In Norway, judicial mediation has been operating for more than 10 years. It initially began as a pilot project and expanded. All courts have participated from 2006. Judges usually conduct the mediations. There are no formalised skills and training requirements. A facilitative approach is used with some evaluative elements. If the case does not settle, it is assigned to a different judge.449 Norway is introducing a new Disputes Act, which is expected to come into force in 2008 and under which judicial mediation will continue.450 According to a consultation with Norwegian judges, the vast majority of disputes are resolved by judicial mediation.451

5.4 ARGUMENTS FOR AND AGAINST COURT-CONDUCTED MEDIATION
Arguments for court-conducted mediation
Some of the perceived benefits of court-conducted mediation include:

- the involvement of court officers in mediation being likely to improve the chances of settlement452
- judges being able to assist lawyers to handle difficult clients with unreasonable expectations453
- the opportunity for parties to arrive at their own settlement and to “fashion a more creative resolution than a judge could do at trial”454
- the opportunity to obtain advice on a range of issues such as the likely trial date, the possible costs of trial and what further directions might be needed for trial preparation455
- court officers conducting mediations being able to clarify and resolve preliminary issues456
- judicial skills including observation, patience and legal knowledge making judicial officers well equipped for settlement discussions as well as determinations.457

Support for judicial mediation also comes from the courts. The Supreme Court identified that the masters’ mediation program has been very successful and that 80% of the 50 mediations conducted by masters have resolved the proceeding completely or in part.458 The court expressed the view that masters are the appropriate officers to conduct mediations because ‘they are court officials who have
The Supreme Court also noted in its submission that another positive outcome of master mediation is that issues in dispute are narrowed. The Federal Court has made similar comments, as have other commentators. The Supreme Court and TurksLegal and AXA submissions identified that judicial mediation can reduce costs and delay. Norwegian judges we consulted indicated that in their experience judicial mediation reduces costs and delay. Crown Counsel similarly identified that mediations conducted by masters may mean reduced costs to the parties as the service is provided free. Commentators suggest that judicial mediation can save time and money because the complex procedural and evidentiary provisions that make litigation so lengthy and therefore expensive are avoided.

The Mental Health Legal Centre and Federation of Community Legal Centres submissions argued that judicial mediation would assist ‘less powerful’ parties. Their view is that court officers can help ensure mediation is conducted fairly and that the authority of the court but are not the people who will ultimately decide cases at trial. The Magistrates’ Court made a similar comment and suggested that judicial officers can bring an ‘additional advantage to the task’—the ability to disabuse parties of unrealistic expectations—a ‘reality check’. If a judicial officer states that a particular issue seems weak or lacks merit, that statement impacts significantly upon the parties. After all, the judicial officer is the person who can decide the case if it is unresolved, they ought to know. A suitable judicial officer undertaking either conferences or mediations will be more successful in obtaining a resolution than any other person.

The Australian Institute of Judicial Administration has noted this is particularly relevant where one of the parties is self-represented. The Victorian Bar, the Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators also considered that in a case involving a self-represented litigant it would be appropriate for a judicial officer to mediate.

The Australian Institute of Judicial Administration has noted that the success of judicial mediation in the Australian jurisdictions where it is in use appears to justify the practice. The Institute’s view is that:

- the statutory obligation of confidentiality binding upon a mediator, and the withdrawal of a judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary.

Arguments against court-conducted mediation

Some current and former judicial officers and legal commentators have expressed concern about the move away from the traditional role of the judiciary. Submissions also raised concerns regarding judicial mediation.


441 ibid.


444 Spencer citing Epp above n 439, 196.


447 ibid 258–9.


449 ibid.


451 Consultation with Norwegian judges (17 October 2007). This view is supported by statistics quoted on the Courts of Norway website, which states that 70–80% of cases are settled at or shortly after judicial mediation: <www.domstol.no/DItemplates/Article___3080. aspx?Language=en> at 17 October 2007.


453 Consultation with Norwegian judges (17 October 2007); Spencer, Part II (2006) citing Epp above n 439, 196.


456 Submission CP 22 (Mental Health Legal Centre).


458 Submission CP 58 (Supreme Court of Victoria); Consultation with the Supreme Court of Victoria (2 August 2007).


460 Submission CP 55 (Magistrates’ Court of Victoria).

461 Submission CP 58 (Supreme Court of Victoria).

462 Federal Court of Australia (2007) above n 23, 26. Crown Counsel identified that masters conducting mediations are able to give binding directions and to finally resolve aspects of the dispute so that if the matter proceeds to trial, the issues in dispute are narrowed: Crown Counsel (2006) above n 455, 17. See also Justice Debele, ‘Should Judges Act as Mediators?’ (Paper presented at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1–3 June 2007) 15.

463 Submission CP 58 (Supreme Court of Victoria); Submission CP 41 (TurksLegal and AXA).


466 Submission CP 22 (Mental Health Legal Centre), CP 9 (Federation of Community Legal Centres).

467 Submission CP 33 (The Victorian Bar), CP 33 (Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators).


Chapter 4

Improving Alternative Dispute Resolution

One major concern is that the role of a mediator is so different from that of a judge that it is undesirable for a serving judge to act as a mediator. Sir Laurence Street has argued that the use of judges and court officials as mediators threatens public confidence in the integrity and impartiality of the court, and compromises the role of the judge whose primary responsibility is to judge and not to promote settlement between parties.470 The Law Institute, State Trustees and the Legal Practitioners’ Liability Committee expressed similar views in their submissions.

Judge Wodak pointed out that there are issues associated with a judge mediating a dispute and then proceeding to hear that matter or a related dispute:

*I have reservations about a judge, having been a judicial mediator, hearing the case, even with the consent of the parties. The unsuccessful party may leave the court confused, and with a feeling that the legal system was unsatisfactory.*471

Parties could find the process intimidating and may not be able to distinguish mediation from other processes conducted with the authority of the court.472 Sourdin notes that this is an untested assumption but it may be correct given the low level of understanding in the general population about mediation and the confusion of ordinary people confronted with litigation.473

The Bar and State Trustees also expressed concern that there may be a perception among parties that information conveyed to a judicial mediator may be passed on to other members of the court if the dispute is not resolved. The Legal Practitioners’ Liability Committee considered that it is inappropriate for masters or judges who may later be called on to determine interlocutory applications, or preside at a trial of the dispute, to be involved in the mediation process.

The Bar, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators were also concerned that a dispute could arise between the parties as to what occurred at the mediation and the mediator could be called later as a witness in the proceeding, or even sued. The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators felt that this would be highly undesirable if the mediator was a judicial officer.474

Another consideration is that judicial determinations following trials serve an important purpose in developing the common law.

A further argument is that public funds should not be diverted into keeping private matters of public interest.475

Another concern identified is that judicial mediation is time-consuming and resource-intensive and that the valuable and expensive time of judges should be spent undertaking judicial adjudication.476 The Victorian WorkCover Authority, the Bar, the Institute of Arbitrators and Mediators, the Chartered Institute of Arbitrators and the Law Institute argued that there are private mediators who can provide the same service.477

Judge Wodak contended that courts should not mediate disputes where one party is self-represented because it is not possible for court officers to provide them with legal advice.478

The Bar commented that: ‘mediation is a unique skill that is not necessarily possessed by Judges and Masters’.479 Other commentators have expressed a similar view.480

Another concern is that parties may be pressured to settle by judges who have formed an impression of the case based on incomplete evidence.481

The Law Institute noted that choosing an ADR practitioner adds to the parties’ confidence in the process. However, this is not the case where judicial officers are assigned to conduct ADR.482

Chodosh argues that judges may see judicial mediation as ‘a threat to their authority to make public judgments and normative pronouncements. He also notes that judges may perceive the risk of a ‘brain drain’ from the bench because of incentives for judges to retire early in search of a more lucrative career in private ADR.483

Some constitutional impediments to judges operating as mediators have also been identified.484 Such arguments have centred on the nature of mediation and the constraints on judges that arise because of Chapter III of the Australian Constitution. Essentially, it is claimed that the ‘incompatibility principle’ may arise ‘in the performance of non-judicial functions of such a nature that the capacity of a judge to perform his or her judicial functions with integrity is compromised or impaired’.485 The purpose of the incompatibility doctrine is to ensure that the fundamental basis of the separation of powers doctrine is not undermined. In response to this argument, Justice Michael Moore has suggested that the purpose
of Chapter III has to be considered in conjunction with the objectives of the court system. He concludes that the judicial role may not be undermined by judges acting as mediators because: ‘At the heart of the judicial function is the resolution of disputes or controversies.’\textsuperscript{486} Sourdin has also commented that the issue of the role of the decision maker in mediation has not been viewed with such concern in the context of tribunals.\textsuperscript{487} This is discussed further in Chapter 1.

### 5.5 Suggestions and Safeguards

The concerns raised above regarding judicial mediation and the risk that public confidence in the judiciary will be impaired as a result are clearly important considerations. However, many jurisdictions in Australia, including in Victoria, promote the just, quick and cheap resolution of the real issues in the proceedings.\textsuperscript{488} If courts are perceived by the community to deal with disputes in a way that is efficient in terms of time and cost yet still provide for just outcomes that include the use of ADR and adjudication, public confidence in the courts can still be maintained.\textsuperscript{489}

Spencer suggests that Chief Justice Spigelman has indicated there can be ‘no loss of confidence’ in the judicial institution should courts support judicial mediation, providing that ‘the judicial and non-judicial roles of the court are kept separate and the public are educated in accepting the emerging role of the court in providing a just, cheap and quick resolution of the real issues in the proceedings’.\textsuperscript{490} Similar views have been expressed by others.\textsuperscript{491}

Settlement conferences that involve all parties where private sessions do not take place do not raise the same concerns,\textsuperscript{492} although there may be difficulties where privileged or otherwise confidential information is disclosed on a without-prejudice basis. In this event, and in the case of mediations where private sessions do take place, the statutory requirements of confidentiality should ensure that judicial mediators do not disclose what took place at mediation.\textsuperscript{493} Confidentiality requirements could be reinforced with appropriate court practices and additional education measures. Commentators also note that the same confidentiality concerns are not raised where judges excuse themselves from hearing a case based on apprehended bias.\textsuperscript{494}

The commission is of the view that parties and lawyers are likely to benefit from additional education programs about how judicial mediation operates and the importance of mediation as an integral part of the court’s process of resolving disputes. The commission recognises that it is important to ensure that the adjudication of proceedings and the processes of mediation are independent of each other. The mediator should not adjudicate the case if it goes to trial, unless the parties consent. This is in line with the position in other courts.\textsuperscript{495}

Judicial officers and others involved in mediation are protected by the general immunity from suit contained in legislation\textsuperscript{496} and would presumably be immune from suit in any event.
Chapter 4

Improving Alternative Dispute Resolution

Judicial mediation, like other forms of mediation, may be time-consuming and resource-intensive. However, a reduction in the number of cases required to be tried, the curtailment of interlocutory applications and the more expeditious resolution of disputes may justify the allocation of judicial resources to mediation and other forms of ADR.

Although there are variations in experience, aptitude and skills the commission does not have any reason to consider that judicial officers do not have the requisite ability to successfully conduct mediations or ADR processes generally. If there are doubts about a judge’s mediation skills or style, additional education and training will no doubt assist in the development of mediation skills.

As to the concern that parties do not get to choose their mediator, at least with judicial mediation there are no arguments over the choice of mediator. Alternatively, parties may opt to engage an external mediator of their choice, at their expense.

Although the commission favours the increased use of judicial (and other forms) of mediation and ADR there are important resource issues to be considered. The Supreme Court and Magistrates’ Court indicated in their submissions that they would prefer to undertake more court-conducted mediation but that this was not possible due to a lack of resources. The Supreme Court said:

Restrictions … have targeted the scarce resources of Masters at cases of most need. Many cases that could have benefited from Master Mediation have not received that attention.

In these circumstances, the commission considers that suitable matters for direct involvement of judicial officers in ADR might include those cases where private mediation is unsuitable or unavailable, such as where:

- one of the parties is in financial hardship and/or self-represented
- the parties are unable to agree on a choice of mediator
- there has already been an unsuccessful external mediation
- the case is of public interest or is highly complex and could benefit from a mediator with court authority.

Given the resource issues, the commission agrees with the views expressed in the submissions that persons other than judges should also be involved in the conduct of mediations, as is the case at present. Telstra and the Australian Corporate Lawyers Association suggested in their submission that judicial mediation should not be limited to judges. They felt that thought should be given to ensuring the various court personnel are used in the most effective manner:

[T]here seems to be scope to reengineer the court processes and reallocate work from judges to associates, registrars and masters, which would enable judges to focus their time more effectively on trials and writing judgments.

The Transport Accident Commission, Michael Redfern, the Mental Health Legal Centre, Hollows Lawyers, the Law Institute, State Trustees and Judge Anderson were all supportive of court-conducted mediation where such mediations are conducted by persons other than judges. Court-conducted mediation by such persons is also appropriate because they will not be presiding over any hearing should the mediation or other form of ADR fail. This also allows judges to focus on adjudicating. However, it is a matter for the courts to decide who should conduct court ADR processes.

5.6 CONCLUSIONS AND RECOMMENDATIONS

There is no consensus on whether the judicial role should encompass mediation in Australia. There are strong views for and against judicial mediation. The case for the deployment of judicial officers as mediators arises in part out of increasing support for the use of ADR and out of changing perceptions of the role of courts. Courts are now more proactively involved in seeking to expedite the resolution of disputes using a variety of adjudicatory and non-adjudicatory methods.

One commentator suggests that the appointment of judicial mediators should assist the process of removing matters on the ‘trial trail’ that have the potential to settle. Others suggest that preventing the use of judicial mediation may be counter-productive—it presents a barrier to the adoption of more flexible and facilitative processes in litigation. Despite such divergences of viewpoint, judicial officers are becoming more involved in both facilitating and conducting mediation in courts in Victoria and in other jurisdictions.
The commission supports judicial mediation. There are however, a number of practical, legal and resource issues that need to be addressed. Relevant skills and training are of obvious importance and are discussed further below. Judicial officers should not be involved in both mediation and adjudication in the same matter, unless the parties consent. The demands of adjudication are likely to continue to place constraints on the deployment of judges as mediators. It remains to be seen whether the commission’s proposals on various matters dealt with in this report will, if implemented, have a significant impact on the number court proceedings, on the management and conduct of cases and on the incidence of settlement between the parties without third party involvement. If the proposed reform measures achieve the intended effect of significantly reducing the volume of litigation and increasing the ‘natural’ incidence of settlement in matters that proceed to litigation, then this will reduce the burden on the civil courts. In the absence of either a decrease in the adjudicative demands placed on the courts, or an increase in resources, court-conducted mediation in the higher courts is likely to continue to be conducted by masters, registrars and judicial registrars rather than judges.\textsuperscript{508} The commission agrees with the view of the Australian Institute of Judicial Administration that the statutory obligation of confidentiality binding on a mediator, and the withdrawal of the judge from the trial or appeal if the mediation fails, should enable judges to act as mediators without detriment to the public’s expectations of the judiciary.\textsuperscript{509} Many litigants are likely to support more proactive judicial involvement in ADR.

High-quality mediation training for judges and all court staff involved in mediation or referral to mediation is necessary. Mediation training can usefully complement judicial skills.\textsuperscript{510} As NADRAC notes, most judicial officers would have received their training and experience within an adversarial litigation culture. NADRAC considers that there is value in judicial officers undertaking training and education in non-adversarial approaches.\textsuperscript{511} Michael Redfern suggests that judicial officers should be encouraged to undertake courses in the philosophy and culture of ADR.\textsuperscript{512} With proper education and training, judicial officers can improve their skills in ADR, including mediation. Regular updating of skills and knowledge is also important.

The commission notes that from 1 January 2008 new voluntary National Mediator Accreditation Standards came into existence. This new scheme is an industry based scheme which relies on voluntary compliance by mediator organisations (Recognised Mediator Accreditation Bodies) that agree to accredit mediators in accordance with the standards. Lawyers would also benefit from additional education about ADR, including judicial mediation. Consideration should be given to the monitoring and evaluation of court-conducted mediation. As the Transport Accident Commission pointed out, there is relatively little empirical research about the effectiveness of mediation in the Victorian court system and its success in resolving matters earlier.\textsuperscript{513} Conclusions may be difficult to draw in the absence of well-designed and methodologically sound studies. This may require the randomised allocation of similar cases to ‘ADR’ and ‘non ADR’ tracks dealt with by the same judicial officers. The proposed Civil Justice Council should conduct an ongoing review of ADR processes in the Victorian courts, including court-conducted mediation.

6. THE NEED FOR COMPELLARY REFERRAL TO ADR

‘Most jurisdictions in Australia now have provision for the mandatory referral of parties in legal proceedings to ADR processes’.\textsuperscript{514} At present there are a number of such provisions in Victoria. However, there is still considerable controversy over whether matters should be referred, in the absence of the consent of the parties, to processes such as arbitration and other forms of ADR where the outcome may be binding without a settlement agreement between the parties. Some provisions already facilitate compulsory referral to arbitration.

A number of legal and other constraints may restrict or prevent compulsory referral of litigants to binding arbitration. First, arbitration and other ADR processes that may result in a binding outcome (other than by settlement agreement between the parties) are usually only considered appropriate where the parties consent. However, as has been noted with compulsory referral to mediation in NSW, parties who may be ‘reluctant starters’ often become ‘willing participants’.\textsuperscript{515} Curtailment of the ‘right’ of litigants to a judicial adjudication of legal proceedings may be open to challenge on human rights grounds, including under the Victorian Charter. Such provisions are not applicable to corporations. In addition, there may be impediments derived from Chapter III of the

\textsuperscript{514} Sourdin (2005) above n 6, 113.
\textsuperscript{515} Spencer, Part II (2006) above n 439, 197.
\textsuperscript{509} Ibid 198.
\textsuperscript{511} Sourdin suggests that such views have been overtaken by practice: Sourdin (2005) above n 6, 113.
\textsuperscript{513} This is a view shared by Telstra and the Australian Corporate Lawyers Association. They suggested thought here seems to be scope to reengineer the court processes and reallocate work from judges to associates, registrars and masters, which would enable judges to focus their time more effectively on trials and writing judgements: See Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra).
\textsuperscript{517} See also Michael Redfern’s submission to the Consultation Paper: he suggests that judicial officers should be encouraged to undertake courses in respect of the philosophy and culture of ADR. Submission CP 53.
\textsuperscript{518} Submissions CP 58 (Supreme Court of Victoria), CP 55 (Magistrates’ Court of Victoria).
\textsuperscript{519} The Mental Health Legal Centre suggested that this should be amended to include ‘financial or other hardship’: Submission ED11. 1. The commission does not consider that such an amendment is necessary.
\textsuperscript{520} This is a similar approach to the Supreme Court’s referral practice, as described above.
\textsuperscript{507} Sourdin (2005) above n 431, 261.
\textsuperscript{510} For example, the courts could and already do appoint masters, special masters, registrars, judicial registrars, magistrates, retired judges or acting judges as appropriate, rather than judges.
\textsuperscript{508} Ibid 198.
\textsuperscript{511} Sourdin suggests that such views have been overtaken by practice: Sourdin (2005) above n 6, 113.
\textsuperscript{513} This is a view shared by Telstra and the Australian Corporate Lawyers Association. They suggested thought should be given to ensuring court personnel are used effectively: ‘[T]here seems to be scope to reengineer the court processes and reallocate work from judges to associates, registrars and masters, which would enable judges to focus their time more effectively on trials and writing judgements.’ See Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra).
\textsuperscript{515} Spencer, Part II (2006) above n 439, 197.
\textsuperscript{512} Sourdin (2005) above n 6, 113.
\textsuperscript{515} As suggested by Cannon (2002) above n 431, 261.
Constitution. A further complication is the impact that any such mandatory referral to arbitration would have on litigants’ appeal rights. Each of these matters is considered further below.

The commission believes courts should have express power to compulsorily refer parties to a wide range of ADR options, including processes such as arbitration, which may have a binding outcome. However, in view of possible legal constraints, the preferable course is for the court to (a) retain jurisdiction over any matter referred to any ADR process, including arbitration and (b) retain responsibility for the final adjudication of the matter if it is not resolved in a manner consented to by the parties. This could be done using existing powers for the referral of matters or issues to a special referee (or through the proposed power to appoint special masters, referred to above). In other words, we envisage a ‘hybrid’ model whereby an independent person would be appointed to ‘arbitrate’ (or use other ADR techniques) in their capacity as referee (or special master). If a consensual settlement does not eventuate then the referee (or special master) would make findings of fact and conclusions of law, on such matters as are within the terms of the reference from the court, and provide detailed reasons. These would be incorporated in a report to the court. The court, after providing the parties with an opportunity to be heard, would then determine the matter and deliver a judgment. Existing appeal rights would apply to the judgment.

This approach would presumably overcome any legal constraints that may otherwise prevent compulsory referral to ‘binding’ ADR processes and incorporate safeguards for the reluctant litigants. Any final decision would be made by the court after the parties have had an opportunity to be heard before judgment is entered.

Traditionally, referees and arbitrators have had very distinct roles.\(^516\) However, there have been cases where an arbitrator previously agreed between the parties was subsequently appointed by the court as a referee.\(^517\)

### 6.1 SUPPORT FOR COMPELLARY REFERRAL TO MEDIATION

Mediation is defined by NADRAC as:

> a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role concerning the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.\(^518\)

It is already possible for courts to refer parties to mediation, even without their consent. However, as noted above, there are divided views over the desirability of making such compulsory referrals.

There is considerable support for judicial referral of parties to mediation without consent. In *Remuneration Planning Corporation Pty Limited v Fitton (2001)*, Justice Hamilton of the NSW Supreme Court noted that mediations ordered over the objection of the parties might often be successful:

> Since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.\(^519\)

More recently, Justice Spigelman, Chief Justice of NSW, commented:

> One matter that appears somewhat counter intuitive is the conferral upon courts of a power to order mediation. This was once thought to be pointless because it appeared unlikely that a party who was ordered to mediate would be prepared to enter such negotiations in a co-operative manner. That has proven to be false. Reluctant starters have often proved to be willing participants in the negotiation process. It appears that many litigants have either not understood, or not been advised by their lawyers about, the weakness in their case, or have adopted a negotiating posture from the outset that they could not possibly lose. A formal order of the court requiring mediation has overcome
such inhibitions and has proven particularly successful in a number of spheres of jurisdiction.520 NADRAC’s view is that:

[The potential benefits, both in providing parties with a further opportunity to resolve their dispute and in ensuring publicly funded and scarce judicial resources are used only in determining intractable disputes, justify the continued use of court-ordered ADR.521

In Going to Court, the authors stated that they did ‘not see a great problem with compulsory systems’, nor did most of the people to whom they spoke to about it. In their view, compulsory systems bring worthwhile practical benefits.522 There was considerable support for compulsory referral to mediation in the submissions. The Victorian Bar and David Forster expressed support for compulsory referral in response to the Consultation Paper.523 Michael Redfern thought there should be very early compulsory mediation procedures.524 The Magistrates’ Court and the Dispute Settlement Centre of Victoria felt that compulsory court-ordered mediation provided a forum for settlement and a range of possible solutions.525 One submission in response to the Consultation Paper contended that compulsory dispute resolution processes with sanctions ‘are the only route to take’.526

6.1.1 Position in Victoria

In Victoria, all three courts have the power to order a proceeding or any part of a proceeding to mediation,527 even without party consent.528 The Supreme Court is also empowered to refer proceedings to mediation by a master, with or without the parties’ consent.529 In practice, all three courts encourage parties to agree to mediation. Where the claim is for more than $30 000, the Magistrates’ Court will encourage mediation (rather than a pre-hearing conference).530 Any of the courts may order a further mediation if appropriate. As noted at the beginning of this chapter, the commission’s proposals in relation to pre-action protocols are intended to facilitate the resolution of many disputes, including through ADR, without the necessity to commence legal proceedings.531 In addition, the proposed overriding obligations would impose on all key participants in civil litigation, from its inception, an obligation to use reasonable endeavours to resolve the dispute by agreement, including, in appropriate cases, using ADR processes.532

6.1.2 Other models

Australia

Mediation

Many Australian courts and tribunals have powers to refer matters to mediation with or without the consent of parties. This includes the Federal Court,533 the Federal Magistrates Court,534 the New South Wales state courts,535 the South...
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Australian state courts, the Tasmanian Supreme Court, the Australian Capital Territory state courts, VCAT, the Consumer, Trader and Tenancy Tribunal and the AAT.

Neutral evaluation

Some Australian courts and tribunals also have powers to refer matters to neutral evaluation with or without the consent of parties. This includes the Federal Magistrates Court, and the Consumer, Trader and Tenancy Tribunal.

Other forms of non-binding ADR

Some Australian courts and tribunals have the power to refer matters to other forms of non-binding ADR, without party consent. For example, in the Queensland District and Supreme Courts, the courts may refer parties to case appraisal, the Western Australian District Court can require parties to attend a pre-trial conference, and the AAT president is empowered to refer matters to conferencing, case appraisal and conciliation and procedures or services specified in the regulations.

Pre-action ADR

Participation in mediation or another form of non-binding ADR may also be a prerequisite for commencing proceedings. For example, in disputes about retail leases, proceedings cannot be commenced until mediation has been attempted under legislation in Victoria and NSW. Pre-action obligations are discussed in detail in Chapter 2.

United States

In the United States, compulsory ADR has been introduced in some jurisdictions. The Alternative Dispute Resolution Act 1998 authorises the use of ADR in US federal courts and imposes a number of requirements. The Act authorises mandatory ADR. District courts are explicitly given authority to require parties to ‘consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration…’ A district court that elects to require the use of ADR in certain cases may only do so with respect to mediation, early neutral evaluation and if the parties consent mediation.

Canada

Since January 1999, as part of the courts’ case management program, mandatory mediation has become a permanent feature of the rules of court in Ontario. Rule 24.1 essentially requires that:

- Within 30 days of the filing of a statement of defence, the parties to litigation must choose a mediator.
- The choice of mediator may be from the court-approved list of mediators (the ‘roster’), or as agreed between the parties.
- If the parties fail to notify the court’s mediation coordinator of their mediator within the required time, a mediator from the roster will be assigned by the coordinator.

One study in Ontario of a two-year mandatory mediation pilot analysed more than 3000 cases and found there were positive impacts on the speed, costs and outcomes of litigation when ADR processes were used.

Norway

In Norway, conciliation boards have been established to facilitate resolution of disputes without the necessity for litigation. Each municipality in Norway is required by law to have a conciliation board. Mediation before the conciliation board is mandatory for all civil claims, before proceedings can be commenced. If the mediation does not result in an agreement, the conciliation boards have jurisdiction to make a ruling that resolves the dispute in favour of one of the parties. The conciliation boards must apply the relevant law if they want to resolve the dispute by making a ruling. Such rulings have the same effect as a decision made by a regular court, and can be appealed to the municipal courts. The conciliation boards play a significant role in the Norwegian legal system—226 575 civil cases were addressed to the conciliation boards in Norway in 2002. The annual number of cases dealt with by Conciliation Boards appears to have remained relatively constant. In 2004 218 157 disputes were dealt with by such boards.

The compulsory nature of proceedings before the conciliation board has given rise to concerns that this may not be compatible with Article 6 of the European Charter of Human Rights.
Notwithstanding this concern, the Ministry of Justice has adhered to the obligatory procedure because of the possibility of bringing the claim before a court later and because the conciliation procedures are cheaper and simpler than court proceedings and ‘more decentralised than the court system’.

**United Kingdom**

The position in England and Wales is that courts should encourage, but not compel, parties to participate in dispute resolution. In the Court of Appeal case *Halsey v Milton Keynes General NHS Trust and Steel* 563 (‘*Halsey*’) the court considered human rights constraints on the power to order parties to submit their disputes to mediation against their will:

> It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court ... it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 [of the Human Rights Act 1998]. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.

The court in *Halsey* also took the view that nothing would be achieved by compulsorily referring parties to mediation except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process.564

Some commentators view the decision in *Halsey* as representing a radical departure from the direction in which recent court judgments about ADR had been moving.565

The UK Ministry of Justice in a May 2007 report asserted that it was arguable whether, in fact, a direction to attempt mediation prior to a hearing would infringe Article 6:

> Referral to mediation is a procedural step along the way to a court hearing if the case does not settle at mediation. It does not exclude access to the courts and to require parties to attend a three-hour low-cost mediation session does not order them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point and to continue with the litigation.566

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536 *Magistrates Court Act 1991* (SA) s 271; *District Court Act 1991* (SA) s 321; *Supreme Court Act 1935* (SA) s 65.

537 *Supreme Court Rules 2000* (Tas) r 518.

538 *Court Procedures Rules 2006* (ACT) r 1179—there is no mention of whether the parties’ consent is required.

539 *Victorian Civil and Administrative Tribunal Act 1998* s 88.

540 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 59(1)—there is no mention of the need for the parties to consent to the referral.

541 *Administrative Appeals Tribunal Act 1975* (Cth) ss 34A, 3—there is no mention of a need for parties to consent to the referral.


543 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 59(1)—there is no mention of the need for parties to consent to the referral.

544 *District Court of Queensland Act 1967* (Qld) ss 97–98, *Supreme Court of Queensland Act 1991* ss 102–103—there is no specific reference to party consent.

545 *District Court Rules 2005* (WA) rr 39–40.

546 *Administrative Appeals Tribunal Act 1975* (Cth) ss 34A, 3—there is no mention of the need for parties to consent to the referral.

547 *Retail Leases Act 2003* Pt 10 (Dispute Resolution) and s 87(1).

548 *Retail Leases Act 1994* (NSW) Pt 8, Div 2 (Mediation) and s 6B(1).

549 § 65(1)(b).

550 § 652(a).


555 Ibid.

556 Ibid.


558 Ibid.

559 Ibid.

560 *Statistics Norway, Disputes Dealt with by the Conciliation Boards, by Decision and County 2002*, <http://www.tsb.no/english/subjects/03/05/forlik_en> at 19 March 2008.


562 Ibid.


566 Ibid 15 (original emphasis).
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The Woolf Report considered that ADR should be encouraged but that compulsory ADR should not be recommended either as an alternative to litigation in the courts or as a preliminary step to litigation.567

6.1.3 Concerns about compulsory referral to mediation

The voluntariness of ADR

Even though it is already possible to refer parties to mediation and other forms of ADR, without the parties’ consent, submissions to the commission raised various concerns about compulsory referral. One of the primary arguments is that the hallmark of ADR procedures and the key to their effectiveness is that they are voluntarily entered into by the parties in dispute without binding outcomes except where the parties have reached agreement. Consequently, some contend the court should not direct that such methods be used.568 One rationale is that ‘settlement at an ADR process is more likely to occur if the parties are naturally ready to settle, rather than obliged to participate’.569

Similar concerns were raised in some submissions. Telstra, the Australian Corporate Lawyers Association, Victoria Legal Aid and the Insurance Council of Australia all argued that ADR should only be ordered when the parties participate voluntarily.570 The Springvale Monash Legal Service’s response to the Consultation Paper expressed general concern about compulsory referral to ADR.571 State Trustees suggested that rather than compulsorily referring parties to ADR, there should be incentives for voluntarily engaging in ADR ‘to reduce the cost and formalities involved’.572 The Law Institute contended that pre-issue ADR processes should be voluntary and not a compulsory precondition to issuing proceedings in court.573

The inappropriateness of referral

PILCH contended that ADR would not be appropriate in public interest cases that require a formal publicly binding determination.574 Other commentators have a similar view.575 The Federation of Community Legal Centres argued that ADR should not be used compulsorily where there is a power imbalance between parties.576 Some commentators have also suggested that compulsory referral to ADR is not appropriate if there is a risk of violence to one of the parties or if previous settlement attempts have failed and the matter is unlikely to settle. If a party is compulsorily referred to ADR but does not participate in good faith, this will render the process unsuccessful and increase costs and delay.577 An anonymous submission in response to the Consultation Paper was not supportive of compulsion and contended that mediation should only occur where both parties agree to act in good faith.578

The Charter

Another main concern is the contention that mandatory mediation deprives litigants of their right to a trial, or delays their exercise of that right. Chapter 1 discusses the right to a fair hearing. Section 24 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter) provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. Section 24(3) provides that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits’. In addition, a court (or tribunal) is a ‘public authority’ subject to the Charter when ‘it is acting in an administrative capacity’. A court (or tribunal) is said to be acting in an administrative capacity when, for example, listing cases or adopting practices and procedures.579 The Charter also applies to courts (and tribunals) to the extent that they have functions under Part 2 and Division 3 of Part 3 of the Act.580 The charter also provides that ‘[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’.582

To exercise the right to a fair hearing requires access to the courts. Equal access to the courts is not attainable if people are excluded from the court process.583 The fact that litigants who are referred to mediation retain the right to a judicial adjudication of their dispute if they are unable to resolve it by agreement tends to negate the contention that non-binding ADR options such as mediation are incompatible with human rights guarantees and other legal or constitutional principles protecting rights of access to the courts. As noted above, different considerations may arise where litigants are compulsorily referred to ADR processes, such as arbitration, that have a binding outcome.
Whether the same approach as the English Court of Appeal took in Halsey will be taken in Victoria in light of the right to a fair hearing under the Charter remains to be seen. Astor and Chinkin argue that:

On the face of it, parties are not denied trial as they may choose to settle in mediation. However for some litigants mandatory mediation may effectively deprive them of trial if they do not have the financial or emotional resources to pursue their dispute through both processes. 584

6.1.4 Research on compulsory mediation

Research on the effectiveness of compulsory mediation has produced mixed results. 585 NADRAC has commented that

Some research suggests that court-annexed ADR does not lead to overall savings for courts and tribunals, and ancillary costs such as ADR practitioners’ fees, extensive preparation resulting in increased lawyers’ fees, and unanticipated effects of ADR can all increase the net costs involved. 586

However, research conducted in Canada found that mandatory mediation had led to significant reductions in the time taken to dispose of cases; decreased costs to the litigants; and high proportions of cases being completely settled earlier in the litigation process. Moreover, litigants and lawyers were very satisfied with the mandatory mediation process. 587 There are mixed findings on whether mandatory mediation has improved settlement rates in the United States. 588 Evidence from two pilot schemes, both in the Central London County Court, one voluntary 589 and one quasi-compulsory 590 showed that facilitation and encouragement, together with selective and appropriate pressure, were likely to be more effective and possibly more efficient than blanket coercion to mediate. 591

There is also empirical research in Australia showing that those referred compulsorily to ADR do not generally express objections after the fact, nor do they opt out if given the choice. 592

Despite the mixed results, NADRAC maintains that the empirical research does not support the conclusion that voluntary participation is essential: ‘Parties who have been compelled to participate in ADR may still achieve outcomes they regard as satisfactory through a process they find fair.’ 593 NADRAC also contends that there is little evidence that those who are compulsorily referred to ADR opt out of the process if given a choice. 594

6.1.5 Conclusion

Many Australian courts have powers to refer matters to mediation with or without the consent of parties. Courts will often refer a dispute to mediation even over the strong objection of one (or more) parties. 595 Some issues were identified concerning the Charter; however, we are of the view that a compulsory referral to mediation does not exclude access to the courts, as long as the mediation does not cause any undue delay or expense.
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If the commission’s other recommendation to introduce further ADR processes is adopted, we believe that the courts should be empowered to compulsorily refer parties to non-binding ADR including:

- early neutral evaluation
- case appraisal
- conciliation and
- conferencing

6.2 The Need for Compulsory Referral to Arbitration

Compulsory referral to mediation is already an option in Victorian courts and has considerable support. Moreover, in the aftermath of the recent C7 case,596 there have been further suggestions that courts should have increased powers, or should make more use of existing powers, to require large companies involved in ‘mega’ commercial litigation with other large companies to resolve their disputes outside publicly funded courts through private binding arbitration597 or mediation.598 Judges of the Supreme Court have indicated support for an express power to order parties to arbitration, with or without their consent.599 The Victorian Bar shares this view.600 The Magistrates’ Court and the Dispute Settlement Centre of Victoria supported compulsory arbitration, when exercised by a magistrate with expertise in the area and if there continued to be no merits appeal.601 However, compulsory referral is controversial in relation to arbitration and other forms of ADR that have a binding outcome. The problems identified with mandatory arbitration are discussed in detail later in this chapter.

6.2.1 Position in Victoria

The Supreme Court does not have the express power in the rules to compulsorily refer parties to arbitration, but the County Court does. The County Court rule is derived from statute. The Magistrates’ Court has a compulsory arbitration scheme for civil debt claims of less than $10 000.

6.2.2 Other Models

There are many statutes around Australia that provide for the resolution of disputes by arbitration.602 The consent of the parties is usually required before a matter may be referred to arbitration. The concept of compulsory arbitration is, however, one which has gained some acceptance both within Australia and internationally.603

NSW Workers Compensation Scheme

The NSW Workers Compensation Commission makes arbitration a mandatory step for all matters except disputes simply about the existence or severity of an injury, which are referred to a medical expert for a report. The first stage after filing is a teleconference conducted by an arbitrator, who aims to assist the parties to resolve the dispute. If at the end of the teleconference there are still issues outstanding, the arbitrator decides whether the matter will be determined by an arbitrator on the papers or proceed to a full conciliation/arbitration hearing and/or whether it is to be referred to an Approved Medical Specialist for an assessment in relation to the worker’s condition or fitness for employment.604

If a matter proceeds to conciliation/arbitration, the arbitrator will conduct a combined conciliation and arbitration hearing. The arbitrator first attempts conciliation and, if that fails to settle all outstanding issues, proceeds to arbitrate the matter.605 The arbitration occurs with an inquisitorial procedure and relaxed rules of evidence. If the arbitrator decides there is a need for oral evidence, the arbitrator may question the parties or witnesses, take evidence on oath or affirmation, and permit parties or their representatives to question witnesses. Questioning and cross-examination of witnesses will be permitted in very limited circumstances. Before making a final determination, the arbitrator may receive oral or written submissions.606

If a ‘novel or complex’ legal question arises, the arbitrator may refer a question of law to a presidential member of the compensation commission at the request of a party or at the election of the arbitrator. The arbitrator will then make a decision, which may be either delivered orally (ex tempore) or reserved for written decision, usually within 14 days. Reasons for the decision must include findings on the material questions of fact, reference to the evidence or other material on which those findings are based, the arbitrator’s understanding of the applicable law, and the reasoning process that led the arbitrator to the conclusions reached.607
Appeals against arbitral decisions may be lodged within 28 days of the award, with leave.608 No application for leave to appeal will be accepted where the amount in issue is less than $5000 or 20% of the value of the award.609 Once an application for leave to appeal has been submitted, the other parties to the appeal may respond with a notice of opposition to appeal against decision of arbitrator.610 Once leave to appeal is granted, the presidential member can determine the appeal without holding any conference or formal hearing, on the papers.611 Appeals from the decision of a presidential member of the compensation commission may be made to the Court of Appeal, on matters of law only.612

Philadelphia

Philadelphia has a system of compulsory arbitration for civil claims, other than real estate or equitable actions, which are less than $50 000 (USD).613 A panel of three court-certified arbitrators who are legal practitioners hears the case. Once an award is made, if neither party has appealed the award after 30 days, judgment on the award is entered and enforced in the same manner as any other court judgment.614 Any appeal is by way of a hearing de novo.

6.2.3 Problems with compulsory referral to arbitration

Conferral or exercise of a power to refer litigants to arbitration or other binding forms of ADR, without the parties’ consent, may be open to objection or legal challenge on a number of grounds. The use of compulsion and/or the denial of the right to a judicial adjudication of the dispute may be open to objection on grounds derived from the Charter and/or Chapter III of the Constitution.

Lack of voluntariness

One of the hallmarks of arbitration and the key to its effectiveness is that, generally, it is voluntarily entered into by agreement between the parties. Arbitration is normally based on an agreement between the parties to refer a dispute to an arbitrator. Such agreement may be entered into at the time a dispute arises or may be part of a pre-existing contract. It will usually include an agreement to be bound by the outcome of the arbitration process.615 The form and manner of the arbitration may be regulated by legislation.616

Compulsory arbitration arises independently of the agreement of the disputing parties. Courts may have a discretionary power to order arbitration in particular cases. Compulsory arbitration sits uncomfortably with traditional conceptions of arbitration based on the parties consenting to the process.617 In consultations, some Supreme Court judges suggested that there is a problem with compulsory referral to arbitration under the Commercial Arbitration Act 1984 because it ‘is built on consensus’.

Access to justice and the Charter

As with compulsory mediation, compulsory referral to binding ADR may be incompatible with the right to a fair hearing incorporated in section 24 of the Charter.618

596 Seven Network Ltd v News Ltd [2007] FCA 1062 (The ‘C7’ case).

597 As reported by Chris Merrit, the then Federal Attorney-General, Philip Ruddock, the Labor Party, peak legal bodies, the Australian Lawyers Alliance and Albert Monchino of IAMA were all purportedly in fervent agreement that judges should be given greater powers: Merrit, ‘Black comedy of Seven saga cues calls for private battles to quit public courts’, The Australian Financial Review (Sydney), 3 August 2007, 29.

598 The National President of the Institute of Arbitrators and Mediators, Laurie James, was quoted in The Australian as suggesting that commercial disputes could be sent to non-binding mediation, and if that were unsuccessful, then be sent to binding private arbitration or ‘referees’: ‘[S]uch moves would save taxpayers millions of dollars’: See Merrit (2007) above n 597, and Chris Merrit and Susannah Moran, ‘Ruddock backs calls to force firms to mediate’, The Australian, 28 July 2007.

599 Consultation with the Supreme Court of Victoria (9 October 2007); Submission CP 58 (Supreme Court of Victoria).

600 Submission CP 33 (Victorian Bar).

601 Submission ED1 30 (Magistrates’ Court and Dispute Settlement Centre of Victoria). They also recommended that as an alternative to compulsory arbitration, the court could make more use of sesional retired magistrates, with expertise in an area for certain cases.

602 Supreme Court Act (NSW) 1970 s 76B; Civil Procedure Act 2005 (NSW) s 38; Uniform Civil Procedure Rules 2005 (NSW) r 20.8; Uniform Civil Procedure Rules 1999 (Qld) r 334, Supreme Court Act 1935 (SA) s 66, Supreme Court Civil Procedure Act 1932 (Tas) s 37A, Local Court Act 1989 (NT) s 16(1)(e).

603 See below where mandatory systems and the Philadelphia system are discussed.


605 Ibid 8–10.

606 Ibid 11.

607 Ibid 12.

608 Workers Compensation Commission Rules 2006 (NSW) r 16.2(1).

609 Workplace Injury Management and Workers Compensation Act 1998 (NSW) s 352(2).

610 Workers Compensation Commission, Practice Direction no. 6 Appeal against a decision of the commission constituted by an arbitrator 1 November 2006 (2006), p 5.

611 Ibid 6–8.

612 Ibid.

613 Philadelphia Court of County Pleas (n.d.) above n 148, 1.

614 Ibid 5.

615 Family Law Council (2007) above n 112, 16.


617 Family Law Council (2007) above n 112, 16.

However, compulsory power to refer to arbitration is more problematic than referral to mediation or other forms of ADR which will only result in a binding outcome if the parties reach agreement.

Under the County and Supreme Court Rules, parties may be referred to arbitration conducted in accordance with the Commercial Arbitration Act 1984. Under the Commercial Arbitration Act, the arbitrator makes an award that determines the dispute. The arbitrator’s award is, subject to the Act, final and binding and may, with leave of the court, be enforced as a court judgment. An appeal from an arbitrator’s award may be brought by consent or with the leave of the court but only on a question of law.619 Appeal rights are therefore restricted. A dispute referred to arbitration under the Commercial Arbitration Act is therefore not determined by a competent, independent and impartial court, as required under section 24 of the Charter. Thus, referral to arbitration other than with the consent of the parties may be open to challenge.

However, the Charter itself provides that ‘human rights’ may be subject to such reasonable limits as can be demonstrably justified taking into account all relevant factors, including the nature of the right and the importance of the purpose of the limitation.620 The Charter also makes provision for an override declaration to be made by Parliament.621 Compulsory referral of corporations, as opposed to individuals, to binding forms of arbitration may not be incompatible with the Charter unless individual litigants are also joined as parties to the proceedings. Corporations do not have human rights.622 However, the commission is mindful that there may still be legal and policy objections if the power to compulsorily refer cases to arbitration or other binding forms of ADR is confined to matters involving corporate litigants. This may give rise to arguments that corporations are being treated ‘differently’ to individuals. Leaving aside the legal merits of any such objection, there are clearly policy arguments against limiting certain powers to cases involving only corporations. Moreover, it would be relatively easy to avoid the application of any such power by the joinder of individuals to the proceeding.

Legal or constitutional constraints
There may be legal or constitutional constraints (other than the problem under the Charter identified above) on the conferment of power on, or the exercise of power by, state courts to effectively decline to adjudicate disputes by compulsorily referring them to arbitration or other forms of ADR which may have a binding outcome other than with the consent of the parties. One constraint may arise out of Chapter III of the Constitution. Insofar as any legislation seeks to confer functions on a court which exercises federal jurisdiction, such legislation may be invalid if the functions are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power.623 This issue is discussed in detail in Chapter 1.

6.3 SUBMISSIONS
There were divided opinions in the submissions and consultations concerning compulsory referral to arbitration. Some of the Supreme Court judges were concerned about compulsory referral to arbitration under the Commercial Arbitration Act. Other judges were concerned that, even if appeal rights were preserved for questions of law, this would still diminish present appeal rights.624 Law firm Clayton Utz contended that compulsory referral to ADR is appropriate as long as there is no denial of justice, the Charter is not offended and the parties ultimately retain the right to have the court determine their dispute.625

6.4 CONCLUSIONS AND RECOMMENDATIONS
6.4.1 Compulsory referral to special referees—a hybrid approach
The commission is of the view that it is desirable for courts to have the express power to compulsorily refer parties to binding ADR, such as arbitration. Although such an express statutory power may be compatible with the provisions of the Victorian Charter, and valid on constitutional grounds, the commission has concluded that a ‘hybrid’ model is preferable. Under this model, the court would retain jurisdiction over the dispute and remain responsible for the final adjudication. The power to refer some or all aspects of the dispute to a referee could be used in a more flexible manner than has been the case in the past. Thus a person who might otherwise be appointed as an arbitrator could be appointed as a special referee (or special master if the commission’s proposals in respect of special masters are implemented). The special referee would make a provisional determination, in the form of
The court found that relevant considerations include:

Each opposed application for the appointment of an arbitrator or referee is considered on its merits.

Justice Byrne described the court's position on referral to special referees:

In Abigroup, prompt determination of the proceeding'.

exercised where the court is of the view that this is likely to facilitate 'the effective, complete and

referees, this would remain a matter of judicial discretion. No doubt, such power would only be

Although the commission believes there is scope for greater use of the power to appoint special

referees, this would remain a matter of judicial discretion. No doubt, such power would only be

exercised where the court is of the view that this is likely to facilitate the effective, complete, prompt and economical determination of a proceeding. See also Ch r 1.14(1)(a).

In Abigroup, Justice Byrne described the court’s position on referral to special referees:

[An] an order for reference out will not be made over the opposition of a party unless the case for this is demonstrated by the applicant. The applicant must show that the question or questions to be referred are appropriate to be enquired into before the other questions in issue in the proceeding. It must, further, demonstrate that the proceeding is of such an exceptional nature that the genuine wishes of the respondent for a judicial determination should be disregarded. This is not the case for me to attempt to enlarge upon this requirement and I will not do so. It is sufficient that I emphasise that the applicant will not succeed unless it is able to demonstrate at least that the procedure which it would have the court adopt rather than a conventional trial is more likely to achieve the objectives of the Building Cases List, namely, the effective, complete, prompt and economical determination of the proceeding.

Although the commission believes there is scope for greater use of the power to appoint special referees, this would remain a matter of judicial discretion. No doubt, such power would only be exercised where the court is of the view that this is likely to facilitate ‘the effective, complete and prompt determination of the proceeding’.

6.4.2 Other models

New South Wales

The Supreme Court in its submission noted the New South Wales approach to the use of referees. Justice Smart of the NSW Supreme Court held in Park Rail Developments that the court has no predisposition to making or refusing an order for a reference depending on the wishes of one party.

Each opposed application for the appointment of an arbitrator or referee is considered on its merits. The court found that relevant considerations include:

(a) the suitability of the issues for determination by a referee and the availability of a suitable referee;
(b) the delay before the court can hear and determine the matter and how quickly a suitable referee can do so.;
(c) the prejudice the parties will suffer by any delay;
(d) whether the reference will occasion additional costs of significance or is likely to save costs; and
(e) the terms of any reference including the issues and whether they should be referred for determination or inquiry or report.

6.22 Section 6(1) and the note to this section provide that only persons have human rights and corporations do not have human rights. Under s 3 of the Charter, ‘persons’ are defined as ‘human beings’. ‘Human rights’ are defined under s 3(1) as meaning the civil and political rights set out in Part 2 of the Charter.
6.24 Consultation with the Supreme Court of Victoria (9 October 2007).
6.25 Submission ED1 18 (Clayton Utz).
6.26 Neil Williams, Civil Procedure—Victoria, vol 1 (at January 2008) (LexisNexis Butterworths) s 50.01.05.
6.27 Abigroup Contractors Pty Ltd v BPB Pty Ltd [2000] VSC 261 [15].
In Park Rail Developments, Justice Smart was satisfied that the issues were suitable for determination by a referee and that there were suitable referees to hear and determine the matter. He also noted that the delay in the court being able to hear the matter was too long and that the plaintiffs would suffer serious financial prejudice by such a delay. Although the extra expense was likely to be significant overall, it would be offset ‘[b]y the matter being resolved promptly rather than in two years time. Witnesses’ memories and their availability are likely to be better now than after the lapse of another two years’. Justice Smart also commented on the increasing complexity of construction cases and the length of hearings:

With the heavy loads on the court lists it has often not been possible, despite the best will of the courts in organising lists and trying to streamline the hearing and the profession in preparing matters, to provide for the early hearing desired, especially when the increasing complexity of construction cases often results in a two to four weeks hearing and sometimes longer.

Justice Andrew Rogers (as he then was) has also drawn attention to the issue of the public and private costs incurred in the conduct of trials:

It is all very well for a judge, or the lawyers concerned, to accept with equanimity the additional length of time the trial will take before a judge but what about the State and therefore the taxpayers who have to provide the courts and support facilities and the parties who have to pay for the lawyers and the experts whilst the judge is taught the technical information?

The Supreme Court in its submission also referred to Najjar v Haines, a decision of the NSW Court of Appeal. Justice Kirby made the following comments in that case:

What the Supreme Court Rules, Pt 72, does is set in place a procedure whereby the Court is able to delegate to a referee, with or without the consent of the parties, a number of its functions in a given case. This power is an important one for many reasons. For example, it facilitates the determination of complex scientific issues by persons with appropriate scientific knowledge who should, therefore, be able to provide answers to the problems thrown up more quickly and conveniently than judges. In addition, in times when there are enormous demands upon the courts in the State, it provides a means whereby delay problems may be alleviated.

The Federal Court

The Federal Court is proposing amendments to the Federal Court Act 1976 to empower the court to refer all or part of a proceeding to a referee for report to the court.

The Family Court

In a recent discussion paper, the Family Law Council (FLC) contended that:

simply to offer consensual arbitration, as is currently the case under the Family Law Act 1975, has not been sufficient to establish it as a viable option … compulsory arbitration, ordered by the court in appropriate cases, supported by a clear structure and by measures designed to give the profession, the courts and the litigants confidence in the system, is a necessary first step to creating a climate in which voluntary arbitration can develop.

The FLC identified a number of constitutional issues surrounding compulsory arbitration in the family law context. Taking into account such constitutional issues, the FLC considered four possible models for a court-ordered arbitration scheme:

- model 1: arbitration as early neutral evaluation
- model 2: registration of award without judicial review
- model 3: due process award
- model 4: just and equitable award

All of the models provide for a rehearing de novo by the court.

6.4.3 Why compulsory referral to special referees is desirable

In appropriate circumstances, referral of matters to special referees may reduce costs, accelerate resolution of the matter and facilitate the involvement of persons with expertise relevant to the subject matter of the dispute.
Historically, matters of a technical nature have been occasionally referred out to special referees. The commission is of the view that references to referees under Order 50 could be used more extensively, and that the power should be used to compulsorily refer out complex cases, including, for example, commercial or building matters.

The advantage of this approach is that the referee is subject to the supervision of the court, which retains control over the inquiry. Given that a referee simply reports to the court, the report is neither final nor binding. On adoption, the report may be the basis of a court judgment. However, it is the judge who ultimately decides the controversy, not the special referee.

General appeal rights are reserved and parties’ right of access to the courts under the Charter is not impeded.

There are no procedural fairness issues as procedural fairness is required in a referee’s inquiry. If there is a concern about the need for a public hearing under the Charter, provisions that allow for a case before a referee to be heard in public—as found in the California Rules of Civil Procedure—could be used as a model.636

The commission believes the legal, constitutional and human rights obstacles that may arise if litigants are compulsorily referred to binding arbitration do not arise, or are much less likely to arise, with Order 50 special referees.

Some courts, including in Victoria, appear to be moving towards recognition of the need for and utility of special referees. According to a recent practice note in the County Court, practitioners are expected to ‘consider the appropriateness of the appointment of a special referee pursuant to rules 34A.22 and 50.01 to 50.06, and be prepared to discuss this at directions hearings. A special referee can be appointed without the consent of the parties.637 Similarly, in its ‘new approach’ to building cases, the Supreme Court’s practice note stipulates that at a directions hearing, the parties must explain to the court what interlocutory steps are to be taken, including ‘whether there are any questions which might be referred to a special referee or arbitration pursuant to Order 50’.638

Justice Spigelman, Chief Justice of NSW, made the following comments at a forum in July 2007 regarding arbitration and referees:

One well-established technique of particular significance in building and construction disputes, but also used in general commercial cases, has been a formal mechanism for reference of all or part of a proceeding to independent referees. These referees are sometimes experts, eg engineers who are asked to determine a particular technical matter for purposes of proceedings. Increasingly, however, the referees are retired judges to whom the whole of a matter, including legal issues, is referred.

Such a reference is conducted under the general supervision of the Court and culminates in a report by the referee to the Court, which the Court must adopt before it is effective. The principles applied are that such reports will be adopted save for very good reasons. This mechanism is of particular significance in cases where technical expertise is required.639

Justice McClelland of the NSW Supreme Court made the following comments at a conference in October 2007:

The latter part of the 20th century has seen a questioning of the assumptions we have made about the advantages of the adversarial system. In some significant areas, that questioning has resulted in fundamental change with the adversarial approach being abandoned. Both when injuries are sustained as a result of a motor vehicle accident and where a person is injured at work, the NSW government has legislated to define the entitlement to damages. Where there is a dispute the conventional courts have been either partly or wholly abandoned. In many cases the decision-maker will not be a lawyer. The use of persons with expertise related to the injured person’s problem is more likely.

In other areas it is no longer the case that ‘justice’ is administered only by judges. It is commonly provided or facilitated by commissioners, referees, tribunal members, arbitrators, mediators or experts whom the parties choose to resolve their problems. The creation of these alternate resolution processes are a response to the cost, formality and perceived unsuitability of the conventional system. They have often been created out of


631 Najar v Haines and Ors (1991) 25 NSWLR 224, 246.


634 Ibid.

635 As the discussion paper notes, if judicial power in federal matters is delegated to arbitrators, the decision of the High Court in Harris v Caladine (1991) 172 CLR 84 must be observed: ibid.

636 See discussion above.

637 County Court of Victoria, Practice Note 2008—County Court Building Cases Division, 10 December 2007, 3.


639 Justice Spigelman also identified that the referee procedure is of particular use where only some parties, or only some issues, in a wider dispute are subject to an arbitration clause: ‘A person can be nominated as both an arbitrator and as a referee and, therefore, resolve the whole of the dispute. Many of the referees are in fact retired commercial judges who also act as commercial arbitrators’: ‘Commercial Litigation and Arbitration: New Challenges’ (Paper presented to the First Indo Australian Legal Forum, New Delhi, 9 October 2007).
a recognition that it is preferable to have the dispute resolved by a person with expertise relevant to that dispute rather than by a court which lacks that expertise. An expert in the field comes to the dispute with the learning and experience lacked by a judge. Although the application of the rules may still be supervised by judges, primary decision-making is commonly given to a person who may not be a judge but who, the community accepts, is best suited to carry out the task.

The proposition that every person is entitled to have his or her civil dispute tried and determined in a court of law, at public expense (and at considerable private cost to the other parties to the dispute), may no longer be tenable, if it ever was. As noted by Sir Peter Middleton in his report to the Lord Chancellor in the UK prior to the implementation of the Woolf reforms:

*I do not accept the argument that limitations on the procedures that parties can currently adopt would reduce the quality of justice. Justice does not depend solely on an exhaustive decision-making process. Timeliness and affordability are equally aspects of justice. It is no justice, if a decision can only be reached after excessive delay or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less cost is likely to result in a net improvement in a world where resources are limited.*

Justice Byrne in *Abigroup* summarised the matters that give rise to judicial reluctance to order a reference to a referee against the parties’ wishes:

*They are the duty to the court to provide a judicial forum for the determination of issues for litigants who seek this; considerations which depend upon the terms of the rule under which the order for reference is made; and those of a practical nature including the relative cost, expedition and efficiency of the special referee procedure.*

As Justice Byrne noted, the reference of a question to a special referee involves no abrogation of the responsibility of the court itself to determine cases brought before it; the reference is merely one of the tools available to the judge in the discharge of that function. He also observed:

*While it may be true that this is the usual outcome of the filing of a writ and that the plaintiff may desire such a determination, the decision to do so is not always a statement of preference for a judicial forum. Absent cooperation from a defendant, a plaintiff usually has no alternative forum available unless there be a binding and enforceable arbitration agreement. Even less so can it be said that a defendant who is sued in court has voluntarily chosen a judicial forum.*

Compulsory referral to special referees may be particularly appropriate for certain types of ‘mega-litigation’. The recent Federal Court C7 case is discussed in Chapter 1. In the aftermath of that case, it has been proposed that courts should have increased powers to order large corporations out of publicly funded courts and into private, binding arbitration.

Perhaps another consideration is balancing the rights of corporations and the rights of other parties to access the courts. If mega-litigation is taking up a disproportionate amount of court resources, as Justice Sackville suggested in the C7 case, such cases may be contributing to court delays. In submissions, and consultations, judges of the Supreme Court indicated support for the power to order parties to a special referee, even without the parties’ consent. They were supportive of referral to referees under Order 50. They noted that even though there is no requirement under the rules to obtain the parties’ consent, the rules could be amended to clarify that a referral to a referee may be made, with or without the consent of the parties. The judges noted that it was not a frequently used procedure but that it could be used more often. It is a useful procedure because parties have access to competent referees, retain the right of access to the court and have broader appeal rights than under arbitration.

The judges also supported compulsory referral to special referees because they considered it would be a useful tool to relieve some of the ‘court’s burden’. Some felt that large corporations should pay more for the use of the courts for resolution of commercial disputes. At present substantial public costs are incurred both in the provision of court services and through tax deductibility of litigation costs.

Other judges felt that if corporations wished to litigate commercial matters in the courts, they should be able to do so because ‘judges are the best decision-makers in the state’. If corporations want access to judges, then they should have the same rights as anyone else.


643 Abigroup [2000] VSC 261, [12].

644 Seven Network Ltd v News Ltd [2007] FCA 1062 (‘C7 case’).


646 Submission CP S8 (Supreme Court of Victoria).

647 Consultation with the Supreme Court of Victoria (9 October 2007).

648 Consultation with the Supreme Court of Victoria (9 October 2007).

649 Consultation with the Supreme Court of Victoria (9 October 2007).

650 Consultation with the Supreme Court of Victoria (9 October 2007).

651 Consultation with the Supreme Court of Victoria (9 October 2007).

652 Submission ED 21 11 (Michael Redfern).

653 Submission ED1 30 (Magistrates’ Court of Victoria and Dispute Settlement Centre of Victoria).

654 Submission ED 1 26 (Springvale Monash Legal Service).

655 See for example the Fair Trading Act 1999 s 32W, where a term in a consumer contract may be unfair if, ‘contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer’. The Trade Practices Act 1975 (Cth) contains a number of provisions that may be used to circumvent or nullify the effects of arbitration clauses: ss. 44Y, 51AB, 51AC. See also the Fair Trading Act ss 8, 8A, which mirror ss 51AB & 51AC.

Chapter 4

Improving Alternative Dispute Resolution

In Victoria, the *Domestic Building Contracts Act 1995* provides that any term in a domestic building contract or agreement that requires a dispute to be referred to arbitration is void. The legislative concern was that arbitrations would become “overly legalistic, time consuming and expensive”.657 The commission is mindful of section 55(3) of the *Commercial Arbitration Act 1984* and its impact on *Scott v Avery* clauses.658

In the United States, the *Arbitration Fairness Bill* was introduced into the House of Representatives and the Senate in 2007. The Bill seeks to prohibit the use of pre-dispute mandatory arbitration in consumer, employment and franchise agreements.659 This arose out of the increasingly widespread use by large corporations of mandatory arbitration clauses in various types of consumer contracts. Supporters of the proposed legislation point to how consumers are disadvantaged by such clauses in view of, for example:

- the large filing fees
- the alleged bias of industry appointed arbitrators (with empirical research showing that they usually find in favour of the business appointing them)
- the limited discovery available
- the prohibition of class actions
- the inconvenience of the venues
- the one-sided obligation whereby consumers are bound but businesses can elect to litigate in court
- the absence of any public record of proceedings
- the lack of a requirement for arbitrators to issue written findings or conclusions
- the limited scope for judicial review
- the limited range of remedies available to consumers (eg, the absence of injunctive relief and no entitlement to punitive damages).660

Although the commission is supportive of the use of ADR, these developments give cause for concern. It is not clear whether there has been or is likely to be more extensive use of such mandatory arbitration clauses in Australian, particularly Victorian, consumer contracts. It may be that the relatively widespread voluntary industry dispute resolution schemes in many areas of mass service delivery—including financial services, essential services, banking and insurance—have developed as a more benign alternative to such contractual provisions.661

The Productivity Commission is currently reviewing Australia’s consumer policy framework and may comment on this issue as part of its review.662

7. PROVISION OF ADEQUATE COURT RESOURCES

7.1 THE NEED FOR A DESIGNATED COURT OFFICER REFERRING PARTIES TO ADR

Despite the growth of ADR, the court system is still largely focused on traditional adjudication based on adversarial procedures. Over recent years a variety of ADR techniques, including mediation, arbitration and the use of special referees, have been gradually deployed to speed up the process, to relieve the burden on the courts, to reduce the cost of dispute resolution and to provide litigants and judges with additional options. The use of such options is likely to be enhanced if courts are able to provide additional personnel dedicated to the task of referring parties to ADR and providing assistance in arranging ADR providers and facilities.

The commission has recommended that an increased variety of ADR options should be available and that the courts and parties should make greater use of these options.663 The commission is also of the view that the courts should have the express power to refer cases to ADR processes without the consent of the parties.664

There are likely to be savings in time and money if parties are referred to the most appropriate method of dispute resolution from the beginning. Litigants are less likely to become frustrated and dissatisfied with the litigation process if a court provides information and appropriate referral advice about available ADR processes.665
The commission considers that courts are well placed to ensure that appropriate cases are resolved using ADR rather than litigation. As noted in the Federal Civil Justice System Strategy Paper: “given that litigants may not be aware of the alternatives to litigation, the courts can play an important role in encouraging, and providing information, on ADR methods.” Justice Stein has suggested that the role of ‘a 21st century court’ is to provide citizens with a forum for dispute resolution which should not be confined to traditional judicial adjudication. When a litigant comes through the door of the Court she or he should be informed of the alternative mechanisms available for dispute resolution. These should be provided by the Court and should not be ‘out-sourced’. Litigants should be entitled to choose the means best suited to the particular nature and subject matter of the suit.

The commission does not agree that dispute resolution should not be ‘out-sourced’ by the courts but is of the view that courts should be actively involved in providing a range of alternative dispute resolution options. The use of both internal and external ADR options is likely to be increased if courts appoint designated persons with responsibility to recommend suitable forms of ADR and to assist parties in arranging ADR providers and facilities.

7.2 POSITION IN VICTORIA

Currently, the County and Supreme Courts do not have a designated person who is responsible for recommending suitable forms of ADR and assisting parties in arranging ADR providers and facilities. The Magistrates’ Court assists parties in arranging ADR providers and facilities for pre-hearing conferences and mediation conducted by the court. The Magistrates’ Court Rules provide that parties may be referred to an ‘acceptable mediator’ for mediation under section 108(1) of the Act. Acceptable mediator is defined to include, for example, a registrar or a mediator accredited by the Law Institute, the Victorian Bar or the Institute of Arbitrators and Mediators.

7.3 OTHER MODELS

Australia

South Australia

The South Australian Magistrates Court offers in-house mediation services that are coordinated by the court and are conducted by private mediators at no cost to the parties.

New South Wales

In New South Wales, court-annexed arbitration schemes receive some administrative assistance from the courts.

Intervention order program

In 2002, the Magistrates’ Court introduced a pilot program to refer appropriate intervention order applications to mediation at the Dispute Settlement Centre. An independent evaluation of the pilot found that the program had been successful because:

664 See Recommendation 23 below.


658 A Scott v Avery clause provides that the parties must refer specified disputes to arbitration before commencing court proceedings. At common law, the courts required an arbitration clause to be in Scott v Avery form in order to be enforceable. However, the Commercial Arbitration Act 1984, in effect, treats the clause as a simple agreement to arbitrate giving rise only to the right to seek a stay of the court proceeding (s 55(1)). A Scott v Avery clause is therefore effective only where the arbitration is not conducted under the Act or, if it is so conducted, where one or more of the parties is not domiciled or resident in Australia at the time the arbitration agreement is entered into (s 55(2)), or where the arbitration is a statutory arbitration (s 55(3)).


661 See discussion in Public Interest Advocacy Centre (2004) above n 656, 3.


663 See Recommendation 17 below.

664 See Recommendation 23 below.


668 Magistrates Court Civil Procedure Rules 1999 r 22A.01.

669 Magistrates Court Civil Procedure Rules 1999 r 22A.02.

670 See discussion of this scheme in paragraph 2.8.
Improving Alternative Dispute Resolution

- there was a comprehensive promotion strategy which raised awareness of the project among magistrates, key staff and other relevant stakeholders
- clear guidelines and procedures for referral had been developed
- it provided senior court staff with reports on the outcomes of mediation.

The Administrative Appeals Tribunal

In the Administrative Appeals Tribunal (AAT), a person is not entitled to conduct an ADR process unless the person is a member, an officer of the tribunal or a person engaged under section 34H. Section 34H provides that the registrar may engage persons to conduct one or more kinds of alternative dispute resolution processes and must not engage a person unless satisfied that the person has suitable qualifications and experience to conduct the relevant kind of ADR processes. The AAT also publishes information about its dispute resolution processes on its website.

The Family Court

In the Family Court, the ‘Integrated Client Service’ scheme has a central intake and screening mechanism located at a ‘one-stop shop’ desk. A multi-disciplinary team of service providers is involved in assessment of the dispute and, in conjunction with the disputing parties, will refer them to appropriate dispute resolution processes.

The Land and Environment Court

The Land and Environment Court offers a variety of dispute resolution processes. Chief Justice Preston has commented that: ‘The availability within the one courthouse of a variety of dispute resolution processes is a necessary feature of a multi-door courthouse programme.’ The Chief Justice has also identified that while the court may be moving towards becoming a multi-door courthouse, it will be necessary to develop adequate:

- financial resources, including for programme development, new court personnel, training of existing personnel, better … courthouse space and equipment, and preparation and publication of programme literature and information;
- human resources, including intake staff and dispute resolution practitioners …; [and]
- facilities, both in terms of having the appropriate facilities such as … rooms for intake interviewing and … settlement rooms.

Overseas

The United Kingdom

In the United Kingdom, evaluations of court-based mediation schemes have identified the importance of efficient and dedicated administrative support to the success of court-based mediation schemes.

The Netherlands

In the Netherlands, a court-connected mediation office was established following a pilot scheme of court-annexed mediation. The office is responsible for helping courts implement the ADR referral facility. The office also has the task of gathering, describing and informing the courts on ‘best practices’. In order to be able to have adequate information about the number of referrals and the success rate, a monitoring system has been built and implemented in the court administration.

The United States

In 1998 in the United States, the Alternative Dispute Resolution Act 1998 was introduced which authorised the use of ADR in federal courts and imposed a number of requirements on the courts. Stienstra explains the operation of the Act as follows:

To help ensure that court ADR programs are well managed and of high quality, the Act requires each district court to designate an employee or judicial officer who is knowledgeable about ADR to implement, administer, oversee, and evaluate the program. Among this individual’s duties may be recruiting, screening, and training attorneys to serve as neutral [third parties] (§ 651(d)).
7.4 A MULTI-DOOR SYSTEM?

The multi-door courthouse approach was first outlined in 1976 by Harvard Professor Frank Sander. Professor Sander envisaged one courthouse with multiple dispute resolution doors or programs. Cases could be ‘diagnosed’ and referred to the appropriate door for resolution.680 These programs could be located inside or outside the actual court complex. A large number of United States courts have adopted this approach.681 Elements of the multi-door approach operate in Australian jurisdictions, as identified above.

7.5 WHAT TYPE OF ADR PROCESS?

The AAT has developed a referral policy and process models for the different forms of ADR, including the factors favouring referral for different types of ADR, to assist members, officers and parties to understand how the new processes will be implemented.682 The Supreme Court of NSW recommended developing positive criteria for referral to ADR processes. Factors favouring referral to mediation, evaluation and arbitration were identified.683

The Victorian courts may wish to consider developing broad referral criteria and process models to assist judges, court officers, parties and lawyers to understand how the different ADR processes operate and when one process might be more suitable than another. It should be up to each of the courts to decide on a referral policy depending on the types of cases heard in the court. Having guidelines for referral of cases to ADR could help ensure consistency.

While recognising the importance of each court developing its own referral criteria, NADRAC states that factors that influence whether a matter should be referred to ADR include:

- the parties’ ability to participate
- the relative costs and benefits of ADR and litigation
- cultural factors
- the need for flexible processes and outcomes
- the public interest, which may require a public, authoritative determination.684

A designated court officer, when considering a case for referral to ADR, could take into account such considerations.

7.6 TIMING OF THE REFERRAL

“The timing of any referral process is usually acknowledged as an important factor in the eventual resolution of any dispute.”685 It seems to be accepted that there is no right or wrong time for referral.686 On one view, it is better to refer parties to ADR as early as possible. The greatest savings occur when cases are mediated early. The parties avoid the costs of discovery and of filing and defending applications.687 On the other hand, many litigants may not be prepared to consider settlement until they have sufficient information, including through discovery, to assess the strengths and weaknesses of the case of each party. Others may not be prepared to consider ADR or settlement until they are faced with the prospect of trial.688

672 Administrative Tribunal Act 1975 s 34C(5).
676 Ibid 24.
681 See for example the District Court of Columbia, which has operated a multi-door court system since 1985: <www.dcbarg.org/for_lawyers/sections/litigation/multidoor.cfm> at 25 March 2007.
685 Sourdin (2005) above n 6, 129.
686 Ibid.
687 District Court of Columbia (n.d.) above n 699.
688 Ibid.
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The submissions in response to the Consultation Paper contained different views regarding the timing of referral to ADR. The Law Institute felt that mediation should occur earlier in the litigation process than is currently the case, but not before discovery. The Legal Practitioners’ Liability Committee (LPLC) considered that early mediation is desirable, but is not appropriate until the claim and defence to the claim have been properly articulated and issues in contention identified. The LPLC considered that if the parties’ respective positions are not sufficiently articulated prior to mediation it could result in further expenses being incurred. The Construction & Infrastructure Law Committee (Victorian Group) of the Law Council of Australia recognised the benefit of early mediation, ‘before significant expenses have been incurred in litigation, such as extensive discovery’. 689

The Transport Accident Commission suggested that if there has been no pre-litigation involvement, consideration should be given to listing compulsory mediations much earlier in the court timetables to achieve better disclosure of information and to narrow the issues as early as possible. The Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators suggested that there should be express provision in rules of court requiring judges (or masters) or registrars conducting a case management conference or directions hearing in a civil proceeding to consider whether the proceeding, or any question in the proceeding, should be referred out to any form of ADR (and not merely mediation). Judge Wodak considered that compulsory referral to ADR should occur only when all real issues have been defined and all relevant facts and materials disclosed. 690

The commission is of the view that it should be left to each court to decide the timing of the referral to ADR depending on the type of case. Having designated court staff to assist with referrals, including the timing, would assist the courts in managing the ADR processes.

7.7 THE DESIRABILITY OF ADDITIONAL COURT RESOURCES

In Going to Court, Sallmann and Wright suggested that, at the most basic level, courts should provide information and assistance for people, which could include a trained court officer who could deal with inquiries and provide information brochures on the available means of dispute resolution. 691 Their view was that additional funding may be required for such services but ‘it would save substantial resources overall if such a scheme succeeded in assisting people to resolve their disputes without recourse to the full-blown litigation process’. 692

Having a designated officer at the court will enable an assessment to be made of a dispute’s suitability for ADR. If disputes are referred to an appropriate form of ADR at the appropriate time, the chances of settlement are increased and there will be savings in terms of time and money.

Astor and Chinkin suggest that:

> If parties and lawyers are referred to a carefully chosen and appropriate method of dispute resolution carried out by a high quality practitioner, they are more likely to have an experience of ADR that is positive and they are more likely to use it again. 693

The evaluation of the Magistrates’ Court intervention order pilot program 694 found that the major barrier faced by court staff referring matters to mediation was the difficulty in convincing clients with suitable cases to consider mediation. 695

NADRAC suggests that ‘If there is a dedicated staff member or members referring parties to ADR, scheduling is easier, which can contribute to ADR success’. 696 NADRAC also notes that legislation or rules provide only minimal guidance to courts about appropriate referral to ADR. This puts a significant responsibility on courts to make ‘wise referral decisions’. To ensure wise referral decisions are made and inappropriate cases are not referred, NADRAC suggests that each case should be independently assessed by the courts to determine:

- whether an ADR process would assist the parties to resolve the dispute and/or narrow the issues in dispute; and
- which ADR process would be appropriate in the circumstances.

NADRAC suggests that the key is for the courts to ensure there is well-targeted direction to ADR processes in individual and appropriate cases by trained judiciary involving some assessment of the factors likely to result in a positive outcome. The commission agrees with this view and also notes that trained court officers, who may not be judicial officers, could also undertake an assessment of cases and recommend suitable forms of ADR.

It could also be part of the court officer’s role to track the outcome of cases in which courts have
made a referral to ADR over sometimes strenuous objections. Such information would be useful information to help assess and monitor the success of compulsory referral to ADR. Some suggest that a multi-door approach is at the opposite end of the spectrum of dispute resolution to that of the traditional adjudication role of courts. However, as identified by Sallmann and Wright in Going to Court, ‘a version of the multi-door approach makes sense if one takes a broad view of the primary purpose of courts as resolvers of civil disputes’. Another concern is that resources will be required to employ court officers to these positions. The commission considers that the benefits of having court staff employed to provide assistance with ADR referrals and facilities may outweigh the cost of employing them. Costs may in fact be saved for both the parties and courts in circumstances where, following an appropriate and timely referral by the designated officer, the parties settle the dispute much earlier than would otherwise have been the case. Astor and Chinkin note that putting resources into ADR, including into assessing cases to support appropriate referral to ADR, may determine the quality of the ADR services provided. They note that indicators of quality conflict in the short term with cost-savings objectives. However, as they note, ‘in the long term … they may constitute a wise investment’.

Another concern is that there may be a lack of confidence in the quality of the ADR service to which parties are referred. This is a valid concern. Some issues around the quality of service provision by ADR practitioners are that:

- there are currently no uniform standards for ADR service providers or practitioners in Victoria or Australia;
- there is no single national organisation that trains ADR practitioners;
- there is no national, single accreditation body for ADR providers and new standards for mediator accreditation have only just been introduced;
- there is no peak Victorian or Australian body that regulates ADR practitioners.

These and other matters are currently the subject of a detailed review by the Victorian Parliamentary Law Reform Committee, which is due to report at the end of June 2008. However, the commission notes that despite the issues regarding accreditation and training of ADR providers and ADR practice standards, and the desirability of having highly trained ADR providers, there are very experienced dispute resolution practitioners and schemes operating in Victoria and the issues identified should not prevent courts referring parties to ADR.

Currently, the resources and services include:

- **Law Institute of Victoria (LIV): Mediators Directory**
- **Victorian Bar: Dispute Resolution Scheme**
- **The Institute of Arbitrators and Mediators Australia (IAMA) and Chartered Institute of Arbitrators (CIArb)**

689 Submission CP 12 (Construction & Infrastructure Law Committee (Victorian Group)).
690 Submission ED1 7 (Judge Wodak).
691 Sallmann and Wright, Going to Court (2000) above n 47, 91.
692 ibid 93.
693 Astor and Chinkin (2002) above n 45, 263.
694 See the description above under paragraph 7.3.
695 Tyler and Bornstein (2006) above n 671, 54.
696 Mack (2003) above n 13, 43.
697 See paragraph 6 for more information regarding compulsory referral to ADR.
700 A number of bodies provide training including LEADR, the Institute of Arbitrators and Mediators, and the Australian Commercial Disputes Centre (ACDC).
701 Bodies such as ombudsmen and the Victorian Bar use their own accreditation methods and standards. NADRA recommended the development of a national accreditation system for mediators: NADRA, Who Says You’re a Mediator? Towards a National System for Accrediting Mediators (2004). This has been recently introduced, as noted above in the text. From 1 January 2008 new voluntary Mediator Accreditation Standards came into existence. This is an industry based scheme which relies upon voluntary compliance by mediator organisations (Recognised Mediator Accreditation Bodies) that agree to accredit mediators in accordance with these standards. The Commission is grateful to Malcolm Holmes QC of the Sydney Bar for supplying this information.
702 There are self-regulating bodies, such as the National Mediation Conference, whose draft Australian Mediator Practice Standards include a description of the mediation process and requirements for ethical practice, confidentiality and procedural fairness. The Victorian Parliamentary Law Reform Committee suggested there may be benefit in such a standard applying to all ADR providers rather than just to mediators: Parliament of Victoria, Law Reform Committee Alternative Dispute Resolution Discussion Paper (2007) 109.
703 ibid.
704 The directory contains more than 80 arbitrators and approved solicitor mediators with a diverse range of training and experience. There are also approximately 20 accredited specialist mediators. The lists of approved solicitor mediators and accredited specialist mediators are promoted to the courts. The lists are also published on the LIV website and in the LIV Directory and Diary. The online Directory facilitates searches by region, area of practice, mediator name or firm name: Law Institute of Victoria Friday Facts No. 471, <www.liv.asn.au/member/shows/fridayfacts/20070511_471.html> at 11 May 2007.
705 The Victorian Bar scheme provides ADR services through barristers at the Bar’s Mediation Centre. The Bar accredits mediators who are professionally trained in mediation and who usually have expertise in specialised areas of law and practice. Accredited mediators with the requisite skills and experience may apply to become advanced mediators. The Bar mediators directory lists member barristers who are accredited by the Bar as mediators and who wish to be included. The Bar offers the following dispute resolutions: conciliation, expert appraisal, arbitration, assisted negotiation and case presentation: Victorian Bar <www.vcbar.com.au> at 11 May 2007.
706 Both IAMA and the CIArb are involved in the grading and accreditation of persons as arbitrators, mediators and adjudicators. The members of CIArb and IAMA comprise barristers and solicitors, engineers, architects and accountants, as well as other professionals: Submission CP 35 (Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators).
LEADR\textsuperscript{707} The Dispute Settlement Centre for Victoria,\textsuperscript{708} the Neighbourhood Justice Centre,\textsuperscript{709} the Moorabbin Justice Centre\textsuperscript{710} and the Office of Small Business Commissioner: all offer dispute resolution services.\textsuperscript{711} The commission also recognises that it is important that the panel of practitioners include suitably qualified and experienced dispute resolution practitioners. This will help ensure that the ADR service is of a high quality.

In addition, there should be further education and training in mediation and other forms of ADR for court staff and the judiciary.\textsuperscript{712} This will help ensure that appropriate referrals are made.

Where referrals to ADR are not backed with the authority of a judicial officer there may be some resistance. This may be the case where parties are unfamiliar with the proposed ADR process or where they may perceive that a willingness to participate in ADR will be seen as an indication that they have a weak case.

There are also issues of safety as well as suitability that need to be taken into account in referral decisions. Aggressive or violent parties may give rise to difficulties, particularly if they are not independently represented.

7.8 SUBMISSIONS
The submissions were supportive of this proposal.\textsuperscript{713} PILCH felt that court-assisted ADR would provide much-needed support and assistance to self-represented litigants to identify the issues and negotiate suitable resolutions. PILCH also considered that assistance for cases involving self-represented litigants could be provided from a panel of experienced barristers on a pro bono basis or through funding by the Justice Fund.\textsuperscript{714} The Law Institute and the Victorian Bar both considered that they are well placed to provide qualified practitioners for the panel. Victoria Legal Aid considered that its dispute resolution services in family law matters could be extended to civil disputes.

The Magistrates’ Court and the Dispute Settlement Centre of Victoria in their joint submission envisaged an intake process, screening and streaming of cases to suitable forms of resolution by making use of the Dispute Settlement Centre’s extensive panel of mediators.\textsuperscript{715}

7.9 CONCLUSIONS AND RECOMMENDATIONS
The courts should be adequately resourced to appoint or designate persons with responsibility to recommend suitable forms of ADR and to assist parties in arranging ADR providers and facilities. The courts should also have panels of suitably qualified and experienced dispute resolution practitioners available to undertake ADR processes. Such assistance will ensure that disputes are referred to the most suitable form of ADR, that court ADR programs are well managed and of a high quality, and that participants’ confidence in ADR and the courts is enhanced.

8. DATA AND RESEARCH, INCLUDING MEDIATORS’ REPORTS
8.1 THE LACK OF EMPIRICAL RESEARCH AND ACCURATE DATA
There is a lack of empirical data on the effectiveness of court-ordered ADR in Victoria, including its cost effectiveness. There is a need for more research to improve knowledge of the role of mediation in Victoria and, more specifically, to obtain more data regarding how effective ADR is in relation to:

- narrowing issues and settling disputes
- bringing about an earlier resolution of disputes
- reducing the length and cost of proceedings
- assisting the courts to manage their caseloads
- providing fair outcomes.

Measuring the outcomes of ADR in Victoria is important for identifying whether ADR programs are meeting their aims and fulfilling their potential. The commission proposes that the Civil Justice Council should conduct an ongoing review of ADR processes in Victorian courts.
Data collection regarding ADR is also important. The courts have been using mediation reports for some time. The problem is that the reports are not always filed with the court, even where the court has ordered that the mediator or parties report to the court. Performance outcomes of ADR such as participation and settlement rates are not difficult to measure. However, accurate data are required. The requirement to file mediation reports will assist the courts in gathering accurate data regarding mediation. Performance outcomes can then be measured. Such data would also be of use in terms of identifying potential improvements and increased efficiencies for ADR providers and the courts.

The reports should also provide an assessment of the person conducting the ADR process. This should assist the courts to monitor and assess dispute resolution practitioners to maintain quality ADR services. Quality ADR services are important to ensure participants have confidence in the ADR service provided and in court processes.

### 8.2 RESEARCH TO DATE

There is a 'substantial amount of valuable research, mainly in the United States, involving court-based ADR programs, especially family mediation and mediation in general civil cases'. There is also valuable research coming out of the United Kingdom as a result of evaluations by the Civil Justice Council. There are various evaluations of ADR and court-based ADR programs in Australia, particularly by NADRAC.

In Victoria, there have been various reviews of ADR and the courts, including:

- a review, commissioned by the Department of Justice in 1996, that assessed the cost and effectiveness of courts and tribunals for Victorian businesses
- Going to Court, a review by Professor Sallmann and Ted Wright of the civil justice system for the Department of Justice in 2000
- the Department of Justice: ADR reports and surveys referred to in the introduction to this chapter
- the Victorian Crown Counsel review of the Office of Master and Costs Office in the Supreme Court, which included an assessment of master mediation
- the evaluation of the intervention order mediation program in the Magistrates’ Court, a review undertaken in the criminal justice system
- the present Victorian Parliamentary Law Reform Committee’s review (also referred to in the introduction to this chapter)

### 7.07 LEADR is an Australasian, non-profit organisation formed to promote consensus dispute resolution. LEADR’s services include access to panels of independent mediators, and facilitation of mediations and conciliations. LEADR also provides ADR training including training in mediation, negotiation, facilitation and conciliation. LEADR:

- Submission ED1 20 (Public Interest Law Clearing House).


### 7.09 The Neighbourhood Justice Centre deals with a range of civil and criminal cases arising in the City of Yarra. Mediation at the centre is available to residents, government departments, agencies and community organisations within the Yarra municipality. These services are provided by the DSCV: Department of Justice, <www.justice.vic.gov.au/wps/wcm/connect/DOI/Internet/Home/The+Justice+System/Neighbourhood+Justice> at 11 May 2007.

### 7.10 For information on the Moorabbin Justice Centre see the Deputy Premier and Attorney-General, ‘Hulls launches $28.2 million Justice Centre in Moorabbin’ (Press Release, 15 November 2007).


### 7.12 See Recommendation 28 on education of the judiciary and court staff.

### 7.13 Submissions EDI 16 (Telstra), EDI 17 (Australian Corporate Lawyers Association), EDI 9 (Federation of Community Legal Centres), EDI 31 (Law Institute of Victoria), EDI 30 (Magistrates’ Court of Victoria and Dispute Settlement Centre of Victoria), EDI 24 (Victorian Bar), EDI 26 (Springvale Monash Legal Centre), EDI 25 (Victoria Legal Aid).

### 7.14 Submission EDI 20 (Public Interest Law Clearing House).

### 7.15 Submission EDI 30 (Magistrates’ Court of Victoria and Dispute Settlement Centre of Victoria). The court and the settlement centre also felt that enforcement provisions attracting costs for failure to comply with court rules were a major part of the powers that support the effectiveness of mediation conducted “in the shadow of the court”. They considered that additional enforcement provisions were needed. They proposed that the Dispute Settlement Centre, subject to approval and funding, should undertake a pilot program to provide mediation services at the Magistrates’ Court for defended civil proceedings for amounts up to $10 000. The commission notes that Broadmeadows Magistrates’ Court is currently piloting such a program—see Magistrates’ Court of Victoria Practice Direction No. 6 of 2007 (2007).


### 7.20 Tyler and Bornstein (2006) above n 61, 48.
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• the current examination by NADRAC of the development of performance measurements for ADR;

• the Law Council’s current collation of information and statistics from the different Australian jurisdictions regarding mediation.

The Department of Justice has recently undertaken considerable research, including empirical research, regarding ADR throughout Victoria. One of the current projects is a review of the role of mediation in the Victorian Supreme and County Courts. The project will assess the effectiveness of mediation in settling disputes, reducing the length and cost of proceedings and assisting the courts to manage their caseloads. The commission considers that a similar review in the Magistrates’ Court would be beneficial.

8.3 THE EFFECTIVENESS OF ADR

Despite the research identified above, there is little empirical data on the effectiveness of court-ordered mediation in Victoria. NADRAC notes that there are many possible aspects or dimensions in determining whether an ADR process could be called effective or successful. It suggests that the starting point for any discussion must depend on the goal or goals the referral to ADR seeks to achieve, so that outcomes can be measured against those goals. Astor and Chinkin provide a list of goals which a court-connected ADR referral might include—for example, reducing delay, clearing lists, reducing the backlogs, assisting in management of cases, reducing cost (to parties, courts, government, taxpayers).

NADRAC notes that:

In spite of the potential for more sophisticated measures of success, the actual measures used in evaluative research tend to be quite limited. The most frequently used are settlement rates [and] satisfaction (both for its own sake and as a proxy for quality of outcome).

This limited choice of outcome reflects, in part, the difficulty of empirical research in this area, including the difficulty of undertaking research over long periods of time. This difficulty is equally true of research into civil litigation generally, which has not generally been subjected to the same degree of evaluation.

NADRAC notes that there are no agreed standards for measuring the outcomes of ADR in civil disputes. Without agreed performance measurements and data assessing the outcomes of ADR, it is difficult to assess the performance of ADR providers and the outcomes for participants in the civil justice system.

Mack has suggested that ‘the development of nationally agreed conventions for measuring and reporting ADR referrals and outcomes should become an urgent part of the larger task of civil justice statistical measurement’. Mack also notes that there is very little empirical research that ‘investigates whether satisfaction or settlement is affected by whether the ADR is provided by a judge, court staff or an outside third party, whether voluntary or paid’.

The Victorian Parliamentary Law Reform Committee in its Discussion Paper discussed in detail some of the common performance indicators used to measure the success of ADR, including agreement rate and quality, participant satisfaction, participant empowerment and time and cost savings. The committee identified surveys, evaluations and data regarding these performance indicators. It also identified areas where there is limited research and data, including into why some cases reach agreement through mediation or other ADR processes while others do not, and the extent to which the use of ADR processes reduces the time taken to resolve civil disputes.

8.4 THE COST EFFECTIVENESS OF ADR

Based on the submissions and consultations to this review, participants view mediation favourably and perceive it to have potential cost savings. There is evidence that the general community recognises potential cost savings as a feature of ADR services. However, another view is that ADR can create an extra step in the proceeding and if the matter does not settle, parties incur additional costs.

The Law Reform Committee’s Discussion Paper identifies some of the issues surrounding the cost savings of ADR, including that:
The earlier a dispute is settled, the greater the cost savings will be for the litigants and the courts (and government).

Most cases settle rather than progress to a hearing stage, therefore the cost savings are not necessarily savings associated with avoiding a hearing but rather savings resulting from an earlier settlement.

ADR will generally only be cheaper for the individual if a lasting agreement is reached.

Even where ADR is unsuccessful, the process may narrow the issues in dispute, reducing the time taken to resolve the dispute at a hearing, resulting in cost and time savings for litigants and the courts.735

ADR processes have the potential to save costs for litigants, courts and government. However, there is little data or research in Victoria regarding the cost effectiveness of ADR. There is a need for empirical research regarding the cost effectiveness of court-ordered mediation. The Department of Justice is currently reviewing the cost effectiveness of mediation in the Victorian Supreme and County Courts. A similar review would be of benefit in the Magistrates’ Court.

8.5 DATA, INCLUDING MEDIATORS’ REPORTS

The courts have some data on mediation and other forms of ADR.736 As discussed above, if mediators’ reports are filed with the court, the court will have access to accurate data on ADR.

8.5.1 Position in Victoria

In the Magistrates’ Court, pursuant to rule 22A.07, within seven days of a mediation having been completed, the mediator must file a mediation report in a specified form737 and provide a copy of the report to each party who attended the mediation.

Under the Supreme and County Court Rules:

The mediator may and shall if so ordered report to the Court whether the mediation is finished.738

8.5.2 Other models

New South Wales

The New South Wales provisions are similar to the Victorian Magistrates’ Court approach. Section 20.7 of the Civil Procedure Act 2005 (NSW) provides:

Within 7 days after the conclusion of the mediation, the mediator must advise the court of the fact that the mediation has been concluded.

A Practice Note of the NSW Supreme Court requires the following information from the plaintiff following mediation:

Evaluation of referral of proceedings to mediation and entry of any consent orders

Within 14 days after the conclusion of the mediation, the plaintiff in writing informs the Principal Registrar of the following (‘Joint Protocol Evaluation Information’):

- the name and file number of the proceedings;
- the name of the mediator;
- the date(s) of the mediation;
- the number of hours occupied by the mediation;
- whether the parties were represented at the mediation by solicitors;
- whether the parties were represented at the mediation by counsel;
- whether the parties agreed to settle, or partly settle, the proceedings or whether no resolution of any issues was achieved;
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- to the extent that any terms of settlement are not confidential to the parties, the terms of settlement; and
- if the parties agreed to the Court making orders, a signed consent order in a form suitable for entry by the Registry.

On receipt of the Joint Protocol Evaluation Information, the Principal Registrar will forward a copy of that information to the relevant nominating entity.

California

The California Code of Civil Procedure provides, with respect to referees, that:

The Judicial Council shall, by rule, collect information on the use of these references and the reference fees charged to litigants, and shall report thereon to the Legislature.

Netherlands

In the discussion above there is reference to the monitoring system that has been developed and implemented in the court administration.

8.5.3 Discussion

At present, mediation reports are not always filed with the court, even in circumstances where the court has ordered that the mediator report to the court. The courts collect some data about the number of mediations conducted. However, if mediation reports are not always filed, it is difficult for the courts to obtain accurate data and information about mediation. If all of the parties who attended mediation were required to file mediation reports with the court within a specified period, say seven days, and to provide a copy of the report to each party who attended the mediation, it would assist the courts in gathering accurate data about mediation. Such data could then be used to measure participation and settlement rates. The benefit of this is that the courts would then be in a position to assess the overall effectiveness of mediation. Such changes will also be of benefit because they will harmonise court rules and procedures. Accurate data would be useful for comparing data across jurisdictions.

See also the discussion in Chapter 5 regarding the need for additional data collection in the courts and for court forms and documents, including mediator’s reports, to be designed to facilitate the collection of data as a by-product of administrative processes.

8.6 SUBMISSIONS

The Law Institute agreed with the commission’s proposal in Exposure Draft 1 that there was insufficient information or data on the effectiveness of court-ordered mediation in Victoria. The institute also supported the commission’s draft recommendation that a review of the Magistrates’ Court mediation program would be beneficial. Its submission agreed that parties should be required to submit reports at the conclusion of any ADR process as ‘such a report could provide a useful evaluation of both the mediation process and mediator’. The Law Institute also considered that if parties were required to submit these reports, it was important that courts release ongoing summaries and analysis of the information, which would benefit all participants in the process.

Telstra and the Australian Corporate Lawyers Association suggested the gathering of empirical data should be voluntary. They suggested that there might be good reasons for parties wishing to maintain confidentiality over the fact of any dispute and its resolution. They considered the only issue that should be reported is the resolution or lack of resolution of the dispute. This is done in any event when orders are made either disposing of a proceeding or seeking orders for the further conduct of the proceeding.

The Magistrates’ Court and Dispute Settlement Centre suggested that the existing mediator’s report in the Magistrates’ Court could be supplemented by the parties indicating whether the other party had made a genuine attempt to resolve the matter (as shown by the state of preparedness), with cost implications.

The Mental Health Legal Centre suggested that there should be a system whereby anonymous information about settlements could be made publicly available, for example, on a database. Their view was that: “The benefit would be to provide realistic guidance to potential litigants and to facilitate earlier resolution.”
8.7 CONCLUSIONS AND RECOMMENDATIONS

There is a need for more empirical research regarding the effectiveness of court-ordered ADR, particularly the cost effectiveness. Further empirical research will provide valuable input into understanding the benefits of ADR for participants. Once-off reviews such as those identified above have contributed significantly to the knowledge base regarding ADR in Victoria. However, further research will enable the courts to better assess the outcomes for participants in the civil justice system and evaluate the performance of ADR programs.

The Department of Justice’s Civil Law Policy Unit is currently considering the overall effectiveness and cost effectiveness of mediation in the County and Supreme Courts. A review of the effectiveness of the Victorian Magistrates’ Court pre-hearing conference and mediation service should also be carried out. This could be a responsibility of the Civil Justice Council.

The commission considers that parties should be required to file a mediation report with court at the conclusion of any ADR process. Such reports should also provide an assessment of the person conducting the ADR process. This will assist the courts in gathering accurate data about mediation. The courts will then be in a better position to measure the performance of mediation, including participation and settlement rates. This information could also be used to identify potential improvements and increased efficiencies in the courts. Including a requirement that the parties assess the ADR practitioner in the report filed with the court will allow the court to monitor the quality of the ADR practitioners providing services.

The proposed Civil Justice Council should be responsible for conducting and coordinating empirical research into the role of ADR and the effectiveness of ADR. This will be particularly important if our other ADR recommendations, including expanding the ADR options available, introducing more court-conducted mediation and compulsory referral to special referees are implemented.

9. EDUCATION: FACILITATING AN UNDERSTANDING OF ADR PROCESSES

There would appear to be general acceptance of the utility and benefits of ADR within the community. However, we believe there is scope for greater education of the legal profession, judiciary, court personnel and consumers about the full range of available ADR options, with particular focus on:

- the need for different types of ADR in a modern court
- the different ADR processes that are available and how they operate
- in what circumstances the different ADR options might be appropriate and
- at what stage of the proceeding a dispute should be referred to ADR.

If participants’ understanding of ADR processes is improved, more informed decisions would be made regarding which ADR process is appropriate for the particular dispute, the parties are more likely to have a positive experience of ADR, the dispute is more likely to be resolved and the parties are more likely to use ADR again if they have confidence in the process. It is also important in increasing participants’ awareness of when ADR may not be appropriate.748

Education about ADR options was supported in submissions and consultations. Telstra and the Australian Corporate Lawyers Association said that education about the range of ADR options would be useful.749 The Law Institute and PILCH supported greater education regarding the different types of ADR because it will assist litigants to make informed decisions about participation in ADR processes.750 The Legal Services Commissioner submitted that as part of her function of educating the profession, she should be involved in the provision of such programs.751 The Springvale Monash Legal Service also suggested that lawyers, judicial officers and court officers should be educated about when ADR is appropriate.752 In a consultation with the Supreme Court, it was noted that a lot of law reform is about cultural change and education. It was also suggested that it was desirable to provide additional education through various means, including the Council of Legal Education, the Board of Examiners, the Bar readers’ course and the continuing education programs for the profession.753

The Judicial College of Victoria, National Judicial College and Australian Institute of Judicial Administration (AIJA) could coordinate programs for the judiciary and court officers. The Law Institute, Victorian Bar and Legal Services Commissioner could provide training programs for the legal profession. Materials would also need to be developed for litigants, including in particular those who are self-represented.
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RECOMMENDATIONS

Chapter 4: Improving Alternative Dispute Resolution

17. A wider range of ADR options should be available to the courts, including:
   - early neutral evaluation
   - case appraisal
   - mini trial/case presentation
   - the appointment of special masters
   - court-annexed arbitration
   - greater use of special referees to assist the court in the determination of issues or proceedings
   - conciliation
   - conferencing and
   - hybrid ADR processes.

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

18. More effective use should be made of industry dispute resolution schemes. If proceedings have commenced, the dispute should not be able to be referred to an industry scheme, unless the parties agree to stay the proceedings. This would appear to be the present position under most if not all industry dispute resolution schemes.

19. While the use of collaborative law in Victoria has largely been confined to family law matters, it is a process that could be applied to all kinds of civil disputes. Collaborative law could be used in wills disputes, property disputes and other types of disputes, particularly where the parties have a relationship that they wish to continue.

20. Court conducted mediation is to be encouraged but in view of limited court and judicial resources it might be preferable for courts to deal mainly with cases where private mediation is unsuitable or unavailable, such as where:
   - one of the parties is in financial hardship and/or self-represented
   - the parties are unable to agree on a choice of mediator
   - there has already been an unsuccessful external mediation
   - the case is of public interest or is highly complex and could benefit from a mediator with court authority.

21. If a judge has conducted a mediation that fails to resolve the matter there should be a presumption against that judge presiding over the hearing of the matter. However, if the parties consent, the judge should be able to hear the matter.

22. There should be educational programs and training for the judiciary and legal profession about court-conducted mediation.

Binding and Non-Binding ADR

23. The courts should have power to order non-binding ADR, with or without the parties’ consent.

24. In appropriate circumstances, it may be desirable for a person who would otherwise conduct an ADR process to be appointed as a special referee. The reference might be limited to particular questions of fact or law. The special referee could seek to resolve, albeit on a provisional basis, all or part of the dispute, using such processes as are (a) determined by the court, or (b) agreed between the parties. This could include procedures analogous to arbitration even in the absence of consent of the parties. The court should have the power to control the procedures governing the reference.

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

Resources

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

Empirical data

26. There is a lack of empirical data on the effectiveness of court-ordered mediation in Victoria, including the cost effectiveness. There is a need for more research on the effectiveness, including the cost effectiveness, of mediation/ADR in Victoria. The Department of Justice’s Civil Law Policy Unit is undertaking a review of the effectiveness, including the cost effectiveness, of mediation in the higher courts. A review of the Magistrates’ Court mediation program would also be useful. The Civil Justice Council should be responsible for the ongoing review of ADR processes in all three courts.

27. Reports should be required to be submitted by the parties to the court at the conclusion of any ADR process. Such reports should also provide an assessment of the person conducting the ADR process.

Education

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

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The objective of case management is to reduce delays and minimise the costs of litigation … Litigants who are dilatory in their preparation, or who otherwise take up too much of the court’s time, waste public resources and exacerbate the delays which other litigants have to suffer. It is perfectly appropriate for judges to take steps to ensure that litigation is conducted efficiently and expeditiously.

I do not accept the argument that limitations on the procedures that parties can currently adopt would reduce the quality of justice. Justice does not depend solely on an exhaustive decision-making process. Timeliness and affordability are equally aspects of justice. It is no justice, if a decision can only be reached after excessive delay, or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less cost is likely to result in a net improvement in the quality of justice in a world where resources are limited.

1. INTRODUCTION

The commission’s terms of reference for this review ask the commission to have regard to the Attorney-General’s Justice Statement. According to the Attorney-General’s Justice Statement:

Civil litigation continues to be an important feature of the justice system, the option for the final adjudication of rights and obligations. The courts have made significant changes over the past decade to gain control of their caseloads and streamline their processes, but more improvement is needed if they are to become more readily accessible. Victorian courts have been at the forefront in introducing case management and using ADR to resolve cases, but must be assisted to remain in that position through further reforms such as the revision of their rules of civil procedure.

Case management is part of a broader government focus. In the Department of Justice Strategic Priorities 2006, it was noted that: ‘There is scope for improving access to justice by reducing court backlogs and improving court procedure.’ The government intends to continue jurisdictional and procedural reform to maximise the efficiency of the courts and tribunals, and introduce new and improved technology in courtrooms.

The Courts Strategic Directions Project recognised that

Modern case flow management initiatives have given rise to ‘managerial’ or ‘interventionist’ judging where judicial officers and registrars have become directly involved in the pre-hearing management of civil cases in the Court list. It has also given rise to other approaches by which the Courts attempt to ensure the efficient conduct of the proceedings.

The Victorian courts have over the past decade introduced a series of reforms to assist with the just and efficient disposition of cases. As the Chief Justice has observed, the most precious commodity any court has is judge time. One of the components of judge time is time in court:

Generally judges, as former busy barristers, are skilled at moving things along. They do not receive training on courtroom time and motion, but based on experience and instinct most judges are pretty good at it, certainly so far as the Supreme Court is concerned, and I would expect other courts. Judges do not like to see public money wasted because parties are unprepared, not ready or technology lets us down. When that happens, judges, in my experience, will usually move things along and not stand for any prevarication, procrastination, obfuscation or incompetence. However, there are constraints imposed on judges by rulings of the High Court and appellate courts. Ultimately, a judge must see that justice is done.

… there is much more intensive judicial intervention and management of both criminal and civil appeals. A new master has been appointed to manage and direct civil appeals. A new practice direction has been applied to civil appeals essentially to strip appeals down to their bare issues and to identify matters that warrant a fast track approach.

Case management has evolved over the past decade in Australia in response to concerns about excessive costs and delay. Since 2000, the Victorian Civil Justice Review Project, the Australian Law Reform Commission and the Western Australian Law Reform Commission have all commented on developments in case management.
A broad theme which has emerged from these reviews is that the court system is moving towards a ‘second generation’ of case management development. Generally there is a sense that court-developed case management systems have to date produced cost-effective and timely resolution of cases through judicial supervision of cases. However, there appears to be general recognition of the need to more widely introduce reforms such as individual docketing systems, similar to those implemented in the Federal Court and elsewhere. The fact that the civil courts (and VCAT) in Victoria each deal with a large volume of cases not only highlights the need for effective case management and control systems but also gives rise to resource implications. In the course of submissions and consultations it was suggested that a comprehensive docket system could not be implemented throughout the Victorian courts without additional resources. In Chapter 1 of this report we note that the implementation of effective judicial management of cases requires more than the mere commitment to this objective, and outline a number of the factors, identified by Professor Scott, which need to be taken into account.

A number of submissions in response to the Consultation Paper suggested that more active ‘management’ is needed to reduce delay and unnecessary costs. It was also contended that the emphasis should be more on planning for the most effective way to resolve the dispute, rather than simply managing proceedings ‘where it is largely left to the parties to determine the process’. The commission is, however, mindful that proactive case management is a difficult task, both for the parties and for the court. There is a risk that cases may be ‘over’ managed, leading to unnecessary interlocutory hearings and additional costs. As with many areas of civil procedural reform, there is a need to achieve an appropriate balance between competing considerations.

The commission is also aware that the courts under review are actively managing cases and have been doing so for some time. However, the commission is of the view, no doubt shared by judicial officers and others, that there is both scope for improvement and a need for additional reforms.

2. GENERAL POWERS

2.1 JUDICIAL POWER

At present courts have very wide powers to manage proceedings and to make rules governing the conduct of proceedings. However, the commission is of the view that there would be utility in having a broad general statutory provision to explicitly provide for judicial power/discretion to make appropriate orders and impose reasonable limits, restrictions or conditions in respect of the conduct of any aspect of a proceeding as the court considers necessary or appropriate in the interests of the administration of justice, and in the public interest, having regard to the overriding purpose. Such provision should make it clear that the overriding purpose is to prevail, to the extent of any inconsistency, over certain principles of procedural fairness derived from the common law.

2.2 RULE-MAKING POWER

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

2.3 POSSIBLE CONSTRAINTS

Legislation seeking to confer certain powers and functions on the courts, including in respect of case management, is potentially open to challenge on at least two grounds.

First, the Charter of Human Rights and Responsibilities Act 2006 (The Charter) incorporates a right to a fair hearing. Section 24 provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
Section 24(3) provides that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits’. Questions may arise as to whether certain legislative provisions are incompatible with this ‘right’. Also, a court (or tribunal) is a ‘public authority’ subject to the Charter when ‘it is acting in an administrative capacity’. A court (or tribunal) is said to be acting in an administrative capacity when, for example, listing cases or adopting practices and procedures.11 The Charter also applies to courts (and tribunals) to the extent that they have functions under Part 2 and Division 3 of Part 3 of the Act.12

Second, insofar as any legislation seeks to confer functions on a court which exercises federal jurisdiction, such legislation may be invalid if such functions are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power.13

3. EXPANSION OF INDIVIDUAL DOCKET SYSTEMS

The problem

The individual docket system in the Federal Court was developed in a context of dissatisfaction with cost and delay in the courts. The view was that the root cause of the problems was ‘excessive adversarialism’ where the problems had more to do with the actors in the system than its processes or capacity.14 A similar view has been expressed in submissions to and consultations with the commission in this review. The drive for the expansion or extension of the individual docket system comes from various sources both within the courts and the profession. There is also support for a similar approach to that taken in the Federal Court’s Fast Track List (‘Rocket Docket’).

The commission understands that the Supreme and County Courts have previously considered expanding the individual docket system. However, there are obvious problems given that:

- judges move across the civil and criminal jurisdictions
- there is the potential for inconsistent workloads and work practices
- the Supreme Court and the County Court appear to have a higher caseload than the Federal Court and much more diverse jurisdictions.

Despite these problems, the commission considers that there is merit in further extending the individual docket system in the Supreme and County Courts. Despite the benefits, the commission recognises that a docket system is not necessarily easily implemented. It is, however, one method that may assist the courts to reduce cost and delay.

In considering the extension of the individual docket system it is necessary to bear in mind a number of the other recommendations in this report. For example, if the experience in England and Wales is any guide, the introduction of the proposed pre-action protocols is likely to reduce the number of civil proceedings commenced. The more proactive use of alternative dispute resolution is likely to reduce the number of cases proceeding to trial and requiring judicial management. The introduction of the proposed overriding obligations, together with other reform proposals in this chapter, may reduce the number of interlocutory hearings required in individual cases. The ‘package’ of reforms proposed in this report is likely to have a significant cumulative effect on the incidence, velocity, method of disposition and cost of civil litigation. There are likely to be beneficial changes which have both quantitative and qualitative dimensions. Such considerations need to be borne in mind in considering both the desirability of, and the possible constraints on, the extension of the individual docket system, particularly in the County and Supreme Courts.

3.1 WHAT IS AN INDIVIDUAL DOCKET SYSTEM?

A recent example of an individual docket system is the Federal Court docket system, which was introduced in 1997.15 The essence of the system is that each case commenced in the court is allocated to a judge, who is then responsible for managing the case until final disposition.16 Commentators suggest that a docket system aims to encourage the just, orderly and expeditious resolution of disputes.17 The Federal Court states that it seeks to enhance the transparency of the processes of the court.18
The key elements of the docket system are described by the Federal Court as follows:

- Cases are randomly allocated to judges. A case ordinarily stays with the same judge from commencement until disposition.
- Cases in some areas of law requiring particular expertise (including intellectual property, taxation and admiralty) are allocated to a judge who is a member of a specialist panel. Such cases are randomly allocated to members of the particular panel. This system replaces the former specialist lists.
- The docket judge makes orders about the way in which the case should be managed or prepared for hearing. The court may direct that special procedures be used, including case management conferences and referrals to mediation.
- The docket judge monitors compliance with directions, deals with interlocutory issues and ensures that hearing dates are maintained.

### 3.2 POSITION IN VICTORIA

In the Supreme Court, there are a number of specialist lists and most are judge-managed lists. However, the majority of civil proceedings in the Supreme Court are not in specialist lists. For proceedings not in specialist lists, the majority of cases are managed by masters in the Civil Management List. When cases are ready for trial, they enter the General Civil List.

The Commercial List in the Supreme Court is one list that operates on a docket system and other lists appear to be following suit. For example, the Building List has had cases docketed to individual judges from February 2008. Additionally, some lists that have not adopted a formal docket-system effectively operate one.

Pursuant to rule 34A.14, judge-managed lists have existed in the County Court since 1996. Rule 34A.14 provides:

> The Judge in charge of a list or division of a list must have control of every proceeding in the list or the division, and subject to any direction of the Chief Judge, any directions hearing or application in a proceeding must be held by or made to the Judge.

Judges are expected to manage the cases in their lists or divisions from first directions hearing until trial, and, where available, will hear interlocutory disputes concerning those cases.

However, in the Supreme Court and County Court, the lists operate differently and the processes for each of the lists vary. Practitioners need to be aware of the varying processes adopted in each list, and this can lead to confusion. County Court judges are not always available to hear interlocutory disputes in their own lists. Masters hear interlocutory disputes in some lists in the Supreme Court.

### Notes

3. Ibid.
4. Submission CP 58 (Supreme Court of Victoria).
5. Submission CP 58 (Supreme Court of Victoria).
6. ibid.
7. ibid.
8. ibid.
9. ibid.
10. ibid.
11. ibid.
12. ibid.
13. ibid.
14. ibid.
15. ibid.
16. ibid.
17. ibid.
18. ibid.
19. ibid.
20. ibid.
21. ibid.
22. ibid.
23. ibid.
24. ibid.
25. ibid.
26. ibid.
27. ibid.
28. ibid.
29. ibid.
30. ibid.
31. ibid.
32. ibid.
33. ibid.
34. ibid.
35. ibid.
36. ibid.
37. ibid.
38. ibid.
39. ibid.
40. ibid.
41. ibid.
42. ibid.
43. ibid.
44. ibid.
45. ibid.
46. ibid.
47. ibid.
48. ibid.
49. ibid.
50. ibid.
51. ibid.
52. ibid.
53. ibid.
54. ibid.
55. ibid.
56. ibid.
57. ibid.
58. ibid.
59. ibid.
60. ibid.
61. ibid.
62. ibid.
63. ibid.
64. ibid.
65. ibid.
66. ibid.
67. ibid.
68. ibid.
69. ibid.
70. ibid.
71. ibid.
72. ibid.
73. ibid.
74. ibid.
75. ibid.
76. ibid.
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80. ibid.
81. ibid.
82. ibid.
83. ibid.
84. ibid.
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97. ibid.
98. ibid.
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100. ibid.
101. ibid.
102. ibid.
103. ibid.
104. ibid.
105. ibid.
106. ibid.
107. ibid.
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110. ibid.
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112. ibid.
113. ibid.
114. ibid.
115. ibid.
116. ibid.
117. ibid.
118. ibid.
119. ibid.
120. ibid.
121. ibid.
122. ibid.
123. ibid.
124. ibid.
125. ibid.
126. ibid.
127. ibid.
128. ibid.
129. ibid.
130. ibid.
131. ibid.
132. ibid.
133. ibid.
134. ibid.
135. ibid.
136. ibid.
137. ibid.
138. ibid.
139. ibid.
140. ibid.
141. ibid.
142. ibid.
143. ibid.
144. ibid.
145. ibid.
146. ibid.
147. ibid.
148. ibid.
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151. ibid.
152. ibid.
153. ibid.
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156. ibid.
157. ibid.
158. ibid.
159. ibid.
160. ibid.
161. ibid.
162. ibid.
163. ibid.
164. ibid.
165. ibid.
166. ibid.
167. ibid.
168. ibid.
169. ibid.
170. ibid.
171. ibid.
172. ibid.
173. ibid.
174. ibid.
175. ibid.
176. ibid.
177. ibid.
178. ibid.
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186. ibid.
187. ibid.
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281. ibid.
282. ibid.
283. ibid.
284. ibid.
285. ibid.
286. ibid.
287. ibid.
288. ibid.
289. ibid.
290. ibid.
291. ibid.
292. ibid.
293. ibid.
The Magistrates’ Court rarely adopts a docket system because its cases are less complex.30

3.3 OTHER MODELS

Federal Court

The docket system implemented in the Federal Court is described above.

Family Court

The Family Court is introducing a new docket listing system in 2008.31 A committee has been formed to develop a new case management pathway and docket model.32 The model has been designed and consultation with the profession is underway. It is expected that during the 2007–8 financial year, the new case management system will commence. The court already has a series of judicial dockets, which is likely to expand given the substantial increase in the number of children’s cases in recent years.33

Federal Magistrates Court

The Federal Magistrates Court operates a docket system.34

3.4 ARGUMENTS FOR AND AGAINST A DOCKET SYSTEM

The Federal Court has identified the following benefits of an individual docket system:

- savings in time and cost resulting from the docket judge’s familiarity with the case: in particular, the system seeks to eliminate the necessity to explain the case afresh each time it comes before a judge
- consistency of approach throughout the case’s history
- fewer management events with greater results: in particular, the system aims at reducing the number of directions hearings and other events requiring appearances before the court
- discouragement of interlocutory disputes or, alternatively, swift resolution of those disputes
- better identification of cases suitable for alternative dispute resolution
- earlier settlement of disputes or, failing that, a narrowing of the issues and a consequent saving of court time
- early fixing of trial dates and maintenance of those dates.35

Justice Byrne of the Supreme Court has commented on the new docket system in the Building List as follows:

This will have the consequence that the judge will commence the trial having had an intimate knowledge of the progress of the litigation and a consequent ability to identify the positions of the parties before the trial commences.36

The Family Court has identified similar benefits,37 as did TurksLegal and AXA in their submission.38 Sallmann and Wright proposed that individual calendaring may have some important advantages over the systems then operated by the Supreme and County Courts of Victoria. They suggested that careful consideration be given to its adoption and, in this regard, referred to two studies which found that individual docket systems disposed of court cases substantially faster than ‘master calendar’ systems. Sallman and Wright were also impressed with the enthusiasm of the Federal Court judges for their docket system. Also, numerous litigation lawyers urged them to support adoption of the scheme.39 Other commentators have raised concerns regarding docket systems. They suggest that individual case management by judges, such as in an individual docket system, may be very labour intensive and consequently costly.40 An empirical survey of the individual docket system in the United States Federal Court, conducted by the Rand Institute for Civil Justice, found that while it appeared to reduce delay, it did not reduce costs. In fact it seemed to have increased costs.41 Davies suggests that most individual docket systems are administered in a way that makes them too labour intensive for the early stages of most cases and for other than complex cases. In his view:

Case management must be proportionate to the size and complexity, and consequently to the cost, otherwise, of a resolution of a dispute.42

Justice Sackville has raised similar concerns and commented that there has not yet been any systematic research designed to ascertain whether the Federal Court’s docket system has materially reduced the costs and improved disposition rates in the court.43
Despite these concerns, Davies has suggested that it is wrong to delay reform until it is justified by empirical research. If we did that, he says, ‘I think that there would never be any worthwhile reform’.44

3.5 SUBMISSIONS

A number of the submissions, particularly from the profession, were supportive of a docket system.45 For example, in response to the Consultation Paper, TurksLegal, AXA, the Bar Council of Victoria, Slater & Gordon, Victoria Legal Aid, the Transport Accident Commission, the Law Institute of Victoria, the Group submission and Travis Mitchell all expressed support for a docket system. General support was also expressed by Clayton Utz and QBE Insurance Group in their responses to the Exposure Drafts released by the commission.

The Legal Practitioners’ Liability Committee considered that in particularly complex cases, a ‘docket judge’ should be appointed.46 The Bar contended that the docket system should be expanded and that sufficient judicial resources should be made available for the Supreme and County Courts to administer such a system.47 The Bar, Mallesons Stephen Jaques and Maurice Blackburn considered that if there were resource issues, more complex cases would be suited to a docket system.48 Slater & Gordon’s view was that while additional resources may be required initially, there is clear evidence from the Federal Court that a docket system has the potential to reduce costs.49

Corrs Chambers Westgarth commented:

Docket judge management of interlocutory processes will result in positive behaviour changes by opposing litigants. The real sanction that underpins the success of the docket judge system is the effect it has on the litigant’s behaviours because of the sanction that the docket judge will ordinarily preside at trial and streamlining the pre-trial process.50

The Law Institute supported a docket system similar to that in the Federal Court— noting, however, that it may not be appropriate in jury trials.51

There was some resistance to the proposal from the courts. Some of the Supreme Court judges felt that all cases are not suitable for a docket system. There was some resistance to the proposal from the courts. Some of the Supreme Court judges felt that all cases are not suitable for a docket system. However, other judges recognised that not all cases go back before the same judge and that this could be a problem.52 Some judges also considered that a docket system may be good for practitioners ‘but it is not good for the courts’. Apart from the need for judicial resources to manage cases there may be difficulties in re-allocating work where matters settle close to a trial date.53

30  The court’s view is that a docket system only works in courts that have small numbers of complex cases: submission CP 55 (Magistrates’ Court).

31  Law Council of Australia ‘Law Council Project to Encourage Family Law Dispute Resolution’ (Press Release 14 November 2007), and consultation with Maureen Schull, Director Family Law Section, Law Council of Australia (5 December 2007).


33  Bryant (2006) above n 32.


38  Submission ED1 22 (TurksLegal and AXA).


41  ibid; see also Davies, ‘Managing the Work of the Courts’ (Paper presented at the Australian Institute for Judicial Administration Asia-Pacific Courts Conference ‘Managing Change’, Sydney, 22–24 August 1997) 9 in which Davies also suggests that, given that Australia’s case management schemes are largely derived from the United States, Rand’s research should not be ignored.


44  Davies (1997) above n 41, 7. His view is that ‘we do not have the time or the money to delay implementation of what appear to be worthwhile reforms until adequate research and analysis have been done’. On the other hand, he says, it is important to monitor and evaluate reforms as they are being implemented.

45  Submissions CP 41 (TurksLegal and AXA); CP 33 (Victoria Bar); CP 20 (Slater & Gordon); ED2 10 (Victoria Legal Aid); submission CP 37 (Transport Accident Commission); submission CP 18 (Law Institute of Victoria); CP 47 (the Group Submission); CP 4 (Travis Mitchell); CP 21 (Legal Practitioners’ Liability Committee); ED1 18 (Clayton Utz); and ED2 17 (QBE Insurance Group).

46  Submission CP 21 (Legal Practitioners’ Liability Committee). Submission ED2 19 (Maurice Blackburn) considered that the lack of and individual docket system ‘is one of the main reasons why most class action litigation is conducted in the Federal Court rather than the Victorian Supreme Court’.

47  Submission CP 33 (Victoria Bar).

48  Submissions CP 33 (Victoria Bar); CP 49 (Maurice Blackburn); CP 7 (Maurice Blackburn).

49  Submission CP 20 (Slater & Gordon).

50  Submission CP 42 (Confidential submission, Corrs Chambers Westgarth, permission to quote granted 14 January 2008).

51  Submission CP 18 (Law Institute of Victoria).

52  Consultation with the Supreme Court of Victoria (9 October 2007).

53  Consultation with the Supreme Court (9 October 2007).

54  Consultation with the Supreme Court (9 October 2007).
Judge Wodak of the County Court considered that the use of individual dockets is unlikely to be compatible with the current system of rostering. He also advised that many judges are unfamiliar with and have little or no experience of case or list management. ‘Such Judges, and their Associates would need to acquire skills in these areas.’

The Magistrates’ Court considered that a docket system would not be suitable in that court because it has a large number of less complex cases and it would be too demanding on the resources of the court.

The Institute and TurksLegal and AXA noted the potential need for additional resources to implement a docket system. Although this is a valid concern, as noted above, the commission’s view is that the cumulative impact of the other recommendations in this report will result in a significant decrease in the existing volume of cases.

Crown Counsel noted in his review that the Supreme Court has effectively used masters in specialist case management roles and that this has facilitated the efficient disposition of cases within the various specialist court lists. We are of the view that any expansion of the individual docket system should encompass the involvement of masters. Additional judicial resources may not be required.

In the course of considering the desirability of an expansion of the individual docket system a number of additional problems were identified. These include the following:

- There is a need to achieve equity in the distribution of workload among judges in a system in which each case is counted as a single unit.
- If some judges are inefficient at managing their dockets, more efficient judges may have to compensate by taking over cases from less efficient judges.
- Integrated Court Management System (ICMS) may require modification to support a docket system.

3.6 CONCLUSIONS AND RECOMMENDATIONS

Despite the concerns raised, the commission considers that an expanded docket system, similar to the Federal Court’s system, would have many benefits, including savings in time and costs resulting from greater judicial familiarity with cases before trial. In our view, the docket system should be expanded in the Supreme and County Courts and possibly used in more complex, higher value claims in the Magistrates’ Court.

Any such system will obviously need to take into account the variability in the size and complexity of cases. In smaller, less complex cases, the aim should be to ensure that there are not excessive case management hearings.

The commission is of the view that the method of implementing a docket system should be determined by the courts. The Chief Justice in the Supreme Court, the Chief Judge in the County Court and the (proposed) Civil Justice Council should monitor and evaluate any changes. Insofar as there is any change in the Magistrates’ Court the Chief Magistrate should be involved in the process of review and evaluation.

However, we note that there is a large number of resource and practical issues which need to be taken into account in implementing a docket system in the courts under review. Accordingly, we consider that a consultant or consultants could be engaged to assist the courts in determining how a docket system could be implemented in the County and Supreme Courts. When considering a docket system, the Federal Court engaged a United States expert, Maureen Solomon, to review case listing, processing and management in the court.

The proposed Civil Justice Council should be responsible for ongoing monitoring and evaluation of an individual docket system, if implemented. This should encompass an examination of the impact of any changes on, inter alia: (a) the resources required to be allocated by the courts, (b) the rate at which cases are disposed of and (c) the costs incurred by the parties.
4. ACTIVE JUDICIAL CASE MANAGEMENT

4.1 ACTIVE CASE MANAGEMENT

4.1.1 The problem

One objective of active case management is to encourage and require the parties, their lawyers and those funding the litigation to limit the issues in dispute. The courts have an obligation to control proceedings but it is also up to the parties to not take unnecessary steps or burden the court with superfluous documents or applications. The courts are and have been actively managing cases for many years. The courts have inherent jurisdiction to manage cases and do not necessarily need court rules to do so. Notwithstanding this, there is a case for more clearly delineated, explicit powers to actively case manage. This will assist the courts and the lawyers, parties and funders to turn their minds to the real issues in dispute and the most efficient means of resolving those issues.

4.1.2 Position in Victoria

Active judicial case management is also referred to as ‘managerial judging’. The proactive judicial management by individual judges of individual cases is one aspect of this process. Another equally important aspect is the systems used by the courts for the control of the overall caseload of the court. Such systems encompass not only the mechanisms for the assignment and control of cases by judges, but also computerised and other methods of tracking the status and progress of cases. Managerial judging and case management seek to shift the balance towards judicial rather than lawyer or party control of litigation. Apart from controlling interlocutory steps necessary to prepare the matter for trial, judges can also act in a ‘facilitative’ rather than an adjudicative manner, by encouraging the parties to settle their dispute or to narrow the issues required to be tried.

As noted above, the Supreme Court and the County Court have been actively managing cases for many years. One of the features of the recently announced ‘new approach’ in the Building Cases List in the Supreme Court is that: ‘Judges will be more active and pro-active in exercising their powers in order to seek to achieve a just resolution of building disputes in a speedy and efficient manner.’ According to the Magistrates’ Court, until the recent advent of judicial registrars, the Magistrates’ Court lacked the resources to engage in active case management. This will assist the courts and the lawyers, parties and funders to turn their minds to the real issues in dispute and the most efficient means of resolving those issues.

Pursuant to rule 1.22(2), active case management includes—

(a) encouraging the parties to cooperate with each other in the conduct of proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and a hearing, and accordingly disposing summarily of the others;
(d) deciding the order in which the issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as can on the same occasion;
(j) dealing with the case without the parties needing to attend court;
(k) making use of technology;
(l) giving directions to ensure that the hearing of a case proceeds quickly and efficiently;
(m) limiting the time for the hearing or other part of a case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness.

55 Submission ED2 5 (Judge Tom Wodak). This is a valid point; however, we consider there may be ways around this problem: for instance, the court could contact the solicitors involved in other matters and determine whether their matter might be ready for trial or able to be made ready for trial quickly.
56 Submission ED2 5 (Judge Tom Wodak).
57 Submission CP 55 (Magistrates’ Court of Victoria).
58 Submissions CP 41 (TurksLegal and AXA) and ED2 16 (Law Institute of Victoria).
59 See, in particular, recommendations a to pre-action protocols, alternative dispute resolution, overriding obligations and overriding purpose, and summary judgment.
61 Submission ED2 5 (Judge Tom Wodak).
63 An ‘administrative mention notice’ as currently used in the County Court, or something similar, could be adopted to limit the number of hearings required: See discussion of telephone directions hearings later in this chapter.
64 Following Maureen Solomon’s review (which recommended the adoption of a docket system), the Federal Court set up various committees to develop court procedures to enable the introduction of a docket system. A pilot was subsequently established in the Melbourne Registry, after which the docket system was introduced across all registries: Sage et al (2002) above n 10, 3 and 8. See also Australian Law Reform Commission, Review of the Federal Civil Justice System: Discussion Paper No 62 (1999), [9.1].
67 Submission CP 30 (Magistrates’ Court).
68 Magistrates’ Court Civil Procedure Rules 1999 rr 1.19–1.22.
This rule is based on rule 1.4 of the UK Civil Procedure Rules (1998). There is no equivalent provision to this rule in the Supreme or County Court Rules.

4.1.3 Other models

Australia

The Federal Court

The Federal Court is seen to be actively managing cases as part of its docket system. Active judicial case management is a fundamental part of the docket system.

New South Wales

As discussed in Chapter 3, in NSW provisions relating to case management are now embodied in the Civil Procedure Act 2005 (NSW). According to Justice Hamilton:

This is both to mark their central importance in modern procedure and to ensure that no argument can be raised that a case management procedure or sanction is beyond rule maker power.

The Family Court

Division 12A of the Family Law Act 1975 came into effect in 2006. It gives three clear directives to judges. They are to actively control, direct and manage court proceedings; those proceedings are to be conducted in a way that promotes cooperation between the parties (specifically, child-focused, shared parenting); and they are to be conducted without undue delay, with as little formality, and with as little legal technicality, as possible. Judges may also speak directly to children during proceedings, though not as witnesses.

This approach was developed for a number of reasons, one of which was the pressure caused by the increase in the number of self-represented litigants in the past decade. Of particular note is section 69ZN of the Family Law Act 1975, which sets out the principles for conducting child-related proceedings. The second principle provides that:

The court is to actively direct, control and manage the conduct of the proceedings.

Court-conducted mediation and case conferences

Court-conducted mediation and case conferences conducted by court officers are also seen as part of active case management. Chapter 4 of this report deals in detail with alternative dispute resolution, including court-conducted mediation in Australia. Case conferences are discussed further below.

Overseas

United Kingdom

As discussed in Chapter 1, in his review of the civil justice system in England and Wales, Lord Woolf concluded that an unacceptable situation had arisen out of ‘unmanaged adversarial procedure’. In his view, active judicial management of cases was necessary in order to assist in achieving the stated objectives of improved access to justice through the reduction of inequalities, cost, delay and complexity and to introduce greater certainty as to timescales and costs. The Civil Procedure Rules (UK) emphasise active case management.

United States

Commentators suggest that the United States has been leading the way in active judicial management. The Civil Justice Reform Act 1990 introduced mandatory case management and ADR in the Federal Court.

Continental Europe and Japan

There is a culture of managerial judging in continental Europe and Japan is also moving in this direction. Obviously in systems where courts take a more ‘inquisitorial’ approach to investigation and fact finding, this will result in more proactive judicial control of the proceedings. Professor Zuckerman’s comparative review of common law and civil code countries is discussed below.
Arguments for active case management

One benefit of active case management is that the court and the parties share the responsibility for managing cases efficiently. One fundamental difference between the continental European models of civil litigation and the Anglo-Australian model is that in some European models judges are more involved in investigating and ascertaining the facts. The commission is not presently considering the substitution of an ‘inquisitorial’ alternative for the ‘adversarial’ model of conducting civil litigation. However, as a number of commentators have observed, there appears to be an ongoing evolutionary convergence of these models.80

In the introduction to his comparative review of civil justice systems in both civil code and common law jurisdictions, Professor Zuckerman identified that:

The clearest trend emerging from the different national accounts is a general tendency towards judicial control of the civil process. Both common law countries and civil law countries display a shift towards the imposition of a stronger control by judges over the progress of civil litigation. In virtually all the systems reviewed here there is a perception that, when the process of litigation is left to the parties and their lawyers, its progress is impeded by narrow self-interest … the disruptive self-interest of parties and their lawyers can only be kept at bay by an active judiciary that directs the litigation process and is able to prevent disruptive tactics.81

Other commentators have noted that if left to their own devices, parties will behave in inefficient ways.82 One study found that litigant costs were contained in the Victorian County Court due to the active involvement of the judge in the development of cases, particularly in controlling the use of discovery and interrogatories:83

Active judicial management techniques are seen to reduce case preparation time by enabling judges to control the progress of cases, curb abuses of court processes and encourage both settlement and alternative modes of dispute resolution.84

Sir Anthony Mason has commented on the future role of judges as follows:

The likelihood is that the trial judge will become more of a manager of the trial, while he or she continues to be the umpire.85

Sir Laurence Street has commented:

Should we not recognise the justification for extending the authority of judges in the actual course of the conduct of litigation? Waste of time on irrelevancies and repetition—whether flowing from incompetent advocacy or deliberate tactical manoeuvring—is by no means uncommon. Our resources simply cannot afford that. Why should judges not be given express power to control length and subject matter of the various aspects of the hearing both in addresses and in evidence.86

Justice Ipp has written:

Litigation has grown both in complexity and in quantity of cases. The load on judges has increased unreasonably. Governments have failed to provide resources to deal with this major accretion of demand for court services. Judges have to cope with these changed circumstances. Accordingly, there is a need to shorten trial time, save costs and maximise earlier settlements. The concentration of effort from the judiciary has been to examine the economics of litigation and improve efficiency in despatching cases through the system. The justification for this is the real injustice to those would be litigants waiting in the wings.87

Other arguments in favour of active case management include the following:

• It addresses the economic reality that court resources are limited. More judicial rather than party control of litigation is required in the interests of the administration of justice as a whole, that is, those litigants queuing outside, as well as those litigating inside the door of the courtroom.88
Judges have always made discretionary decisions that are not based on clearly defined standards or rules but are made ‘in the interests of justice’. The novel aspect of managerial judging is simply that these decisions may also take court resources into account. Judges make discretionary decisions that are not based on clearly defined standards or rules but are made ‘in the interests of justice’. The novel aspect of managerial judging is simply that these decisions may also take court resources into account. It takes place in open court with a complete transcript and there are adequate appellate procedures; these constitute reasonable safeguards against judicial error or misconduct.

Arguments against active case management

The ALRC in its Issues Paper identified the following arguments against active case management:

- It increases the power of judges and expands the opportunities for judges to use or abuse their powers, particularly in a context where standards and rules are still being devised.
- It threatens the impartiality of judges. Judicial intervention is said to increase the opportunities for judges to be unduly influenced or against a party through frequent close contact between judges and lawyers and the extensive information provided to judges during pre-trial hearings.
- There can be a lack of accountability for decisions made during pre-trial case management. Judicial intervention may have the effect of forcing parties to abandon lines of argument before they have had the opportunity to fully explore their merits and the scope for these decisions to be reviewed is limited.
- It may result in the existing system of justice being replaced with a lower quality system of justice, albeit one that is cheaper and quicker. The concern is that case processing may become an end in itself, rather than the means of achieving justice, with the managerial focus on speeding up the process rather than on improving the quality of decisions.

The courts’ powers to make orders to control proceedings are not in dispute. However, there are arguments over the weight which court efficiency and case management factors should be given in making these decisions. Case management may be undermined by appeal courts which overturn lower court rulings. In State of Queensland and Another v J L Holdings Pty Ltd, the High Court said:

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

Although the High Court rejected the idea that case management considerations can be a sole or pre-eminent consideration, the court recognised case management as an established feature of contemporary court practice. The weight given to case management considerations, however, has been limited by the High Court in J L Holdings. In consultation with the commission Chief Justice Warren commented that parties all too often attempt to exploit this authority and judges and masters often feel their hands are tied. The Chief Justice recommended that legislative recognition of case management considerations would allow this factor to be given due weight and allow judicial officers to make difficult case decisions with greater confidence.

The commission considered these issues in some detail. To address this problem, the commission has made various recommendations which are discussed above in paragraphs 2.1 ‘judicial power’ and paragraph 2.2 ‘rule-making power’

There is also some evidence that the courts are beginning to take a different view of the High Court’s decision in J L Holdings. In a recent decision in the Federal Court, Justice Finkelstein said of J L Holdings:

The High Court ruled that case management, while a relevant consideration, does not trump justice to the parties. A close reading of J L Holdings shows that the High Court was confining its comments to the case where costs would provide full compensation to the opposite party. However, J L Holdings has been applied in many cases where a simple costs order will not do justice between the parties. The case has, in my view, unfairly hamstrung courts. Almost every day a defaulting party seeks the court’s indulgence to extend time, amend documents or obtain some other allowance (often not for the first, second or third time) and successfully relies on J L Holdings to obtain relief.
It is time that this approach is revisited, especially when the case involves significant commercial litigation. One of the primary objects of a commercial court is to bring the litigants’ dispute on for trial as soon as can reasonably and fairly be done. If, in some instances, the preparation of the case is not perfect so be it. A case that is reasonably well prepared is just as likely to be decided correctly as a perfectly prepared case.

I am of the firm view that parties should not be treated as leniently as they have been in the past. Commercial parties expect this approach from the courts and their expectation should be met. A useful rule to adopt is to allow an extension only if the failure to meet the existing timetable is the result of excusable non-compliance. In deciding whether there is excusable non-compliance the court should take into account, among other factors: (a) the direct and indirect prejudice to the opposing party; (b) the impact of the delay on the proceedings; (c) the reasons for the delay; (d) good faith or lack of good faith on the part of the party seeking to be excused; and (e) the effect of putting off a trial both on other litigants and generally on the court’s ability to efficiently manage its cases.96

Some concerns have been raised about the extent to which certain provisions, procedures and orders in respect of ‘case management’, including active case management, may impact on the right to a fair trial at common law and under the Charter.

Other concerns relate to increased costs due to increased judicial involvement.

4.1.5 Submissions

There was significant support for active judicial case management and the docket system in the submissions.97 According to the Group submission:

[Experience suggests that those proceedings which are more actively case managed by judicial officers tend to proceed though the court system more quickly and to have the issues in dispute distilled more effectively and efficiently.98]

Mallesons Stephen Jaques’ view was that judicial case management is useful because the judge retains discretion to impose sanctions in appropriate circumstances.99 Judge Wodak, State Trustees, QBE Insurance and Victoria Legal Aid expressed general support for the proposal. State Trustees considered that active case management promotes the faster disposition of matters.100 The Law Institute held a similar view and endorsed the County Court’s Medical List.101

Commercial litigation funder IMF supported the introduction and extension of all the case management activities noted in the English context, including active case management.102 Maurice Blackburn considered that stronger case management is vital particularly in large complex cases such as class actions:

Causing delay and cost has become an art form for many large defendants that would prefer to try to exhaust their opponent rather than deal with the merits of a claim. The courts must be more vigilant to protect claimants through active judicial management.103

The Magistrates’ Court submission identified that its active case management provision gives the court power, amongst other things, to limit the time for the hearing or other part of the case. However, it was noted that this may be ultra vires.104 The court stated that “if the power to set such limits is considered appropriate, the ability of the Court to make such orders should be put beyond doubt by legislation”.105

A further confidential submission supported the approach to active case management reflected in the Civil Procedure Rules in force in England and Wales.106

The Bar was particularly critical of delay in the current civil justice system and contended that inefficiency is leading to the loss of significant commercial work to other jurisdictions, in particular to NSW and the Federal Court. It argued that delay impacts on individuals and corporations who are unable to enforce their private rights and reduces legal expertise, which impairs the quality of justice.107

89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid.
93 (1997) 141 ALR 353.
96 Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd [2007] FCA 1623 [5].
97 Submissions CP 41 (TurksLegal and AXA); CP 33 (Vicotorian Bar); CP 20 (Slater & Gordon); ED 12 (Victoria Legal Aid); CP 37 (Transport Accident Commission); CP 18 (Law Institute of Victoria); CP 4 (Travis Mitchell); CP 21 (Legal Practitioners’ Liability Committee); CP 39 (Building Practitioners’ Society); CP 49 Mallesons Stephen Jaques; CP 42 (Chambers Westgarth, permission to quote 14 January, 2008).
98 Submission CP 47 (the Group Submission).
99 Submission CP 49 (Mallesons Stephen Jaques). In their submission, Mallesons expressed the view that “there is a place for sanctions in case management, but only as a range of options available to the court to apply in particular cases, without being imposed automatically on the defaulting party”.
100 Submission ED 27 (State Trustees Limited).
101 Submission CP 18 (Law Institute of Victoria).
102 Submission CP 57 (IMF (Australia) Ltd).
103 Submission ED 29 (Maurice Blackburn).
104 See discussion of Magistrates’ Court Civil Procedure Rules 1999 rr 1:19–1:22 above.
105 Submission CP 55 (Magistrates’ Court).
106 Confidential submission ED 2 (permission to quote granted 17 January 2008).
107 Submission CP 62 (Vicotorian Bar).
The Bar called for robust and effective case management reforms. It recommended ‘end-to-end’ case management comprising:

1. The streaming of work between and within courts

   The Bar referred to the Woolf approach of assigning cases to ‘tracks’ according to the nature of the case and the amount in dispute. It acknowledged the Supreme Court’s move to specialised lists and suggested that further reform should incorporate a streaming model with three elements:

   a) the allocation of cases to an appropriate court. Due to the expansion of the County Court’s jurisdiction, the Bar contended that ‘an opportunity exists for the Supreme and County Courts to develop differentiated specialisations and case-management offerings to enable a “streaming of cases” between courts’. It suggested that this approach would require the courts in conjunction with the government to adopt an integrated strategic view of the ‘types of matters and case management processes they feel best deliver justice given their respective roles in the court system’.

   b) highly complex matters should be managed using high-contact processes that are active and intensive (eg a docket system) whereas cases of medium complexity could be managed with a ‘front-end’ case management judge and cases of less complexity could be managed through simpler lower-contact case management processes.

   c) the streaming of cases to judges expert in the area of the dispute. The Bar noted that there was room to improve the effectiveness of this process in the Supreme Court by reducing the rotation of judges between Divisions and developing panels with expertise in specialist areas within the Divisions.

2. The front loading of issue definition and resolution

   The Bar observed that an effective case management system must include mechanisms for getting to an early understanding of a case. By way of example it referred to the ‘scheduling conferences’ in the Federal Court’s Fast Track list. Where a scheduling conference mechanism was not appropriate or effective the Bar suggested that a pre-trial case manager should actively encourage the parties to resolve non-contentious issues prior to trial.

3. Active management of core issues and processes at trial

   The Bar advocated judicial control over proceedings to focus parties on core issues and to intervene where parties lost that focus. The Bar provided examples of intervention to refuse an adjournment on the grounds of further discovery or non-essential witness unavailability, limiting the use of witness statements to non-contentious issues, or controlling the length of submissions made in court. Importantly, the Bar called for a single judge or teams of judges to be accountable for the entire end-to-end management of a case.

   The Bar also called for the urgent implementation of processes to track and analyse the throughput of cases under a reformed process.108

Other comments made in the submissions include the following:

- Judge Wodak considered that Order 34A.19 and Order 47.06 of the County Court Rules109 could be improved, but that they still offer a significant degree of judicial case management before and at trial.110

- IMF suggested that the identification and assessment of the litigation risks should be conducted at the earliest possible stage of the process and judges should be actively involved in this process.111
There were no submissions in opposition to the proposed expansion of the docketing system. However, the commission notes the comments of Justice Hayne, who recently expressed concern regarding the dangers of over-management of the litigation process: ‘If cases are settling because they are managed to the point of the parties’ exhaustion, the system has failed them.’

4.1.6 Conclusions and recommendation

Despite the concerns raised by commentators, the commission is of the view that more active judicial case management is desirable. This will help ensure that the courts and the parties share control of the proceedings. The court has a legitimate interest in ensuring that a proceeding, including the trial itself, is not left in the parties’ hands, but is conducted efficiently and expeditiously in the interests of justice. We therefore support the introduction of an explicit ‘active case management’ statutory provision. Inclusion of an active case management provision in Victorian legislation (and/or rules) will ‘mark their central importance in modern procedure’ and help ‘to ensure that no argument can be raised that a case management procedure or sanction is beyond rule maker power’.

4.2 POWER TO CALL WITNESSES

4.2.1 The problem

The proposal to give the court explicit power to call witnesses, without the parties’ consent, is controversial. There appear to be divisions in judicial opinion as to whether such power exists for civil proceedings at present. There are also divided judicial views about whether and when to exercise any such power. The commission sought submissions and comments on the draft proposal. Strong arguments for and against were received. The commission is also mindful that if such a power is considered appropriate, there are ancillary issues to be considered, including the mechanisms by which any additional witnesses would be called to give evidence.

On balance, the commission is of the view that there should be an express provision for judges to be able to require certain persons to be called to give evidence whether or not the parties consent. Any such power might be exercised in respect of parties, witnesses as to events and experts on matters relevant to the proceedings. However, the exercise of judicial discretion to call a person to give evidence when the parties have chosen not to call that person gives rise to quite distinct policy and practical considerations.

Such a power would only be likely to be used when there is no other reasonably practicable alternative means of achieving justice between the parties. We consider the conferment of such an express power would not necessarily involve any major shift from the court’s role as independent arbiter in an ‘adversarial’ dispute (where it can draw adverse inferences from the failure of a party to call a witness) to one of an ‘inquisitorial’ nature. In the vast majority of cases the parties are likely to remain primarily if not exclusively responsible for determining who will be called to give evidence, subject to the overriding management powers of the court to limit unnecessary or repetitive evidence.

4.2.2 Position in Victoria

There is no express statutory provision empowering Victorian courts to call witnesses in a civil proceeding, without the parties’ consent.

Common law

There seems little scope for doubt that courts presently have the power to call witnesses in civil proceedings, with the parties’ consent. More controversial is the calling of witnesses by the court without the parties’ consent or over the objection of one party. Judicial opinion appears to be divided on whether in a civil trial the presiding judge may call a witness without the consent of the parties. There is authority that in civil cases a judge may not call a witness without the consent of both parties. It has been said that a judge may direct a party to call additional evidence (though this is to be doubted, or limited to the particular instance of an official...
assignee in bankruptcy), but that the preferable course is to suggest to the appropriate party that they apply for leave to reopen their case.116 Under some rules of court, judges are given power to call witnesses of their own motion.117

In the Federal Court case of Obacelo Pty Ltd v Tavercraft Pty Ltd118 (Obacelo), Justice Wilcox considered that the judge in a civil case, similar to the judge in a criminal case, had the power to call a witness without the consent of all parties. He said, however, that the discretion to use this power should be exercised sparingly and with great care.119 Justice Wilcox also noted judicial concerns that the power should not be exercised to call a witness that neither party wished to give evidence because the court would be assuming the conduct of the case.120 He also said that counsel could cross-examine as of right if a judge called a witness to give evidence.121 In that case, one of the parties asked the court to call a witness. As Justice Wilcox noted:

It not uncommonly happens that a person is in a position to give a Court material evidence yet no party wishes to call that witness. A party calling a witness suffers the disadvantage of being burdened, without the opportunity to challenge it by cross-examination, with such part of the evidence of that witness as assists the opponent’s case while being forced to suffer cross-examination by the opponent on that part of the evidence which assists his or her own case. A dilemma whether or not to call a particular witness may arise in a variety of situations.122

As Justice Wilcox proceeded to note, many of the cases dealing with the power of the court to call witnesses are criminal cases where the observations in respect of civil trials were obiter.123 In the case before him, although holding that he had power to call a witness, in the exercise of his discretion he declined to do so.

In a Victorian custody case Justice Barry doubted whether earlier decisions were binding authority that a judge has no power to call a witness where this was necessary for the attainment of justice, and suggested that such decisions may turn, not on the existence of the power, but on the occasion and manner of its exercise.124 In Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd,125 Justice Powell concluded that until a higher court decides otherwise or the position is changed by statute, a trial judge in a civil trial may not call or examine a witness on their own motion except by consent of the parties or in the absence of objection.126

In the criminal law context the High Court has determined that there is judicial discretion to call a witness not called by the parties but that this should only be exercised in exceptional circumstances.127

The potential impact of the Uniform Evidence Act

The Uniform Evidence Act is not yet in operation in Victoria. However, it is anticipated that it will be in force from 2009. It may impact on this proposal. Section 11 of the uniform evidence legislation preserves the common law powers the judge holds in respect of the examination of witnesses. Section 11 relevantly provides:

The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

There is longstanding recognition of judges’ power to control the conduct of proceedings in their own court. Section 11 entrenches this power (and duty).128 Commentators suggest that the court ‘may call a witness in appropriate circumstances given the court’s general power to control proceedings pursuant to this section’.129

Section 26 may also be relevant. It gives a very general power to the court to make orders concerning the way witnesses are to be questioned. Section 26 provides:

The court may make such orders as it considers just in relation to:

(a) the way in which witnesses are to be questioned; and

(b) the production and use of documents and things in connection with the questioning of witnesses; and

(c) the order in which parties may question a witness; and

(d) the presence and behaviour of any person in connection with the questioning of witnesses.
There is some indication that section 26 may enable a judge in civil proceedings to call a person as the court’s own witness.130 However, this is a very broad interpretation of the provision, which seems to be limited in its application as to what to happen in respect of witnesses after they have been called.131

Commentators have noted that there is a traditional presumption that only parties call evidence, though challenges to adversarial precepts and an increase in judicial activism suggest this may change.132

4.2.3 Other models

Family Court

As discussed above, Section 69ZN of the Family Law Act 1975 sets out the principles for conducting child-related proceedings.133 The court’s general duties and powers relating to evidence are listed. Pursuant to section 69X(1), in giving effect to the principles in section 69ZN, the court may:

(e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.

Section 69ZP provides that the court may exercise a power under Division 12A on the court’s own initiative or at the request of one or more of the parties to the proceedings. Rule 15.71 of the Family Law Rules also relevantly provides:

Court may call evidence

(1) The court may, on its own initiative:

(a) call any person as a witness; and

(b) make any orders relating to examination and cross-examination of that witness.

Queensland

Under the Uniform Civil Procedure Rules 1999, the court may call evidence of its own motion. Section 391 relevantly provides:

Court may call evidence

(1) The court may, by order and on its own initiative, call a person before it as a witness in a proceeding.

(2) The court may give the directions about examination, cross-examination and re-examination of the person the court considers appropriate.

Similar provisions are found in legislation governing the Administrative Appeals Tribunal134 and the NSW Administrative Decisions Tribunal.135

4.2.4 Arguments for and against the power to call witnesses

Arguments in favour of judicial discretion to call witnesses

Justice Ipp has suggested that although the right of a trial judge to call a witness of their own motion is highly qualified, it exists in civil cases.136 Justice Ipp notes that:

Some countries take the view that it is morally necessary that the State should concern itself not only with the decision of a case according to the evidence, but with arriving at a right decision even if the parties themselves do not choose to place the relevant material before the court. It is of course not possible to find the truth if the investigation is left to the parties themselves.137

Another commentator has suggested that:

There should be a general enactment to the effect that it is the responsibility of the judge to take steps to ensure that cases are correctly decided and accordingly that the judge is entitled to intervene if [he or she] thinks the case is being conducted in such a way as to lead to an unjust decision; to require a particular witness to be called; or to ask questions of the witnesses beyond his present restricted role of clearing up ambiguities in evidence.138
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In Bassett v Host, Justice Hope echoed these views. Justice Mahoney concluded that a trial judge had the right and duty “to use [his or her] influence to see that the court has before it the evidence for the proper determination of the issues.”

On the one hand, the adversarial system is based on the neutrality of the trial judge and this necessarily limits the degree to which a judge can intervene to help parties, including unrepresented litigants. However, as a number of commentators have pointed out, the judiciary also has an obligation to ensure that proceedings are conducted fairly and may be required to intervene to aid an unrepresented party.

The ARLC has pointed out that a judge has a responsibility to ensure that proceedings are fair, and suggested that this responsibility means that, in some circumstances, there is a judicial right and obligation to intervene, both for the benefit of an unrepresented party and more generally. Justice Ipp suggests that the power to call witnesses of the court’s own motion is part of the movement towards increased powers of judicial intervention. The benefits of active judicial case management are outlined above. The court has a legitimate interest in ensuring that a proceeding, including the trial itself, is not left in the parties’ hands, but is conducted efficiently and expeditiously in the interests of justice.

A further consideration is that there may be circumstances where a party may desire a witness to be called but may not wish to call the witness because doing so would deprive that party of the opportunity for cross-examination but enable the other party to do so.

Arguments against judicial discretion to call witnesses

Some commentators suggest that “the essential feature of the adversary or accusatorial system of justice is the questioning of witnesses by the parties or their representatives, summoned for the most part by them, and called mainly in the order of their choice before a judge acting as umpire rather than as inquisitor.” Justice Dawson in Whitehorn v The Queen said of judges calling witnesses:

“The reality is that to assert the power of a judge to call a witness [themselves] is to raise considerations which, in our adversary system, have serious implications. That is why an assertion of the existence of such a power is invariably qualified by such a reference to the rarity of the occasions upon which its exercise will be justified and the extreme caution which should be observed in its use … The adversary system is the means adopted and the trial judge’s role in that system is to hold the balance between the contending parties without himself [or herself] taking part in their disputations. It is not an inquisitorial role in which he [or she] seeks to remedy the deficiencies in the case on either side.”

In The Queen v Apostilides the High Court set out a number of general propositions applicable to the conduct of criminal trials. These include the proposition that: “Save in most exceptional circumstances, the trial judge should not himself [or herself] call a person to give evidence.” The court, in referring to the need for the extreme reluctance with which the trial judge should even consider ‘usurping the responsibility of the parties with respect to the calling of witnesses’, referred with approval to the judgment of Justice Dawson in Whitehorn:

“A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge’s role in that system is to hold the balance between the contending parties without himself [or herself] taking part in their disputations. It is not an inquisitorial role in which he [or she] seeks himself [or herself] to remedy the deficiencies in the case on either side.”

4.2.5 Submissions

Submissions were divided on this issue. Some of the Supreme Court judges were strongly in favour of the power to call witnesses of the court’s own motion. One view was that “the power may only be used once in 10 years”, but the judge would really require it in that instance. Other judges considered that adopting more inquisitorial powers was important and this power was consistent with that approach.

Other judges were strongly opposed to the proposal. Judge Wodak felt that judicial officers did not have the resources or the ability to confer with and prepare witnesses, nor in adversarial litigation should they do so. Some Supreme Court judges did not support the power because ‘it is the burden of proof that determines a case’ and the proposed power would undermine that position.
They were also concerned with what would happen in an appeal if a judge made a mistake when calling a witness. Another judge considered that it was more effective to put pressure on one party to call the witness than give the court express power to call the witness of its own motion.151

Victoria Legal Aid contended that it would undermine the independence of the judiciary and represent an inconsistency between proposals to limit the ability of parties to call their own witnesses while simultaneously allowing judges to call witnesses themselves.152

Maurice Blackburn contended that the system remains adversarial and the court cannot know the many reasons that go into a decision not to call a particular witness. In the firm’s opinion: ‘for the Court to presume to call these witnesses itself is fraught with risk’.153

4.2.6 Conclusions and recommendation

The commission is, on balance, persuaded that the courts should have an express power to call witnesses in civil proceedings without the parties’ consent. Such a power would enable the courts to have greater control over the proceedings and has been the case in the Family Court. In some cases this may result in savings in time and cost. In other instances, it may increase the duration of the trial but improve the quality of the outcome. In appropriate cases, the power would also enable the courts to assist self-represented parties. There may also be a need for an express power given that the proposed Uniform Evidence Act provisions are broad and may not be able to be relied on.

The commission does not envisage that the power to call witnesses of the court’s own motion would be a commonly used power. Rather this power could be used when there is no other reasonably practicable alternative means of achieving justice between the parties. An express statutory provision would put beyond doubt a judge’s power to call a witness of his or her own initiative in a civil case.

The commission considers that the conferral of an explicit power to call witnesses would not necessarily involve any major shift from the court’s role as independent arbiter in an ‘adversarial’ dispute (where it can draw adverse inferences from the failure of a party to call a witness) to one of an ‘inquisitorial’ nature. Such a power is only likely to be used in exceptional circumstances although it would be a matter for the court to determine when the exercise of such power may be appropriate.

A draft provision is as follows:

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

This provision gives the courts a discretionary power only.

5. IMPOSITION OF LIMITS ON THE CONDUCT OF PRE-TRIAL PROCEDURES AND TRIAL

Rationale for the recommendation

As discussed in the context of the previous two recommendations, there is a need for additional express powers for the courts to ‘actively’ manage cases. In the wake of the C7 litigation, there have been calls for greater powers for the courts to better manage proceedings and the conduct of the parties. As mentioned in Chapter 1, Justice Sackville identified that:

- The role of the judiciary needs to change further—to adopt even more rigorous and interventionist pre-trial case management strategies and greater control over the parties in the conduct of the trial itself.
- Courts need not only a greater panoply of case management tools but also a greater willingness to use them.
- Traditional adversary procedures, even within a case management system, must be modified.
- Judges must be given explicit statutory powers and protection to curtail the scope, duration and expense of [mega] litigation even over the express opposition of the parties.154
Other judges have recently made similar comments. For example, Chief Justice Murray Gleeson was recently reported as saying that Australian judges should take their lead from the High Court and ration the time lawyers have to argue their case.  

In a recent judgment, Justice David Harper of the Victorian Supreme Court was reportedly very concerned about ‘tardy behaviour’ of two parties in preparing for trial and considered striking out the defence and hearing the case as though undefended. The decision followed comments from some Federal Court judges about the need to speed up disputes that become mired in pre-trial disputation.

The commission is of the view that there would be utility in having more clearly delineated and specific powers to impose limits on the conduct of proceedings. Such powers will enable directions and orders to be made to confine a case to issues genuinely in dispute and to ensure compliance with court orders, directions, rules and practices. Such powers should include more clearly defined and specific powers with respect to:

1. **pre-trial procedures**: including, for example, the power to direct parties to take specified steps and to conduct proceedings as directed with respect to discovery, admissions, inspection of documents, pleadings, particulars, cross-claims, affidavits or statements, time, place and mode of hearing

2. **trial procedures**, including, for example, powers limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, limiting the time that may be taken by a party in presenting its case or in making submissions and limiting the duration of oral submissions and the length of written submissions.

Although the existing general powers of the court, and existing procedural rules, may be sufficient to achieve these ends, a comprehensive statutory provision may have greater impact, may resolve any argument about the limits of existing rule-making powers and may overcome existing constraints on the exercise of case management powers.

### 5.1 Clearer powers to limit the conduct of pre-trial procedures

First, the commission has considered whether there should be more clearly delineated and specific powers to impose limits on the conduct of **pre-trial procedures**.

#### 5.1.1 Position in Victoria

As discussed in Chapter 2, various provisions presently provide that the courts under review must endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined. To this end the court may give any direction or impose any term or condition it thinks fit.

#### 5.1.2 Other models

**NSW**

In NSW, there are clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures.

Section 61 of the NSW *Civil Procedure Act 2005* relevantly provides:

1. **The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings:**

2. **In particular, the court may, by order, do any one or more of the following:**
   - (a) **it may direct any party to proceedings to take specified steps in relation to the proceedings,**
   - (b) **it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,**
   - (c) **it may give such other directions with respect to the conduct of proceedings as it considers appropriate.**
(3) If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:

(a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,

(b) it may strike out or limit any claim made by a plaintiff,

(c) it may strike out any defence filed by a defendant, and give judgment accordingly,

(d) it may strike out or amend any document filed by the party, either in whole or in part,

(e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,

(f) it may direct the party to pay the whole or part of the costs of another party,

(g) it may make such other order or give such other direction as it considers appropriate.

(4) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.

**Federal Court**

In the Federal Court, there are clearly delineated and specific powers to impose limits on the conduct of pre-trial and trial procedures. Order 10.1 of the *Federal Court Rules* relevantly provides:

(1) On a directions hearing the Court shall give such directions with respect to the conduct of the proceeding as it thinks proper.

(1A) In any proceeding which is to be heard by a Full Court, whether in the original or appellate jurisdiction, such directions as is thought proper with respect to the conduct of the proceeding may be given by the Court constituted by a single Judge.

(2) Without prejudice to the generality of subrule (1) or (1A) the Court may:

(a) make orders with respect to:

   (i) discovery and inspection of documents;

   (ii) interrogatories;

   (iii) inspections of real or personal property;

   (iv) admissions of fact or of documents;

   (v) the defining of the issues by pleadings or otherwise;

   (vi) the standing of affidavits as pleadings;

   (vii) the joinder of parties;

   (viii) the mode and sufficiency of service;

   (ix) amendments;

   (x) cross-claims;

   (xi) the filing of affidavits;

   (xii) the giving of particulars;

   (xiii) the place, time and mode of hearing;

   (xiv) the giving of evidence at the hearing, including whether evidence of witnesses in chief shall be given orally or by affidavit, or both;

   (xv) the disclosure of reports of experts;

   (xvi) costs;

   (xvii) the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing;


157 Ibid.

158 Supreme Court (General Civil Procedure) Rules 2005 r 1.14(1); Country Court Rules of Procedure in Civil Proceedings 1999 r 34A.19, 34.01; Magistrates’ Court Civil Procedure Rules 1999 r 1.21(2); Magistrates’ Court Act 1989 s 136.
(xviii) the taking of evidence and receipt of submission by video link, or audio
link, or electronic communication, or such other means as the Court
considers appropriate;

(xix) the proportion in which the parties are to bear the costs (if any) of
taking evidence or making submission in accordance with a direction
under subparagraph (xviii); and

(xx) the use of assisted dispute resolution (including mediation) to assist in the
conduct and resolution of all or part of the proceeding.

(aa) where, in any proceeding commenced in respect of any alleged or threatened
breach of a provision of Part IV of the Trade Practices Act 1974, an order
pursuant to section 80 of that Act is sought, direct that notice be given of the
order sought by public advertisement or in such other form as the Court directs;

(b) notwithstanding that the application is supported by a statement of claim, order that the
proceeding continue on affidavits;

(c) order that evidence of a particular fact or facts be given at the hearing:
   (i) by statement on oath upon information and belief;
   (ii) by production of documents or entries in books;
   (iii) by copies of documents or entries; or
   (iv) otherwise as the Court directs;

(ca) order that an agreed bundle of documents be prepared by the parties;

(cab) direct that the parties give consideration to jointly instructing an expert to provide
to the parties a report of the expert’s opinion in relation to a particular issue or
issues in the proceeding, on the basis that the parties concerned will be jointly
responsible to pay the expert’s fees and expenses;

(d) order that no more than a specified number of expert witnesses may be called;
   (da) order that the reports of experts be exchanged;

(e) appoint a court expert in accordance with Order 34, rule 2;

(f) direct that the proceeding be transferred to a place at which there is a Registry other than
the then proper place. Where the proceeding is so transferred, the Registrar at the proper
place from which the proceeding is transferred shall transmit all documents in his charge
relating to the proceeding to the Registrar at the proper place to which the proceeding is
transferred;

(g) order, under Order 72, that proceedings, part of proceedings or a matter arising out of
proceedings be referred to a mediator or arbitrator;

(h) order that the parties attend before a Registrar for a conference with a view to satisfying
the Registrar that all reasonable steps to achieve a negotiated outcome of the proceedings
have been taken, or otherwise clarifying the real issues in dispute so that appropriate
directions may be made for the disposition of the matter, or otherwise to shorten the time
taken in preparation for and at the trial;

(i) in a case in which the Court considers it appropriate, direct the parties to attend a case
management conference with a Judge or Registrar to consider the most economic and
efficient means of bringing the proceedings to trial and of conducting the trial, at which
conference the Judge or Registrar may give further directions;

(j) in proceedings in which a party seeks to rely on the opinion of a person involving a subject
in which the person has specialist qualifications, direct that all or part of such opinion
be received by way of submission in such manner and form as the Court may think fit,
whether or not the opinion would be admissible as evidence.
The Court may revoke or vary any order made under (1), (1A) or (2).
(4) Paragraph (aa) of subrule (2) does not limit the power of the Court to direct at any stage of the proceeding that such notice be given.

Overseas
In the United States and in England and Wales, there are clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures.160

Submissions
Submissions in response to the Consultation Paper
In the Consultation Paper there were a number of questions concerning judicial management of proceedings generally and pre-trial procedures in particular. Submissions dealing with these issues are discussed in other parts of this chapter.

Question 28 of the Consultation Paper asked:
Are there any time limits for taking procedural steps which should be introduced or varied?

The submissions in response were varied. The Victorian Aboriginal Legal Service argued that all time limits should be examined and restructured.161 The Police Association submitted that time limits should be standardised or more consistently applied in line with other jurisdictions.162 The Victorian WorkCover Authority contended that as far as possible, time limits should be consistent between cases in a particular jurisdiction, and between jurisdictions, and should be imposed on the parties by way of court rules or practice directions (rather than by individual court order). WorkCover considered that mandatory timeframes are a positive step in supporting timely litigation and resolution in both the pre-litigation and litigation processes.163 The TAC supported mandatory timeframes in both pre-litigation and litigation processes.164

The Mental Health Legal Centre submitted that time limits should be flexible enough to recognise the relative resources and ability of parties to comprehend and prepare their cases. In addition, the Centre argued that there should be capacity to extend time limits or reinstate matters where missed time limits have led to the matter being struck out in certain circumstances.165

Travis Mitchell and the Bar contended that a tight set of deadlines in other courts, similar to those in the Commercial List of the Supreme Court, with greater costs consequences, would increase the speed of litigation.166

The State Trustees highlighted the need to take into account the special circumstances of persons under a disability when the commission examines time limits, including a possible extension of the time limitation under Part IV of the Administration and Probate Act 1958.167

The Magistrates’ Court considered that time limits were adequately covered under the court’s rules.168

Submissions in response to Exposure Draft 2
Maurice Blackburn was generally supportive of the draft provision (see below), which specifies the types of directions orders the court could make in respect of pre-trial procedures. However, the firm contended that the pre-trial directions powers were necessary only in large or complex litigation.

5.2 CLEARER POWERS TO LIMIT TRIAL PROCEDURES
In addition to limits on pre-trial procedures, the commission has considered whether there should be more clearly delineated and specific powers to impose limits in respect of the conduct of the trial.

5.2.1 Position in Victoria
County Court
Pursuant to rule 47.06(1), a judge may at any stage of a proceeding by direction limit—
(a) the time to be taken in examining, cross-examining or re-examining a witness;
(b) the number of witnesses (including expert witnesses) that a party may call;
(c) the time to be taken in making any oral submission;
(d) the time to be taken by a party in presenting his or her case;
(e) the time to be taken by a trial.

159 Order 72 pertains to the procedure for court ordered mediation and arbitration. 160
160 See for example: Fed R Civ P r 6, Civil Procedure Rules 1998 (UK) rr 2.1–2.3.
161 Submission CP 27 (Victorian Aboriginal Legal Service).
162 Submission CP 6 (Police Association).
163 Submission CP 48 (Victorian WorkCover Authority).
164 Submission CP 37 (Transport Accident Commission).
165 Submission CP 22 (Mental Health Legal Centre).
166 Submission CP 4 (Travis Mitchell), CP 33 (Victorian Bar).
167 Submission CP 23 (State Trustees Ltd).
168 Submission CP 55 (Magistrates’ Court of Victoria).
Pursuant to rule 47.06(3), the discretion of a judge to give these directions must be exercised having regard to the following matters in addition to any other relevant matter—

(a) the time or number limited must be reasonable;
(b) the direction must not prejudice the right of each party to a fair trial, and in particular, to a reasonable opportunity to adduce evidence and cross-examine witnesses;
(c) whether the case is complex or simple;
(d) the number of witnesses a party intends or seeks to call;
(e) the volume and character of the evidence a party intends or seeks to adduce;
(f) the interests of other litigants in the Court;
(g) the time expected to be taken for the trial;
(h) the importance of the proceeding as a whole or of any question in the proceeding.

Supreme Court
There is no equivalent in the Supreme Court Rules to rule 47.06 of the County Court Rules.

Magistrates’ Court
As outlined above, rule 1.22(2)(m) enables the court to actively manage a case by limiting the time for the hearing or other part of the case, including the number of witnesses and the time for the examination or cross-examination of a witness.

5.2.2 Other models

NSW position
An example of a legislative approach is section 62 of the Civil Procedure Act 2005 (NSW), which provides:

Directions as to conduct of hearing

(1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.

(2) The court may, by order, give directions as to the order in which questions of fact are to be tried.

(3) Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:

   (a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,
   (b) a direction limiting the number of witnesses (including expert witnesses) that a party may call,
   (c) a direction limiting the number of documents that a party may tender in evidence,
   (d) a direction limiting the time that may be taken in making any oral submissions,
   (e) a direction that all or any part of any submissions be in writing,
   (f) a direction limiting the time that may be taken by a party in presenting his or her case,
   (g) a direction limiting the time that may be taken by the hearing.

(4) A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:

   (a) to lead evidence, and
   (b) to make submissions, and
   (c) to present a case, and
   (d) at trial, other than a trial before a Local Court sitting in its Small Claims Division, to cross-examine witnesses.
(5) In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:

(a) the subject-matter, and the complexity or simplicity, of the case,
(b) the number of witnesses to be called,
(c) the volume and character of the evidence to be led,
(d) the need to place a reasonable limit on the time allowed for any hearing,
(e) the efficient administration of the court lists,
(f) the interests of parties to other proceedings before the court,
(g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,
(h) the court’s estimate of the length of the hearing.

(6) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party a memorandum stating:

(a) the estimated length of the trial, and the estimated costs and disbursements of the solicitor or barrister, and
(b) the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party.

Federal Court

Rule 10.1(1) is referred to above. Some of the provisions relate to the conduct of a trial. Furthermore, Order 32 Rule 4A ‘Limitation on time etc to be taken for trial’ provides:

(1) At any time before or during a trial, the Court or a Judge may make a direction limiting:

(a) the time for examining, cross-examining or re-examining a witness; or
(b) the number of witnesses (including expert witnesses) that a party may call; or
(c) the time for making any oral submissions; or
(d) the time for a party to present the party’s case; or
(e) the time to hear the trial.

(2) The Court or Judge may amend a direction made under this rule.

Supreme Court of Western Australia

Order 34 Rule 5A of the Rules of the Supreme Court 1971 (WA) is similar to County Court Rule 47.06 and section 62 of the Civil Procedure Act 2005 (NSW) in that it gives the court power to limit the number of witnesses etc. This provision also gives the court power to limit the time for oral submissions.169

Family Court

In the Family Court, there are clearly delineated and specific powers to impose limits on the conduct of trial pursuant to Section 69ZX(2) of the Family Law Act 1975. This section gives the power to direct that evidence regarding a particular matter and of a particular kind not be presented (ss (g) and (h)).

Ontario

The Ontario 2007 Report noted that at the Advocates’ Society Policy Forum in March 2006, there was widespread consensus that all too frequently trials greatly exceed their estimated length due to poor trial management by both the bench and the bar and that greater discipline is required. Accordingly, considerable support was expressed for having the judiciary exercise more aggressive trial management before and during the trial.170 The report recommended that:

- Pre-trial judges should make any necessary trial management orders that promote the most efficient use of trial time and, in particular, should be vested with the authority to impose time limits on the presentation of each side’s case, subject to a residual discretion in the trial judge to alter such orders where unanticipated circumstances arise or in otherwise clear cases where the overall interests of justice require that they be amended.

169 Rules of the Supreme Court 1971 (WA) r 34.5A(c).
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- The judiciary should be encouraged to use their inherent authority to better regulate the conduct of trials so that trials proceed in an orderly and efficient manner.  

Limits on length

Section 69ZX(2) of the Family Law Act 1975 also provides that the length of written submissions may be limited. In the Western Australian Supreme Court, for interlocutory hearings, an outline of submissions can be limited to five pages in length. The Victorian Court of Appeal now requires a party’s outline of submissions not to exceed 20 pages in length.

5.2.3 Arguments for and against powers to limit trial procedures

Arguments for powers to limit trial procedures

As discussed above, there is increasing acceptance of the need for judicial intervention in the conduct of proceedings. The proposition that litigation is a pure ‘affair of the parties’ is no longer generally accepted. The traditional view that the judge is a passive referee who either has no power, or should be extremely reluctant to exercise any power, to control the conduct of the litigation has little support. Greater judicial intervention is considered not only desirable, but necessary, in order to increase efficiency and to reduce costs and delay.

The Victorian courts clearly have power to control proceedings. However, there continues to be tension between the requirements of effective case management and the interests of justice. Although there are various statutory provisions and rules which confer on the courts express authority to exercise control and impose limits on parties, on one view such provisions are not as comprehensive as provisions which have been introduced in other jurisdictions. Accordingly, there is utility in having uniform, more clearly delineated, comprehensive and specific powers to control the conduct of pre-trial and trial procedures.

As part of the ‘new approach’ to building cases in the Supreme Court, the court can give directions including for the conduct of trial, and this may encompass time limits for the trial. Justice Byrne of the Supreme Court recently made the following comments on this new approach:

The judges will be ready to fix times for the performance of various procedural steps and to determine preliminary issues for trial where this will assist the resolution of the whole dispute. At trial, judges will be more ready to exercise the powers of the Court to direct the way the trial is presented and, where appropriate, to impose time limits for the performance of various aspects of the trial. To the extent that this might seem novel, or even unpalatable, it will be one of the factors which will weigh in the decision to select the appropriate court for the litigation.

The Final Report of the Hong Kong Chief Justice’s Working Party on Civil Justice Reform endorsed clearly defined directions for the conduct of trials and considered it would be desirable to have a rule specifically setting out such powers, commenting that:

Knowing what periods of time have been allocated for each task, counsel would be able to plan their submissions and examination and cross-examination accordingly. This would promote fairness in the distribution of trial time between the parties.

There is value in clearly identifying the types of orders the courts can make for the conduct of pre-trial procedures and at the hearing. The courts may be more likely to use the powers if they are clearly listed. Also, if parties or lawyers fail to comply with directions and orders, clearly identified powers will no doubt make it easier when considering sanctions for non-compliance.

Arguments against powers to limit trial procedures

There is a variety of considerations which weigh against greater judicial control over the conduct of trials and proceedings, generally.

It may be contended, as a matter of principle, that under our adversarial system parties should retain control over the conduct of proceedings.

As a matter of law, it may be that in some situations greater judicial control may run counter to principles of procedural fairness, human rights protections, restraints imposed by appellate courts, or, in the cases of courts able to exercise federal jurisdiction, may be incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power.
As a matter of practicality, judicial officers suffer from what Justice Sackville has described as an ‘information deficit’. They cannot be expected to have the same knowledge as the parties or their legal representatives have about the strengths and weaknesses of the case or the forensic rationale for adopting a particular course of action.

Also, proactive judicial intervention may result in further interlocutory disputation and may give rise to additional appeals from interlocutory decisions and appeals from final judgments. The power to control the conduct of the trial might arguably undermine the ability of parties to put forward their case, and may provide appeal grounds in the event that the party prohibited from certain forensic conduct is unsuccessful.

Furthermore, excessive judicial management of litigation may increase costs through the need for additional directions hearings.

5.2.4 Submissions

Submissions in response to Consultation Paper

Questions 30 and 31 concerned the conduct of trials and hearings and asked:

30. Is there need for reform of practices, procedures or rules relating to the conduct of trials or hearings? If so, what are the problems and what changes should be implemented?

31. In some jurisdictions, courts have conducted shortened hearings with strict limits on:

- the time allocated
- the evidence permitted
- the issues to be determined

with a view to the dispute being resolved without the necessity for a final trial on all issues. Do the rules of procedure need to be amended to facilitate shortened hearings? If so, what specific changes should be implemented?

The Bar supported an amendment of the Rules of Court in the Supreme Court to incorporate a rule equivalent to rule 47.06 of the County Court Rules, which would enable a judge in an appropriate case to require that the trial be conducted on a ‘chess clock’ basis. The Bar noted:

**Imposition of time limits during trial has the advantage of focussing the minds of the advocates.**

The Police Association supported the notion of shortened hearings with strict limits: ‘it goes some way to standardising the process’ with other jurisdictions.

WorkCover and the Traffic Accident Commission were not supportive of the notion of shortened hearings with strict time limits. They contended that previous experience of pro forma court orders, which sought to impose mandatory timelines and restrictions on the calling of oral evidence and hearing times, resulted in perceptions of judicial imbalance in the treatment of parties to the litigation.

Submissions in response to Exposure Draft 2

Judge Wodak supported the proposal and identified that the mere mention of the provision in the County Court Rules (rule 47.06) ‘has usually provided an incentive to the parties to agree to some modification in the number of expert witnesses to be called, and in shortening the evidence’. The Supreme Court judges were supportive of the proposed case management powers and considered that it was a matter for each judge to decide whether he or she wanted to exercise the powers.

Maurice Blackburn also contended that imposing limitations on the trial time, on interlocutory hearings and on the length of both oral and written submissions was an important part of active case management and should reduce expense. The firm said:

**In large complex litigation, hearing times and the length of submissions have expanded dramatically in the last 15 years, with an associated explosion in cost. It is difficult to see a corresponding increase in the quality of the justice provided to the litigants.**

In a consultation with the Supreme Court, it was noted that putting case management powers in legislation may pose difficulties as they may not easily be amended.
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5.3 OTHER RECENT REFORMS

The Federal Court’s Fast Track List—‘Rocket Docket’

The Federal Court’s Fast Track List—the ‘Rocket Docket’, was introduced in May 2007 to address the issues of costs and delay. The Victoria Registry is currently piloting the new procedure. It may be extended to other states. It applies to commercial cases and some intellectual property cases. The new procedures are significantly streamlined. Tight time constraints are imposed on the parties as well as on the court. In broad terms, the changes include:

- the abolition of pleadings, which are replaced with an outline of a party’s case
- a scheduling conference approximately six weeks after filing at which the case will be set down for hearing not later than six months after the filing date
- in all but urgent cases, interlocutory hearings being replaced by interlocutory applications to be dealt with on the papers; oral hearings being allowed in limited circumstances
- interrogatories not being permitted except in exceptional circumstances
- a substantial reduction in the obligations to make discovery
- In place of witness statements (other than expert witnesses) the parties being encouraged to file agreed statements of fact
- a pre-trial conference at which both the parties and their lawyers must attend
- a trial that will be a ‘chess-clock’ style following the current fashion of arbitrations, especially international arbitrations
- the judge delivering judgment quickly, usually within six weeks
- proceedings being excluded from the list if the trial is likely to exceed eight days.

As at 14 December 2007, 14 cases were reportedly in the Fast Track List. The introduction of the rocket docket is representative of broader trends, in Australia and overseas, directed at reforming procedural rules to improve the efficient resolution of commercial disputes and civil litigation more generally. One commentator endorsing the Fast Track List said: ‘There are many major corporations that are litigation averse. These changes, if implemented, should lead to a reduction of costs and improved access to justice.’

In the submission in response to the Consultation Paper, the TAC contended that in the context of personal injury litigation, where there has usually been an extensive pre-litigation process (in accordance with agreed pre-action protocols), the parties, and especially the injured person, would be well served by being included in such a fast track docket system.

The Institute of Arbitrators and Mediators (IAMA) Fast Track Arbitration Procedure

The IAMA Fast Track Arbitration Procedure was also introduced in 2007. Schedule 2 in the IAMA Arbitration Rules 2007 provides for the fast track arbitration procedure. Parties can agree to submit a dispute between them to arbitration in accordance with the rules, but the rules are not compulsory. The rules contain an overriding objective, which is to conduct the arbitration fairly, expeditiously, cost-effectively and proportionate to the amount of money, the complexity of issues and any other relevant matter. Parties must conduct the arbitration in accordance with the overriding objective. Under the rules, a 150-day limit is suggested for the entire process. Another feature of the rules is a 20-day limit within which the claimant is to provide documents, including a written statement and evidence to be presented. Hearings can be conducted as a ‘stop clock’ arbitration if directed by the arbitrator or agreed on by the parties. The awards given by arbitrators are expected to provide detailed written reasons which are proportionate to the time available.

5.3.1 Conclusions and recommendations

The commission is persuaded that there should be more clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures and trial proceedings.

The commission has drafted a provision (set out below) that incorporates various elements of rules and legislation from Australian jurisdictions, in particular, Order 10.1 of the Federal Court Rules, section 61 of the Uniform Civil Procedure Act 2005 (NSW) and rule 2.1 of the Uniform Civil Procedure Rules 2005 (NSW).
The commission has also drafted a provision (set out below) that incorporates various elements of rules and legislation from other Australian jurisdictions, in particular, section 62 of the Civil Procedure Act 2005 (NSW) and Order 10.1 of the Federal Court Rules.

**Draft provisions**

Set out below is a draft provision that specifies the types of directions orders the court could make as to pre-trial procedures:

**Section/Rule Y: ‘Directions as to practice and procedure generally’**

1. The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

2. The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

3. Without prejudice to the generality of subsection (1) the Court may give such directions or make such orders as it considers appropriate with respect to:
   
   (a) discovery and inspection of documents, including the filing of lists of documents; either generally or with respect to specific matters;
   
   (b) interrogatories;
   
   (c) inspections of real or personal property;
   
   (d) admissions of fact or admissibility of documents;
   
   (e) the filing of pleadings and the standing of affidavits as pleadings;
   
   (f) the defining of the issues by pleadings or otherwise; including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions;
   
   (g) the provision of any essential particulars;
   
   (h) the joinder of parties;
   
   (i) the mode and sufficiency of service;
   
   (j) amendments;
   
   (k) counterclaims;
   
   (l) the filing of affidavits;
   
   (m) the provision of evidence in support of any application;
   
   (n) a timetable for any matters to be dealt with, including a timetable for the conduct of any hearing;
   
   (o) the filing of written submissions;
   
   (p) costs;
   
   (q) the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding;
   
   (r) the attendance of parties and/or legal practitioners before a registrar/master for a conference with a view to satisfying the registrar/master that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial;
   
   (s) the attendance of parties and/or legal practitioners at a case management conference with a judge or registrar/master to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the judge or registrar/master may give further directions.
(t) the taking of specified steps in relation to the proceedings;
(u) the time within which specified steps in the proceedings must be completed;
(v) the conduct of proceedings.

(4) If a party to whom such a direction has been given or against whom an order is made under subsection (1) or (2) fails to comply with the direction or order, the court may, by order, do any one or more of the following:

(a) dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,
(b) strike out or limit any claim made by a plaintiff,
(c) strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly,
(d) strike out or amend any document filed by the party, either in whole or in part,
(e) strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
(f) direct the party to pay the whole or part of the costs of another party,
(g) make such other order or give such other direction as it considers appropriate.

(5) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given or order made by the court.

(6) The court may revoke or vary any direction or order made under subsection (1) or (3).

Set out below is a draft provision that specifies the types of directions orders the court could make as to trial procedures:

Section/Rule X: ‘Directions as to conduct of hearing’

(1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.

(2) The court may, by order, give directions as to the order in which questions of fact are to be tried.

(3) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(4) Without limiting subsections (1) and (2), the court may, by order, at any time before or during a hearing, give directions:

(a) limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,
(b) not allowing cross-examination of a particular witness,
(c) limiting the number of witnesses (including expert witnesses) that a party may call,
(d) limiting the number of documents that a party may tender in evidence,
(e) limiting the time that may be taken in making any oral submissions,
(f) that all or any part of any submissions be in writing,
(g) limiting the length of written submissions,
(h) limiting the time that may be taken by a party in presenting his or her case,
(i) limiting the time that may be taken by the hearing,
(j) with respect to the place, time and mode of trial,
(k) with respect to the giving of evidence at the hearing including whether evidence of witnesses in chief shall be given orally or by affidavit, or both,
(l) with respect to costs, including the proportions in which the parties are to bear any costs,
(m) with respect to the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing,
(n) with respect to the taking of evidence and receipt of submissions by video link, or audio link, or electronic communication, or such other means as the Court considers appropriate,
(o) that evidence of a particular fact or facts be given at the hearing:
   I. by statement on oath upon information and belief,
   II. by production of documents or entries in books,
   III. by copies of documents or entries; or
   IV. otherwise as the court directs,
(p) that an agreed bundle of documents be prepared by the parties,
(q) that evidence in relation to a particular matter not be presented by a party, or
(r) that evidence of a particular kind not be presented by a party.

(5) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party and/or the court a memorandum stating:
   (a) the estimated length of the trial, and the estimated costs and disbursements, and
   (b) the estimated costs that the party would have to pay to any other party if they were unsuccessful at trial.

6. ENHANCING COMPLIANCE WITH PROCEDURAL REQUIREMENTS AND DIRECTIONS

6.1 THE PROBLEM
The benefits of clearly delineated and specific powers for the conduct of proceedings have been identified above. The threat of sanctions is important for encouraging compliance with court directions and orders. A number of submissions contended that there is a need for greater explicit powers to enable the courts to deal with recalcitrant parties or practitioners.
The commission considers that there should be more clearly delineated express powers to order sanctions, including costs sanctions, for non-compliance with court directions and orders, unless there is a valid reason for non-compliance.

6.2 DIRECTIONS
Victorian position
At present there are general provisions dealing with non-compliance with court rules, which are set out below. The commission notes, however, the ‘new approach’ of the Supreme Court Building Cases List. The trial judge may, if the occasion warrants, make orders that costs be awarded on an issues basis. The costs of (a) an unsuccessful issue, (b) unnecessary discovery, (c) the unnecessary inclusion of documents in the court book or (d) the unnecessary use of resources, may not be allowed to the successful party or may be awarded against a successful party.203

NSW position
Section 61 of the Civil Procedure Act 2005 (NSW) is set out above. Subsection (3) specifies the applicable sanctions. Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.

6.3 SANCTIONS FOR FAILURE TO COMPLY WITH RULES AND COURT ORDERS

There are various provisions in the rules of the courts under review that provide for sanctions or other procedural consequences where there is non-compliance with the rules or court orders. A number of these provisions are referred to below.

Non-compliance with the rules

In the Supreme, County and Magistrates’ Courts, where there has been a failure to comply with the rules, the court may—

(a) set aside the proceeding, completely or in part
(b) set aside any step taken in the proceeding, or any document, judgment or order
(c) exercise its powers under the rules to allow amendments and to make orders dealing with the proceeding generally.204

The court must not set aside any proceeding on the ground that the proceeding was commenced by the wrong process.205

The court must not set aside any proceeding or any step taken in any proceeding or any document, judgment or order therein on the ground of a failure to which rule 2.01 applies on the application of any party unless the application is made within a reasonable time and before the applicant has taken any fresh step after becoming aware of the irregularity.206

The court may dispense with compliance with any of the requirements of the rules, either before or after the occasion for compliance arises.207

Judgment on failure to prosecute or obey order for particulars or discovery

In the Supreme and County Court Rules, Order 24 deals with the disposition of a proceeding without a trial:

(1) Dismissal for want of prosecution—where the plaintiff fails to serve a statement of claim within the time limited or does not set the proceeding down for trial within 28 days after it was set down for hearing.208

(2) Failure to obey order for particulars or discovery, or inspection of documents or for answers to interrogatories, the Court may order that the proceeding be dismissed (for plaintiffs) or that the defence be struck out (for defendants).209

(3) Stay on non-payment of costs after dismissal for want of prosecution.210

Pursuant to the rules, the court has power to dismiss any proceeding for want of prosecution. Where a party fails to do an act or take a step in compliance with the rules, the proceeding may be dismissed or the defence struck out and judgment may be entered.211

In the Supreme and County Courts, if a party fails to answer interrogatories within the time specified by the rules212 or set by the court the interrogating party may serve a notice on the defaulting party. If the interrogatories are not answered within seven days of service of the default notice, the court may order that the proceedings be dismissed (if the party interrogated is a plaintiff) or that the defence be struck out (if the party interrogated is a defendant).213

Pursuant to the Magistrates’ Court Civil Procedure Rules 1999, the court may order that a complaint be dismissed or a defence be struck out (amongst other orders214) where—

1) a party fails to comply with a notice for further particulars215
2) a party fails to comply with a notice of discovery216
3) a party fails to answer interrogatories.217

6.4 COSTS ORDERS

There are also various statutory provisions, rules and inherent powers providing for the award of costs. The governing statutes and rules of each of the courts provides for the exercise of broad discretion with respect to costs orders.218 The Magistrates’ Court Act 1989 incorporates some limitations on the exercise of discretion. Various provisions in relation to costs are considered in further detail in Chapter 11.
NSW position

In NSW, rule 42.10 of the Uniform Civil Procedure Rules 2005 provides that if a party fails to comply with a requirement of the rules, or of any judgment or order of the court, the court may order the party to pay such of the other parties’ costs as are occasioned by the failure.

Federal Court

Various provisions in the Federal Court Rules make provision for orders in respect of costs. Order 62 provides for costs orders generally and makes specific provision for costs orders against legal practitioners (rule 9), for the disallowance of costs in respect of improper, vexatious or other unnecessary matters in documents or proceedings (rule 36) and unnecessary appearances (rule 37). Orders for costs may also be made at directions hearings (Order 10, rule 1(2)(xvi)).

United Kingdom

In his final report, Lord Woolf stressed four important principles:

(a) The primary object of sanctions is prevention, not punishment.
(b) It should be for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach, for example that a party may not use evidence which he [or she] has not disclosed.
(c) All directions orders should in any event include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively.
(d) The onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.219

The Hong Kong Chief Justice’s Working Party on Civil Justice Reform commented: ‘It was emphasised that the sanction should be relevant to the non-compliance and tailored to be proportionate to the importance of the breach in the context of the action as a whole’.220 It was noted that ‘in implementing this approach, if practicable, rules, practice directions and court orders should specify the consequences of non-compliance’.221

Thus, in relation to the court’s general powers of case management, the UK Civil Procedure Rules provide that:

When the court makes an order, it may –

(a) make it subject to conditions, including a condition to pay a sum of money into court; and
(b) specify the consequence of failure to comply with the order or a condition.222

If such an order is made, then the consequence takes effect without need for a further order, placing the onus on the party guilty of non-compliance to seek relief:

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204 Supreme Court (General Civil Procedure) Rules 2005 r 2.01; County Court Rules of Procedure in Civil Proceedings 1999 r 2.01; Magistrates’ Court Civil Procedure Rules 1999 r 2.01.
205 Supreme Court (General Civil Procedure) Rules 2005 r 2.02; County Court Rules of Procedure in Civil Proceedings 1999 r 2.02; Magistrates’ Court Civil Procedure Rules 1999 r 2.02.
206 Supreme Court (General Civil Procedure) Rules 2005 r 2.03; County Court Rules of Procedure in Civil Proceedings 1999 r 2.03; Magistrates’ Court Civil Procedure Rules 1999 r 2.03.
207 Supreme Court (General Civil Procedure) Rules 2005 r 2.04; County Court Rules of Procedure in Civil Proceedings 1999 r 2.04; Magistrates’ Court Civil Procedure Rules 1999 r 2.04.
208 Supreme Court (General Civil Procedure) Rules 2005 r 24.01; County Court Rules of Procedure in Civil Proceedings 1999 r 24.01.
209 Supreme Court (General Civil Procedure) Rules 2005 r 24.02; County Court Rules of Procedure in Civil Proceedings 1999 r 2.03.
210 Supreme Court (General Civil Procedure) Rules 2005 r 24.03; County Court Rules of Procedure in Civil Proceedings 1999 r 2.03.
211 Supreme Court (General Civil Procedure) Rules 2005 r 24.03; County Court Rules of Procedure in Civil Proceedings 1999 r 2.03.
212 42 days after service. Supreme Court (General Civil Procedure) Rules 2005 r 30.04.
213 Supreme Court (General Civil Procedure) Rules 2005 r 30.09. The Order also applies to counterclaims and third party notices pursuant to Supreme Court (General Civil Procedure) Rules 2005 r 30.09.1(4).
214 These rules also apply to counterclaims and third party notices. The court may also order that a party comply with a notice of discovery, or a request for particulars and interrogatories within a time specified by the court. Alternatively, the court may order a party to comply with a request within a specified time and also set out the consequences for failure to do so (e.g. dismissal or strike out).
215 Magistrates’ Court Civil Procedure Rules 1999 r 9.08.
216 Magistrates’ Court Civil Procedure Rules 1999 r 11.07.
217 Magistrates’ Court Civil Procedure Rules 1999 r 12.07. A defendant whose notice of defence is struck out pursuant to Rules 9.08, 11.07 and 12.07 is taken to be a defendant who does not give a notice of defence.
218 See in particular paragraphs 2.1, 2.2 and 2.3 of Chapter 11 of this Report.
221 Ibid [439].
222 Civil Procedure Rules 1998 (UK) r 3.1(3).
Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.\(^{223}\)

The party who has failed to comply cannot count on being granted relief. The court is required by rule 3.9 to consider all the circumstances including the following:

(a) the interests of the administration of justice;
(b) whether the application for relief has been made promptly;
(c) whether the failure to comply was intentional;
(d) whether there is a good explanation for the failure;
(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
(f) whether the failure to comply was caused by the party or his [or her] legal representative;
(g) whether the trial date or the likely trial date can still be met if relief is granted;
(h) the effect which the failure to comply had on each party; and
(i) the effect which the granting of relief would have on each party.\(^{224}\)

6.5 ARGUMENTS FOR AND AGAINST CLEARER POWERS TO IMPOSE SANCTIONS FOR FAILURE TO COMPLY WITH COURT DIRECTIONS AND ORDERS

Arguments in favour of clearer powers

The benefits of clearly delineated case management powers have been identified. There is also a need for sanctions for non-compliance to encourage party and lawyer compliance with case management directions.

Non-compliance with directions may also constitute a breach of the proposed overriding obligations. For example, one obligation is that participants must use reasonable endeavours to act promptly and minimise delay.\(^{225}\) However, the overriding obligations are not confined to case management directions.

Explicit and specific powers to order sanctions for non-compliance with case management directions may be of greater utility than a broad power. An explicit power to order sanctions should encourage parties to comply with case management directions.

The ALRC examined the way costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction. In one report, the ALRC recommended replacing the current broad discretion to award costs with a clear, systematic framework of costs rules incorporating express provision for a range of disciplinary and case management costs orders.\(^{226}\) The ALRC recognised that the ability to make costs orders is an important mechanism for encouraging party and lawyer compliance with case management guidelines.\(^{227}\)

Clearly identifying the range of sanctions for non-compliance with case management directions is likely to enhance the effectiveness of case management.

Arguments against clearer powers

Courts already have extensive powers under statutory provisions, court rules, and/or pursuant to their general jurisdiction to impose sanctions including costs orders. Accordingly, on one view, further rules are not required.

Another concern is that sanctions will be overused, and may be automatically imposed for procedural default, without proper regard for the reasons for non-compliance and extenuating circumstances.

Those who give primacy to party control of adversarial civil proceedings would contend that courts should not be unduly interventionist.

Even if the arguments in favour of proactive judicial intervention are accepted, there remains the risk that sanctions will become a forensic tool for more resourceful parties. Moreover, applications and hearings in respect of sanctions may add to costs and delays and give rise to undesirable ‘satellite’ litigation and appeals.
6.6 SUBMISSIONS

Submissions in response to the Consultation Paper

Question 28 of the Consultation Paper asked: ‘Are there any sanctions for failure to comply with time limits which should be introduced or varied?’

There were varied responses. The TAC and the WorkCover suggested that once orders are made, the courts must ensure that there is subsequent compliance and management and sanctions for non-compliance. In their view, where a time limit is not complied with, the legal presumption should be that any costs occasioned by reason of the default are payable by the defaulting party.226

The Magistrate’s Court contended that the court rules adequately provide for possible sanctions for non-compliance, including dismissal of a claim and striking out a notice of defence.229 Similarly it was noted that:

Problems experienced with recalcitrant parties or practitioners can be dealt with by the greater and more frequent exercise by judges, masters and registrars of these powers.230

Mallesons suggested that there is a place for sanctions in case management, but only as part of a range of options available to the court to apply in particular cases, and they should not automatically be imposed on the defaulting party.231

Another submission contended that the courts should be charged with the obligation to oversee strict compliance with the directions timetable, which could be supported by the introduction of costs penalties if deadlines are not met.232

6.6 SUBMISSIONS

Submissions in response to Exposure Draft 2

Maurice Blackburn was supportive of the introduction and use of greater sanctions for non-compliance. In particular, the firm contended that failure to comply with the proposed overriding obligations by tactics of delay and attrition should be ‘the subject of sanction’.233

Judge Wodak expressed the view that the powers in proposed section Y(4) are sensible. He also contended that legislation may be needed in order to provide a proper basis for such orders or directions to be made. In his view, sub-paragraph (c) of section Y(4) could be modified by adopting the approach in sub-paragraph (a), to enable a defence or part of it to be struck out, for example where a defendant should be precluded from contesting liability, but should still be able to contest damages.

The commission adopted this approach.234

6.7 CONCLUSIONS AND RECOMMENDATION

Despite the fact that courts presently have extensive general and specific powers to impose sanctions, including costs orders, the commission is of the view that there is a need in having a clearer framework of rules incorporating express provision for a range of ‘disciplinary’ and case management orders. Draft provisions are set out in proposed section Y(4).

A range of disciplinary and case management orders that include but are not limited to costs sanctions would be useful. Sometimes costs may not be the most appropriate sanction, particularly where a party has substantial resources. The proposed draft provides for a range of orders and sanctions. Their application would be a matter for judicial discretion.

The commission agrees with the view of Lord Woolf that the primary object of sanctions is prevention, not punishment. The commission also agrees in principle that it is desirable for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach; for example that a party may not use evidence that has not been disclosed. It is also desirable, where practicable, for all directions orders to include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively. In principle, the commission agrees with the position taken by Lord Woolf that the onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.

However, the commission is also mindful that there are many understandable reasons why parties, particularly those that may be less experienced or lacking in resources, may not always be able to comply with orders and directions within the required time. Where procedural steps need to be taken, large law firms acting for affluent clients or large corporations or insurers are usually able to mobilise resources to ensure that the required tasks are completed within time limits. Not all litigants are in the same position. Accordingly, although there is considerable scope for the use of presumptive sanctions
to apply in the case of default, in large measure sanctions will need to be applied in light of the relevant factual circumstances and the conduct of litigants and lawyers. This will usually require the exercise of judicial discretion.

The commission considers that overuse or inappropriate use of sanctions is unlikely to occur. Courts are likely to only impose sanctions when there is an unacceptable failure to comply, and should not do so if there is a valid reason for noncompliance.

It is also to be hoped that compliance by parties and lawyers with the proposed overriding obligations will result in increased cooperation between litigants and a reduced incidence of procedural default.

7. GREATER USE OF TELEPHONE DIRECTIONS HEARINGS AND TECHNOLOGY

7.1 THE ISSUE

The commission’s terms of reference ask us to have regard to the impact of current policy initiatives on the operation of the civil justice system, including investments in information technology such as an Integrated Courts Management System. A number of the challenges facing the civil justice system are identified in Chapter 1. The increased use of technology should enable time and cost savings for the courts and the parties and increase access to justice. The commission’s recommendations regarding case management and technology are outlined below.

One of the Victorian Government’s key initiatives is to develop new systems to improve service, efficiency and coordination between court jurisdictions: ‘A new technology platform will expand the opportunities for on-line service, improved case management, in-court services, and information.’[235]

The Government has also identified that:

There are a number of key building blocks that need to be put in place if the courts are to successfully deliver justice in the 21st century, including … Information Technology.[236]

In his final report, Lord Wolf expressed the view that appropriate technology was ‘fundamental to the future of our civil justice system’. He said that technology would ‘not only assist in streamlining and improving existing systems and processes; it is also likely, in due course, itself to be a catalyst for radical change as well’.237 He went on to assert that: ‘IT will be the foundation of the court system in the near future and now is the time that it should be seen to be receiving attention at the highest levels.’238

The commission considers that the Victorian Government and the courts have identified the importance of technology in the courts and undertaken various reforms, which are aimed at improving case management systems and document control. For example, an Integrated Courts Management System (ICMS) is currently being developed. This is discussed below. The E-litigation practice note was recently implemented in the Supreme Court (see discussion below). The commission considers that further helpful reforms would be the greater use of telephone directions hearings and the greater use of technology generally, including email and Internet online instant messaging systems in the management and conduct of civil proceedings.

7.2 TELEPHONE DIRECTIONS HEARINGS

Telephone directions hearings are held by the courts, but the practice appears to be ad hoc and dependent on the individual judge or master.

**Supreme Court**

In the Supreme Court, for cases not managed in a list, directions may be given without requiring a hearing or written submissions. However, sometimes the court may require the parties to attend a directions hearing for complex matters. Directions hearings may be conducted by conference telephone call.239 For cases managed in lists, the procedures with respect to directions hearings vary.240

**County Court**

In the County Court, the procedures vary between lists. Directions hearings are not held, at least initially, in certain lists in the County Court.241 Instead, an administrative mention notice is sent to the parties and the parties submit consent orders.242 The notice invites the parties, by a date approximately 49 days after the filing of the notice of appearance, to submit draft consent orders in a standard form to the court for the management of any interlocutory processes as well as the timetabling of the proceeding to trial. No appearance is required or expected on the date in the notice—the orders
The procedure is different in the Building Cases Division, the Commercial List Pilot in the County Court, the Damages (Medical Division), the WorkCover List, and the WorkCover (General Division).

**Magistrates’ Court**

Directions hearings are not used in the Magistrates’ Court. However, for pre-hearing conferences, where a party cannot attend a conference personally they may request that the pre-hearing conference be conducted by telephone.

**Other models**

**Australia**

In the Supreme Court of New South Wales, there is a dedicated telephone conference call facility used principally for common law directions hearings before the Registrar. Telephone callovers commenced in the Court in March 2007. Matters considered suitable for telephone directions hearings include consent matters and matters where parties or their legal representatives are located outside the Sydney CBD. A telephone conference can still proceed even if one or more parties choose to appear in person. Directions and orders that may be obtained by telephone calloever include adjournments, directions and allocation of hearing dates. Parties are expected to fax any proposed directions to the Registrar by 5pm on the day before any scheduled telephone directions hearing. The conference is taped and a copy of the tape sent to the court by the conference call provider. Copies of the tape can be purchased from the court. The charges are billed to the parties’ nominated Australian fixed telephone number.

In the Administrative Appeals Tribunal, directions hearings and conferences are also conducted by telephone.

**Overseas**

**United Kingdom**

According to two UK reports, there has been a widespread take-up of case management conferences being conducted by telephone conferencing. Under amended procedures which were implemented in April 2007, the presumption is for certain types of cases (largely procedural hearings and interim applications with a time estimate of less than one hour) to be conducted by telephone unless the court orders otherwise.

In other cases, the court may order that an application or part of an application be dealt with by telephone hearing, either of its own initiative or at the request of the parties. Normally such orders will not be made unless all parties consent. However, on very urgent applications (such as for an urgent injunction) the court may even agree to conduct the hearing of an ex parte application by telephone.

In addition to the use of telephone conferences, directions are often made following an exchange of emails.

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247 The procedures apply in county courts and district registries of the High Court (not the High Court in London) in which telephone conference facilities are available: Johnson and McIntosh (2007) above n 252, 6.
Chapter 5

Case Management

Norway
Under the proposed Disputes Act (expected to commence in 2008), court sittings may be held as
distance meetings by telephone or televised communication if the parties consent or if authorised by
the Act.255 The initial court sitting at the directions stage may be held as a distance meeting, as may
the examination of parties, witnesses and experts if direct examination is not feasible or would be
particularly expensive or onerous.256

Finland
Oral preparation for the pre-trial stage can be organised by telephone or by some other technique. The
requirements are that it should be reasonable in light of the purpose of the preparatory stage and that
there should not be numerous or complex questions to resolve. Sessions where the telephone or other
media are used will be public hearings. This means that the general public and press may be present
and will have the possibility of hearing all the discussions.257

Canada
There is widespread use of conference calls for more routine procedural matters in Canada.258

7.3 E-LITIGATION
Supreme Court
The Supreme Court introduced guidelines for the use of technology in civil proceedings in 2007.
The practice note provides guidance to parties and lawyers concerning the use of technology for the
preparation and management of civil litigation in the court. It also incorporates a court-approved
framework and default standard for managing both hard copy and electronic documents.259
The court’s practice note identifies that e-litigation should be considered in the following types of
cases:260
• where a substantial portion of the discoverable documents consist of electronic material;
• where the potential total number of discoverable documents is more than 1000;
• where there are more than three parties to the proceeding;
• where the proceedings are multi-jurisdictional or cross-border.
In general, the rules governing discovery of electronic documents are the same as those for hard-copy
material (Order 29).
The court can make a variety of orders, including, for example, that the proceeding be conducted
using technology, that parties or their lawyers meet to discuss how best to use technology in the
proceeding, that the parties retain an IT consultant to assist them and that there be an electronic trial.
An order for an electronic trial of the proceeding may include orders for electronic court documents,
an electronic court book, and that discovery be electronic.
A subset of the court book documents should form the basis of a hard-copy core bundle. The bundle
will contain the principal documents which the parties expect will be used frequently during the trial.
It is a tool which will avoid time-consuming resort to the court book for reference to documents
requiring intense or frequent scrutiny in evidence or argument. It has the added advantage of being in
hard copy.
The reasonable costs incurred in complying with the practice note are treated by the court as being
‘necessary and proper for the attainment of justice or for enforcing or defending the rights of a party’
within the meaning of rule 63.69 of the court rules.261
Federal Court
According to the court’s annual report:

The Court has adopted a more proactive approach to the conduct of electronic trials
in the Court and has held wide discussions with legal firms on a new document
management protocol and a new Practice Note to facilitate more of these trials. Following
the drafting of these documents, discussions will be held with legal representative
organisations for their input.262
7.4 ELECTRONIC FILING OF DOCUMENTS (‘E-FILING’)

The Victorian Government has identified that:

The courts’ challenge is to provide a service that assists participants to navigate the court processes as smoothly as possible. Information technology has provided many new options for the courts to meet this range of needs. The courts are beginning to exploit these opportunities by, for example, developing the capacity to lodge documents electronically over the Internet. Information about court services, both of a general and case-specific nature, is also becoming more available over the Internet.263

In the Supreme, County and Magistrates’ Courts, legal practitioners and parties are able to lodge documents with the court electronically.264 Most documents can be electronically filed, with some exceptions.265 E-filing in Victoria is voluntary—there is no requirement to use e-filing.

The Magistrates’ Court of Victoria’s Civil EDI (Electronic Data Interchange) program was introduced in late 1993 and was the first of its kind in the world. The facility enables authorised solicitors to electronically lodge civil complaints; enter judgment in default of a defence and issue warrants to seize property and summonses for oral examination. The advantages of EDI include:

- attendance at the registry is not required
- no postage or document exchange facility is required
- court documents are issued without delay
- the process eliminates the need for payment by cheque or stamp duty as court fees and transaction costs are electronically withdrawn from an account nominated by the solicitor using the service
- the process is largely paperless.266

Certain requests will not be processed by EDI. If an order has been made by a magistrate, an application for default judgment cannot be obtained electronically. According to the court, this is to protect the integrity of the process. Given that no attendance at court is required, the advantages of EDI are that time and costs are reduced and there is increased access to justice for litigants.267

Other models

Electronic filing has not yet had a major impact on civil litigation in Australia, although most jurisdictions have begun to introduce it or plan to do so. Despite its availability in most courts, the take-up rate has been slow.268 Developments in NSW, including e-filing in the NSW courts under JusticeLink, are discussed below.

E-filing is available and mandatory in Singapore, it is widely available but voluntary in the United States and Israel and only available in some courts in England, Canada and Australia.269

One example of its widespread use is in US federal courts. Electronic filing has become standard practice involving more than 27 million cases on the federal filing system. More than 250 000 lawyers and others have filed documents in the federal court alone.270

7.5 VIDEOLINK/VIDEO CONFERENCING

The Government has recognised that:

The power of videoconferencing technology allows some court services to be delivered remotely, either for parties and witnesses who live some distance from the venue, or for vulnerable witnesses such as sexual assault victims. Victoria has led the world in rolling out videoconferencing technology to its courthouses.271

In the Supreme, County and Magistrates’ Courts, applications in proceedings are able to be made, and are made, via videoLink.272


256 Backer (2007) above n 255. See also the proposed Norwegian Disputes Act, above n 254, § 21-10.


260 Supreme Court of Victoria information session, Supreme Court of Victoria, Melbourne, 15 March 2007.

261 Supreme Court of Victoria (2007) above n 259, 5.


264 Supreme Court (General Civil Procedure) Rules 2005 O 28; County Court Rules of Procedure in Civil Proceedings O 28, Magistrates’ Court Civil Procedure Rules 1999 O 1.18.

265 For example subpoenas, court books and exhibits to affidavits: Supreme Court Rules O 28.13; County Court Rules O 28.13.


267 Ibid.


269 Ibid 4–5.

270 Ibid 5.


272 Supreme Court (General Civil Procedure) Rules 2005 O 41A; County Court Rules of Procedure in Civil Proceedings O 41A; Magistrates’ Court Civil Procedure Rules 1999 O 16A.
7.6 THE INTERNET AND EMAIL

Court Connect is a free Internet search facility for cases in the County Court. The service is designed to provide selected information concerning cases in the court’s civil and criminal jurisdiction, including the case number, parties’ names, a list of documents filed in a case including the date of filing, a list of any judgment made by a judge or any order made by a judge or registrar, dates of hearing for events listed, whether jury or hearing fees have been paid, and subpoenas filed from 1 January 2005.

Email alerts

The County Court has a free email alerts service to practitioners that can be accessed via the County Court website. Practitioners receive an email alert that advises them when the monthly and daily civil trial lists have been placed on the website. This eliminates the need to regularly check the website.

Email correspondence with the courts

In the County Court, email correspondence is encouraged. The court accepts email requests for standard timetabling orders where consent orders are not attached, as long as the text of the email includes certain information, including, for example, the proceeding number, names of parties and their legal representatives and an assurance that all parties have conferred and agreed to the timetable sought. Some of the Supreme Court judges encourage the use of email for consent orders.

Around Australia, courts are amending their rules or issuing practice directions to provide for email communication between litigants and the courts more generally. For example, the Queensland Supreme Court has issued a protocol for this. Some courts are experimenting with email communications for pre-hearing conferences and case-preparation.

Overseas

Electronic communication with the court is authorised in Norway and Finland. In Norway, submissions may be sent electronically as well as on paper. A proposal that advocates should be obliged to send their written submissions electronically was not enacted, but apparently a pilot project has been foreshadowed regarding electronic communication between courts and advocates.

In Canada, some courts and judges use email to communicate with counsel directly or through court staff, and court staff use email in some jurisdictions to schedule cases. A Canadian report identified that email between counsel and the courts has eliminated correspondence and document delivery time and reduced costs.

There is a pilot scheme in England in the Preston county court allowing court applications to be made and dealt with by email. This facility may be used where parties are represented and where the court considers that the application is suitable to be dealt with without a hearing. It is also quite common for parties to exchange electronic copies of documents such as pleadings and witness statements and to provide these to the judge if requested, for ease of referencing and searching.

Other online resources

There are other online resources available on the courts’ websites, for example, there are links to the courts’ practice notes and practice directions. Daily lists are also available. In addition, judgments and court rules are available free of charge on the Internet, for example, via the Australian Legal Information Institute (AustLII).

7.7 INTEGRATED COURTS MANAGEMENT SYSTEM (ICMS)

ICMS is a program established by the Department of Justice to implement a single, integrated technology platform and set of applications for all Victorian courts and tribunals. ICMS includes the provision or development of information systems covering:

- case management (including the replacement for Courtlink)
- registry management (including document management)
- interfaces to existing special purpose applications within individual jurisdictions
- the Smart Court Program (videoconference and in court technologies)
- performance reporting
- online information services (Internet) and
- knowledge management (intranet).
ICMS is a major government initiative to modernise and upgrade the technology of all Victorian courts and tribunals. In the 2005–6 Victorian budget, the state allocated $45 million to ICMS: $32.3 million in capital and $12.7 million over four years.

The government has recognised that existing court technology systems are often incompatible with each other. For example, 10 different case management systems currently operate in Victorian courts and tribunals. ICMS was established to implement a single, integrated technology platform and set of computer applications for all Victorian courts and tribunals. Once the ICMS is fully operational, it has been suggested, this will have the capacity to increase cases heard by the Supreme and County Courts by around 150 per year.287

The benefits of ICMS are said to include:

- a modern, flexible technology platform which can support the courts’ business needs well into the 21st century
- a highly integrated, court management system which brings together case management functionality, online resources used by officers and staff of the court, and a seamless web interface with the legal profession and the community
- facilities that encourage and facilitate end-to-end processing of a case, filing or inquiry throughout Victoria’s courts and tribunals without the need for re-keying or re-lodgement
- a high level of consistency in look and feel between systems so that users don’t have to master multiple user interfaces
- simplified login and security access for users
- the technology to improve the efficiency in handling of major cases and
- enabling technology for timely and comprehensive reporting and analysis.

As part of ICMS, CourtView allows for the integration of major court systems and requirements, including case and financial management, imaging, docketing, scheduling, forms and notices, and reporting of cases at all stages of the judicial process. CourtView also facilitates online public access to non-restricted case information, e-filing of court documents, online inquiries by lawyers and online payments.

Also as part of ICMS, the ‘Smart Court Program’ is upgrading in-court technology to enable courts to meet the increasing demand for presenting evidence electronically in cases and receiving evidence remotely from ‘at-risk’ or ‘vulnerable’ witnesses at a number of courts across the state. The technology package includes large format plasma display screens and updated video-conferencing facilities. Smart Court’s facilities also provide significant advantages for people from regional areas appearing as witnesses in court cases in Melbourne or elsewhere, who may be able to give their evidence from their local courthouse instead of having to travel to another city.288

The importance of an ICMS is recognised in the Justice Statement.289 The government has recognised that comprehensive and accurate data have not always been available to support the courts in their work. Information about resources and caseloads has sometimes been difficult to collect and analyse. Absence of basic trend data also hampers the development of effective policies for the criminal and civil justice systems. Recognising the current deficiencies, the government is expanding the courts’ statistical services provided through the Department of Justice so that the courts and government are equipped to develop policies and measure performance on the basis of consistent, comprehensive and reliable data. The development of the ICMS will greatly assist the achievement of this goal. The Courts Strategic Directions working party has also recognised the need for improved research and analysis to enable better planning for future demand.290

Additional data collection

At present there is a need for additional data collection to assist in case management and judicial and court administration generally. The Victorian Bar has recognised the importance of a comprehensive, computerised system of monitoring litigation across the courts to monitor the progress of litigation, the causes of delay and the effectiveness of measures to address it.291 The Courts Strategic Directions Statement 2004 recommended that a properly funded Courts Statistics and Information Resource

273 Information regarding Court Connect is obtained from the website of the County Court of Victoria: <www.countycourt.vic.gov.au> at 16 November 2006.

274 Court Connect does not include the contents of documents or full details of orders or judgments. If such information is required, attendance at the relevant registry office and payment of the prescribed fee is necessary. Also, where a suppression order has been made either of a case or of a particular document filed in that case, no details of that case or of the particular document will be available for searching.

275 As of 1 June 2007, the parties are able to email their requests for standard timetabling orders to Judge Davis’ associates: County Court of Victoria, Damages List Applications Division, General Division and Serious Injury Division, Practice Note PNCI 4—2007 (2007) above n 242.

276 Consultation with the Supreme Court of Victoria (9 October 2007).


278 Ibid 7.

279 Insofar as provided for in regulations issued under the Courts of Justice Act, s 197a: Backer (2007) above n 255, 51.

280 Ibid 65.

281 Ibid.


283 Ibid.

284 Johnson and McIntosh (2007) above n 252, 3.

285 Ibid 5.

286 A free Internet facility jointly provided by the University of Technology Sydney and the University of New South Wales faculties of law.


288 Ibid.


290 Department of Justice Victoria, above n 287.

Centre or other appropriate system should be established. Chief Justice Warren in her State of the Judicature Address 2007 stated that the courts must be accountable to the community. That includes, she said,

"courts collecting detailed data as to what they do, how long things take, how many things and types of things they do and then making that data publicly available."

Judge Anderson in his submission in response to Exposure Draft 2 commented that although statistics are kept by the court and distributed monthly to court staff, there is a poor understanding of the collecting of information and its use in formulating appropriate responses.

As discussed in Chapter 4, there is a need for additional data and research. We consider that court forms and documents should be designed to facilitate the collection of data as a by-product of administrative processes. At virtually every stage of civil proceedings documents are required to be completed by the parties and filed with the court. In re-designing the form of such documents provision could be made for the supply of relevant information by the party completing the document. Alternatively, a ‘statistical’ information form could be required to be completed in addition to the normal court document.

There are various technological means by which data could be captured electronically, as a by-product of the completion and processing of such documents, without the need for manual transcription. Such means encompass the use of ‘machine readable’ forms; optical character recognition technology and other methods of extracting data from documents that are filed electronically or scanned. However, documents need to be re-designed after the data sought to be captured have been identified. Such documents need to facilitate not only the recording of relevant data by the person completing the document(s) but the electronic retrieval of such data from the document(s) without the need for ‘manual’ data extraction or further data entry by the recipient of the document. In this manner information could be readily collected and input for computer analysis at minimal cost. This could be an additional agenda item for those implementing the ICMS system. Alternatively, this matter could be taken up by (a) the courts themselves, (b) the commission in stage 2 of the present inquiry or (c) the proposed Civil Justice Council.

7.8 OTHER REFORMS

JusticeLink

In NSW various electronic services are being introduced through JusticeLink.

JusticeLink (formerly CourtLink) is a single case management system for courts and tribunals being developed by the Attorney General’s Department of NSW. It will provide centralised processing and information retrieval and enable interchange of information between NSW Supreme, District and Local Courts, as well as the Sheriff’s Office, Coroner’s Court and Children’s Court. JusticeLink will be available to legal practitioners and, in due course, to the general public.

JusticeLink aims to reduce duplication of data across courts, allow faster and easier access to information, and improve case management, case registration, in-court processing of judgment orders and outcomes, fines and payments, lodging of documents, court listings, statistical reporting, Internet based access for courts and the public, legal practitioner access to court diaries, online access to court transcripts and online procedural hearings.

JusticeLink has been successfully trialled in the NSW Supreme Court and is currently being introduced in the District Court. In the NSW Supreme Court 167 electronic hearings have been held in civil matters as at the beginning of February 2008. Within 12 months, the computer system is expected to be operating in every criminal and civil court in NSW, including 160 Local Courts. JusticeLink will eliminate or reduce the need for attendance of the parties in court on simple procedural matters. JusticeLink will also be used by law firms to ‘e-file’ motions and evidence, enabling all the parties to proceedings to retrieve information electronically. As at the beginning of February 2008, nine law firms are using e-filing and have electronically filed 11 500 documents.292

eCourt

The eCourt is a virtual court designed to replace the need for physical court attendance for case management. The eCourt is only available for relatively straightforward matters where all parties are represented. It is not available for self-represented litigants or non-parties.293
Federal Court
The Federal Court has to date introduced a number of online services. These include:

- **eSearch**, which allows the public to search for information on individual cases
- **eFiling & eLodgment**, which enables litigants or lawyers to file court documents electronically and to pay filing fees using a credit card facility
- **eCourtroom**, which allows directions and other pre-trial orders to be made online. The court uses email for ‘pre-hearing correspondence and case-preparation, and with conducting directions hearings and supervising case management through secure electronic bulletin-boards’. It provides interactive collaborative forums for interlocutory proceedings.
- **eCase Administration**, which allows parties and lawyers to communicate with chambers staff on case-related matters.

A complete electronic trial was recently completed in a native title proceeding.

Other Federal Court initiatives include the implementation of a new case management system, the development of electronic documents for the conduct of appeals, an improved document management system and a national video conferencing system.

Another development is the new Commonwealth Courts Portal—the ordering of transcripts, submitting and settling of court orders, lodgement of documents and searching of court files online. It will commence in early 2008 and the e-lodgement system is expected to follow in July. The system has been developed by the Federal Court, Family Court and the Federal Magistrates Court. All of the courts’ e-services will be provided through a single web-based interface, which will integrate the electronic provision and management of information and services. Lawyers will be able to establish a line of credit, payable at the end of each month, for court fees. The firms may limit who may view documents on the court file; for example, the solicitors and barristers working on the case. Lawyers will also be able to directly submit information and documentation and search for information without assistance from counter staff. The court has reportedly said that the new system will move court staff away from process work to assisting people in how they might proceed.

NSW Land and Environment Court
eCourt
The Land and Environment Court of NSW established an eCourt more than five years ago. eCourt can be used to lodge an appeal online, conduct ecallovers, communicate with the court about administrative aspects of a matter, lodge specified documents online and check online the latest activity generated in the matter.

The security and authentication policy states that eCourt’s security has been designed ‘to balance ease of use and accessibility with appropriate levels of privacy and data security.’ eCourt uses high-level encryption technology to protect the security of all data in transit. Information stored on the system is protected by several layers of security, reflecting current best practice. Security provisions are regularly reviewed. Participants must be a party or be given access by a party to view any eCourt matter. The system has two levels of access security for external users:

1. access to the system via an account (login and password)
2. access to individual matters before the court.

The privacy policy provides a clear framework for ‘how and when the Land and Environment eCourt collects, stores, uses and discloses the information’ provided to it by those accessing eCourt facilities.

Supreme Court of Queensland
The Supreme Court of Queensland also has an electronic court. The technology used allows most cases in the Supreme and District Courts in Brisbane to proceed as electronic trials, even those with relatively few documents. Parties must implement consistent document management and classification procedures prior to disclosure to ensure that electronic trials are managed cost effectively.


293 Supreme Court of NSW (2007) above n 292.


295 Marcus Priest, ‘Court documents at your fingertips’ Financial Review (Sydney) 23 November 2007, 55.

296 Ibid.


7.9 SUBMISSIONS

Arguments for greater use of technology

In the submissions there was significant support for the greater use of technology. Judge Wodak felt that the use of technology is something that ‘must be provided for in any review of the civil justice system’.299 Hollows Lawyers contended that directions hearings are ‘often better resolved by telephone directions’.300 There was general support for the adoption of the practices currently used by the Administrative Appeals Tribunal to actively manage cases including the greater use of telephone directions hearings and technology.

There was overall support for the greater use of technology in the Supreme Court. Some Supreme Court judges already conduct telephone directions hearing and were positive about their experience of such hearings. Other comments were that telephone directions hearings save time and money.301 The Supreme Court advised that there should be an option for directions hearings to be held by email or Internet online instant messaging systems. One Supreme Court judge considered that electronic directions hearings could be very useful, once the technology was available to the courts and possibly when ICMS is implemented. Another Supreme Court judge referred to the email system used in the UK where directions hearings are held by consent.302

The Consumer Action Law Centre stated that:

Allowing litigants to participate in directions hearings by telephone will significantly reduce legal costs as solicitors will not need to devote an entire day or morning to the directions hearing. Court rules should establish telephone directions hearings as the default hearing type, and in-person directions hearings should be required only where personal attendance in the court is needed for a particular reason.303

The Victorian WorkCover Authority supported the electronic court filing of all documents.304 The TAC commented that ‘facilitated pre-trial interlocutory processes electronically, using a secure court portal, would reduce the need for pre-trial appearances’.305 eLaw endorsed the use of online forums for ‘non-contentious interlocutory matters’, as used in the Federal Court.306 The Magistrates’ Court noted that: ‘The telephone is not used to conduct a conference where the desire is to address seriously the question of resolving the dispute. The personal contact is found to be far more effective.’307

Arguments against greater use of technology

There was some opposition to the greater use of technology. One view expressed in the Supreme Court was that telephone directions hearings and video-conferencing were time-consuming and hard for the court to coordinate. In addition, it was felt that orders on the papers are far easier to deal with.308 Judge Wodak, although supporting the greater use of technology in principle, noted that a limiting factor could be the comparative access of parties to the use of technology. He queried whether one party would be disadvantaged by another party being able to use technology which the first party was unable (as opposed to unwilling) to use.309 This is a valid concern. In circumstances where a party does not have access to the requisite technology, it may be more appropriate for a judicial officer to require the matter to be heard in court.

Various other comments were made in the submissions:

- The Police Association suggested that ‘security features should be established that are designed to specifically protect electronically stored material against potential breaches of privacy and secrecy provisions’.310
- The Consumer Action Law Centre considered that VCAT should be ‘required to more actively use telephone and video conferencing’.311
7.10 RATIONALE FOR THE RECOMMENDATIONS

Telephone directions

The ALRC has identified that ‘new technology is expensive for courts and tribunals’, but that:

Technology should also produce cost savings from:

- videoconferencing of proceedings
- simultaneous access to court files
- electronic delivery of court files—reducing the need to physically transport files to other courts or from registry to judge
- less photocopying and file handling
- reduced time spent on data entry and storing and retrieving documents
- simplified archival and retrieval of files and space saving with fewer paper records
- improved accuracy in record maintenance
- improved electronic report creation and file searching and
- potential to reduce staff numbers or make them available for other services.312

The greater use of telephones for the conduct of directions hearings is one means by which pre trial matters may be determined more efficiently and at less cost to the parties. According to a UK report, the ‘widespread take-up’ of telephone directions conferences ‘reflects both financial disincentives to waiting at court, but also the fact that the legal market is changing … so that it is commonplace for solicitors to conduct litigation for clients in distant courts’.313

Another UK report noted that:

The use of telephone hearings and video conferencing seems likely to have increased the accessibility of the civil justice system, particularly for individuals or smaller corporates … where the time and cost that could otherwise have been spent travelling to hearings might be significant.314

The report also identified that ‘the increased use of telephone hearings and video conferencing has undoubtedly led to cost savings in many cases’.315 The report went on to note that experience with the use of new technologies, including telephone directions, has largely been positive in the UK and that judges and litigators should remain open to the introduction of new technologies that ‘can further improve the efficiency and effectiveness of the civil litigation system’.316

A report on civil justice reform in Norway commented that: ‘The use of modern information and communication technologies will be of considerable help in providing swift justice.’317

The Ontario Ministry of the Attorney-General recently released a report on civil justice reform. One of the recommendations identified the need to

allow for speedy mechanisms to obtain direction and orders on procedural matters from the managing judge, master or case management master for cases that are governed by rule 37.15. These mechanisms may include a telephone or in-person case conference.318

Another Canadian report stated:

It is telling that the technology with the most day-to-day impact on communications with the court is the humble telephone conference call. The current ease and low cost of conference calls with the court and their widespread acceptance by the court, which avoids the time involved in scheduling and attending a physical hearing, has made telephone conferences fairly ubiquitous in more routine procedural matters.319

In many if not most instances, telephone directions are more time efficient and cost effective for the courts and the parties than traditional court hearings requiring personal attendance. They also facilitate participation by parties and lawyers who are not located close to a court. Lawyers who may be located far from a court in Victoria either have to travel to court for a directions hearing or arrange for another lawyer to act as their agent and attend on their behalf. In both situations, time and expense is incurred at a cost to the parties.
Chapter 5

Case Management

At present a considerable amount of time is often spent both travelling to the court and waiting for matters to be called. If there are delays in court, a five-minute hearing may actually take up an entire morning as lawyers wait for their case to be reached in the list. However, in many instances, consent orders or adjournments may be obtained with minimal court waiting time or without necessarily requiring court attendance.

Greater use of telephones and other technology may give rise to tension with one aspect of civil procedural reform. As noted by Lord Woolf, there are advantages in clients personally participating in the civil litigation process. For example, their presence at case management conferences may enable them to be informed of the harsh realities of the process, including the costs consequences, and face-to-face communication may facilitate settlement.320 There is also a ‘risk that the court may be at a disadvantage in assessing evidence or submissions delivered through telephone directions or video conferencing rather than seen and heard face-to-face’.321

Also, section 24(1) of the Charter provides that a party to a civil [or criminal] proceeding ‘has the right to have the … proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing’.322 Section 24(3) provides that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits’. Presumably in this context, ‘hearing’ and ‘judgments or decisions’ mean the final adjudication of the matter rather than interlocutory hearings at which procedural matters are determined. In any event, telephone directions hearings can be conducted in open court, as often happens in other jurisdictions (eg the United States and Finland).

E-litigation

The problems associated with e-discovery of documents are well documented.

The production of computer records, and particularly e-mail, has enabled ordinary, informal, candid conversation to become part of the record of civil litigation. This has given rise to a staggering increase in the magnitude of relevant documents.

This has been challenging for the parties and the courts because they have to manage significant volumes of documents—both at the discovery stage and at trial. The Supreme Court has identified that there are inefficiencies and costs associated with the exchange and management of parties’ incompatible electronic data. The Supreme Court’s practice note encourages parties to consider the use of technology at the outset and thereby avoid problems at trial. The court’s aim is to decrease document management problems through technology, thereby reducing costs and delay; and to encourage lawyers to consider the ways in which the use of technology might lead to the more efficient conduct of litigation.

The commission supports the Supreme Court’s approach to e-litigation. Given the County Court now has unlimited jurisdiction, that court may wish to consider adopting the Supreme Court’s approach. The Magistrates’ Court deals with less complex disputes and therefore this approach to e-litigation may not be as suitable in that court. However, as the Magistrates’ Court jurisdiction is now $100 000, the court may wish to consider adopting the Supreme Court’s approach to e-litigation for higher value claims where there is a substantial volume of discoverable material in electronic form.

E-filing

At present, courts in Victoria, and in other jurisdictions, are taking various steps to facilitate the electronic filing and retrieval of court documents. The commission believes that these are desirable developments which should be accelerated if resources permit. However, we recognise that this could disadvantage self-represented litigants who may not have access to the technology required to electronically file and retrieve documents. Those who have access to the relevant technology should be encouraged to use e-filing. One means of encouragement would be for the courts to offer incentives to use e-filing, including reduced filing fees.

Use of the Internet and email

A number of the arguments for and against telephone directions hearings, which are referred to above, are applicable to the use of email by courts. However, email has the added advantage that it does not require the parties and the court to be in communication at the same time. This of course may have corresponding disadvantages.
The NSW Land and Environment Court is an interesting model as it provides privacy and data security. A similar approach could be adopted by the Victorian courts. The commission supports the use of email and Internet messaging systems for directions hearings. In a number of jurisdictions extensive use of email is currently made by courts for the purpose of giving directions for the conduct of civil litigation. Although it may be necessary to ensure that there are appropriate security arrangements to ensure confidentiality, where this is required, and to prevent electronic communications being accessed by unauthorised people, in most instances such communications are likely to only contain information which is presently disclosed in open court.

To date, the Internet has no doubt improved access to the civil justice system. Information published on the courts’ websites provides participants with easy access to information regarding the courts’ procedures and practices. The publication of judgments and statutory and other material on databases accessible through the Internet has done much to improve access to legal information and to reduce the cost of such access. However, as others have suggested, “the ease with which a lay person can navigate the law and civil procedure remains limited.”

7.11 CONCLUSIONS AND RECOMMENDATIONS

The use of telephone for directions hearings seems likely to increase access to the civil justice system and to reduce costs, particularly for individuals and small businesses where the time and cost spent travelling to courts may be significant. Therefore, we consider there should be greater use of telephone directions hearings to save the parties the time and the cost involved of physical attendance at court.

Communication technologies, particularly email, eliminate correspondence and document delivery time and reduce costs. Email directions hearings and Internet messaging systems should also be considered, subject to appropriate electronic security arrangements. Although the content of such ‘procedural’ communications may comprise only information presently communicated in open court, the computers used for the purpose of such communications may contain other sensitive or confidential information which may be able to be accessed by computer ‘hackers’. For example, computer systems used by parties or lawyers may contain privileged documents. Computers used by courts may also contain sensitive documents such as draft judgments. The more extensive use of electronic communication technology, including email, is only feasible if appropriate data security arrangements are in place. The problem is not unique to the judicial system and is already being addressed with existing email services available to the courts and the profession.

We also support greater use of electronic filing and retrieval of court documents. The existing e-litigation protocol in the Supreme Court should help ensure that the electronic assembly and management of documents, particularly for discovery and trial, will be much faster and less expensive where there are large numbers of documents. The County Court could consider adopting the Supreme Court’s approach to e-litigation. The Magistrates’ Court may wish to consider adopting the Supreme Court’s approach to e-litigation in more complex cases, including where a significant portion of the discoverable material is in electronic form.

In proposing that the courts should generally make greater use of technology in the management and conduct of civil litigation the commission is mindful that the courts and the Victorian Government are already committed to this course and that many innovations have already been introduced or are in the process of implementation. However, in the course of consultations and through submissions it was frequently suggested that this process should be accelerated. To do so will no doubt require the commitment of appropriate resources.

320 The Civil Procedure Rules 1998 (UK) r 3.1(c) gives courts the power to order a client to attend. However, in practice clients rarely attend case management conferences and are rarely ordered to do so.
322 This echoes other provisions on human rights. Article 14(1) of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) provides that everyone has the right to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) provides, inter alia, that: ‘In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’
324 Supreme Court (2007) above n 259, 1.
325 This is discussed in more detail under ‘Other reforms’ above.
326 Johnson and McIntosh (2007) above n 252, 9.
8. CASE CONFERENCES AND LISTING CONFERENCES AS AN ALTERNATIVE TO DIRECTIONS HEARINGS

8.1 THE PROBLEM

A number of the recommendations in this report seek to facilitate the early resolution of disputes.\textsuperscript{327} At present many interlocutory steps, including directions hearings, focus primarily on procedural steps directed towards the ultimate trial of the action. Although parties participating in directions hearings may discuss settlement, such hearings are usually formal and adversarial.

Less adversarial ‘case conferences’ are an alternative method by which the parties may endeavour to reach agreement on the steps required for the conduct of the action. They can provide an early opportunity for the parties to reach a settlement agreement or narrow the issues in dispute.

The desirability of more proactive judicial case management is discussed in detail in this chapter and in other parts of this report. Case conferences are a further means by which judicial officers can assist the parties to narrow or resolve the issues in dispute.

Case conferences (or listing conferences) are often convened by other courts or tribunals, eg the Federal Court, Family Court and AAT. The commission considers that informal case conferences may be a preferable alternative to formal directions hearings, or may supplement them. Preferably such case conferences should be held in mediation/conference rooms at court instead of in a courtroom, if facilities are available.

When case management conferences are conducted, a case management information sheet, similar to the one used in the Technology and Construction Court in London, could be sent to the parties by the courts prior to the conference.

8.2 POSITION IN VICTORIA

**Supreme Court**

In the Court of Appeal, a directions hearing/case conference is now held to discuss the issues in the appeal, the estimated length of hearing, any reason why the appeal should be given priority, any reason why the appeal is unsuitable for mediation and, if a hearing date is to be fixed, the availability of counsel for the relevant period(s).\textsuperscript{328} The representatives of the parties who appear at this hearing must be fully conversant with the details of the proceeding. After hearing from the parties, the master determines the degree of urgency, the length of the hearing, directions as to the contents of the appeal book and the time for filing of submissions, and where possible fixes the hearing date and orders mediation where appropriate.\textsuperscript{329}

The recently announced ‘new approach’ in the Building Cases List involves holding a resources conference. It is conducted by a master and is held after the close of pleadings when the issues in dispute have been identified. It is conducted on an informal and, where necessary, confidential basis. It is expected that the conference will be attended by lawyers who have the requisite knowledge of the issues in the proceeding. The person responsible for the litigation within the parties’ organisation is also expected to attend. The rationale is as follows:

> The purpose of the conference is to identify what resources should be applied to the litigation by the litigants, by the lawyers and also by the Court. At this conference the general framework for the conduct of the interlocutory and trial process will be laid down and consideration given to procedures, including information technology procedures, which may advance the resolution of the litigation. The parties will be required to address the financial outcome of the litigation on all likely outcomes. Parts of this conference may, with the approval of the Master, be conducted on a without prejudice basis. Communications at such times will be confidential. Following this conference, the Master will prepare a report (not including privileged matters) which may be used by the Court and the parties for the purposes of charting the progress of the litigation and for costs purposes.\textsuperscript{330}

The Building Cases List in the Supreme Court has also adopted from the Technology and Construction Court in London a requirement that the lawyers for the parties complete a detailed questionnaire (called a case management information sheet) regarding the dispute and the litigation.\textsuperscript{331}
County Court

In the County Court, in the Medical Division of the Damages List, ‘orders may be made for a Case Conference prior to or instead of a Mediation where the parties seek that course, and satisfy the Judge that it is appropriate to proceed that way’. In certain circumstances, the County Court may order a case conference in the Business List, Commercial and Miscellaneous Divisions and the Damages List Applications Division, General Division and Serious Injury Division. Practice Note PNCI 5—2007 of the County Court states that where a case conference has been ordered:

22. The parties themselves, or a representative of a corporate party with authority to settle the proceeding, must attend. The parties may be ordered, in advance of the conference, to file and serve a position paper of 2 or 3 pages discussing the issues of fact and law raised in the case, or to detail in an affidavit the circumstances relevant to a disputed transaction, or a party may be required to produce copies of relevant documents relating to issues of liability and/or quantum.

23. The case conference will be conducted by a judge in open court. The judge will expect counsel to be familiar with the case and to be able to discuss the issues of fact and law which arise. There will be the opportunity for the parties to retire to conduct private meetings.

24. The objectives of the case conference are to settle the action, or if this is not possible, to refine the issues and to determine the most appropriate interlocutory steps to bring the matter quickly to trial.

Magistrates’ Court

The Magistrates’ Court does not routinely hold case conferences.

8.3 OTHER MODELS

Federal Court

Court-conducted mediation is discussed in detail in Chapter 4. The Federal Court holds case conferences and scheduling conferences. In the Fast Track List, parties are encouraged to attend a scheduling conference within 45 days of the filing of the proceedings. This conference must be attended by the parties’ lawyers. The judge leads the conference while sitting with the parties’ representatives at the bar table. The Federal Court of Australia’s ‘Notice to Practitioners—Directions for the Fast Track List’ outlines the process as follows:

6.4 Initial Witness List—Each party must bring to the Scheduling Conference an initial witness list with the name of each witness the party intends to call at trial [and] a very brief summary of each witness’s expected testimony and, unless it is otherwise obvious, state the relevance of the witness’s evidence …

6.5 Narrowing of Issues - At the Scheduling Conference the parties will be asked to outline the issues and facts that appear to be in dispute.

6.6 Fixed Trial Date—At the Scheduling Conference the presiding judge will set a trial date for the case …

6.7 Pre-trial Schedule—With the assistance of the lawyers, the presiding judge will establish a pre-trial schedule for all interlocutory steps needed to bring the proceeding to trial, including (when appropriate) a time by which mediation will occur.

Together with the case summary process, the scheduling conference requires more detailed analysis to be undertaken at an earlier stage than might otherwise be the case. As noted by Grave and Mould: ‘This is likely to mean that the parties have a more realistic understanding early on as to the merits of their respective cases, and may provide an incentive to settlement.’

Family Court

In the Family Court, the case assessment conference is the first major event for most people who are seeking court orders. It may be conducted by either a registrar, a mediator or, in appropriate cases, both a registrar and a mediator.
Chapter 5
Case Management

The case assessment conference provides an opportunity for the parties to reach an agreement, with the help of the registrar and/or dispute resolution practitioner. If the parties cannot agree, the court will assess the main issues and facts of the case and, where appropriate, recommend other services that might help resolve the dispute (for example, further family dispute resolution or progression to a hearing).342

A procedural hearing is held either straight after the case assessment conference or later in the day. A registrar conducts the procedural hearing, with a family consultant usually involved if there are children’s issues. At the procedural hearing, the following may happen:

• any agreement reached during the case assessment conference may be made into legally binding orders of the court, and/or
• orders are made setting out the next step and what must be done to prepare for this.343

Queensland

Under the Personal Injuries Proceedings Act 2002, compulsory conferences are a prerequisite to the commencement of legal proceedings, although the requirement may be dispensed with ‘for good reason’ by the court or by agreement of the parties.344 The Act provides little guidance on the process to be followed at conferences.

The Act provides for each party to be informed of the cases that they must meet by requiring them to disclose, at least seven days prior to the conference, any information that is required to be disclosed by the Act.345 At this time also, the parties are required to certify that they are ready for the conference, and failing settlement, any litigation.346 Attendance at the conference is compulsory and ‘active participation’ by each party is required.347 However, parties may be represented by persons with authority to settle on their behalf. Although the Act provides no other guidance on the conference, it is clear that the process itself and any settlement is to be consensual.

As noted in Chapter 4 with reference to court-conducted mediation:

• Conference hearings are held in the AAT, which are conducted by registrars.
• In the Native Title Tribunal, members conduct case conference hearings.348

England and Wales

Case management conferences are conducted in various types of civil cases in England and Wales.

8.4 RATIONALE FOR THE RECOMMENDATION

Many of the arguments for and against court-conducted mediation are relevant to judicially managed case conferences. In some instances the parties or their legal representatives may agree to meet and confer in relation to the conduct of the case and possible settlement. However, this process is likely to be more effective if an independent third party is present. Moreover, judicial officers, with their added authority, may be more influential in such processes than other dispute resolution practitioners such as mediators.

The proposal for greater use of judicially managed case conferences gives rise to some obvious problems. First, there are resource implications if such conferences require more judicial officer time than the current customary methods for giving directions for the conduct of proceedings. Second, judicial officers may require additional training. Third, given that some parts of the conference may be conducted on a ‘without prejudice’ basis, it will be necessary to use judicial officers other than those who may preside at the ultimate trial of the matter. Fourth, in this as in other areas, it is important to ensure that cases are not over managed. The introduction of further procedural steps may add to the costs borne by the parties.

Despite these problem areas there appears to be considerable support for the greater use of case conferences. For example, the Law Council of Australia (LCA) endorsed case conferences in a recent report. Relevantly, the LCA recommended that:

3.2 The [case management conference] should be conducted by a judge or registrar familiar with the file, in as informal a manner as possible.349

3.3 The Court should require the lead counsel retained on behalf of the parties to appear at the conference and be sufficiently familiar with the matter to be able to identify the basis upon which each of the issues will be run by that party at trial.

3.4 The conference should aim to identify the real issues in the case; the scope of discovery;
the way in which evidence is to be adduced at trial; and determine the sequence of interlocutory steps. A study was undertaken in the UK which assessed the impact of the Woolf case management reforms in the Multi-Track and Fast-Track Lists of the District Court. According to the report: ‘Case management conferences represent the practical and philosophical expression of court control in the case managed track.’

A benefit of case management conferences was described by a circuit judge in the report as follows:

Its main impact has been upon ensuring that cases reach court ready for trial and within a reasonable time.

According to the report, ‘case management conferences are one of the major successes of the CPR’. It identified that ‘case management under the CPR can be directive but in many respects it is employed subtly’. For example, ‘in many cases case management conferences had been preceded by discussions between the parties and the filing at court of proposed agreed directions. Whilst this was not unknown prior to the CPR, the CPR has encouraged this practice.’

The report also found that:

When case management conferences are attended by representatives, these are normally the person in charge of the file … counsel were quite often instructed [which was useful]. The overwhelming view of case managing judges was that the vast majority of representatives, whether solicitor or counsel, attended case management conferences well prepared, appropriately instructed and with sufficient authority to constructively engage with the case managing judge …

This represents a gratifying advance from the pre-CPR position when a consistent complaint was that representatives at directions hearings were often inadequately instructed or too junior to make decisions.

**Submissions**

*Submissions in response to the Consultation Paper*

There was considerable support for case management conferences in the submissions. The Magistrates’ Court considered that:

Case management conferences must be conducted by someone who has extensive experience in litigation if they are to avoid being just another hurdle to be negotiated prior to the hearing of the proceeding. He or she must be able to ensure that the issues between the parties are identified with precision and that proper particulars are given so as to avoid surprise. In practice, those matters are not easy and require skill, born of experience, to tease them out. The judicial officer must be able to look at the proceeding and see what is superfluous and what is missing. This process would determine the nature of discovery between the parties.

In a detailed submission, the Victorian Bar expressed a similar view. The Bar considered that not all judicial officers were suited to ‘managerial judging’ (as different skills are involved). However, it suggested that:

If additional judges could be appointed, it would be desirable for the case management conference to be undertaken by a Judge of the Court … Absent the appointment of additional Judges, the Bar recognizes the invaluable assistance that Masters can provide to the Court in this area.

The Bar identified some of the benefits of case management conferences:

The early involvement, direction and supervision of the litigation process by the Court is generally recognised as being highly desirable … well-directed case management will be instrumental in reducing overall delay and costs in the civil justice system in Victoria.

The Bar also suggested that either at, or shortly after, the first directions hearing a case management conference should be held. It was proposed that the objectives of that conference should be, inter alia, to:

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342 Ibid.
343 Ibid.
344 Personal Injuries Proceedings Act 2002 (Qld) s 36(4) and (5). This is also discussed in Chapter 2.
345 Personal Injuries Proceedings Act 2002 (Qld) s 37(1).
346 Personal Injuries Proceedings Act 2002 (Qld) s 37(1), (2).
347 Personal Injuries Proceedings Act 2002 (Qld) s 38(6).
350 Ibid.
351 Peyser and Seneviratne (2005) above n 252.
352 Ibid.
353 Ibid.
354 Ibid.
355 Ibid.
356 Ibid.
357 Ibid.
358 Submission CP 55 (Magistrates’ Court of Victoria).
359 Submission CP 33 (Victorian Bar).
360 Submission CP 33 (Victorian Bar).
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(a) identify the issues to be determined;
(b) lay down the parameters for discovery and evidence;
(c) resolve how expert evidence (if any) is to be managed;
(d) identify whether any questions in the proceedings should be determined as a separate question ahead of the determination of other questions;
(e) [decide] whether alternative dispute resolution or reference out under Order 50, is appropriate;
(f) [determine] whether admissions of uncontroversial facts should be encouraged.\(^{362}\)

In its submission, the Bar referred to the Technology and Construction Court in London (the ‘TCC’) and the second edition of the “Technology and Construction Court Guide” (the “TCC Guide”):\(^{363}\)

Section 5 of the TCC Guide emphasises the importance of case management and provides for a case management conference which it describes as ‘the first case management conference’. All parties are expected to complete a detailed response to a questionnaire, known as the case management information sheet, sent out by the registry of the Court prior to the first case management conference.\(^{364}\)

The Bar recommended that consideration might be given to adopting a similar procedure in the Supreme and County Courts.\(^{365}\)

Peter Mair suggested that there should be ‘provisions for an independent reviewer (not necessarily a lawyer) to convene a meeting of the litigants with prior access to their statements, giving both the substantial basis for any allegations made and the essence of the defence to those allegations’.\(^{366}\)

Submissions in response to Exposure Draft 2

There was significant support for case management conferences in the submissions. There were no submissions in opposition to the idea. In support of the proposal, Judge Wodak of the County Court supported greater involvement of judicial officers in case conferences provided that ‘the resource and cost implications involved in moving from the present culture to that proposed are acknowledged and proper provision is made to allow judicial officers to take part’.\(^{367}\)

Another County Court judge was similarly supportive of case conferences presided over by judges:

The discussion of the issues in open court with the parties present facilitates the settlement process. The fact that a judge is presiding seems to be important.\(^{368}\)

A Supreme Court judge considered it was good to formalise case management conferences and as long as they were not pseudo-mediation, he supported them as an alternative to directions hearings.\(^{369}\)

IMF supported the introduction and extension of all the case management activities developed in the English context, including case conferences.\(^{370}\)

Steve White contended that the key advantage is that those able to settle the matter can hear what an independent person (the judge) has to say about their dispute on a preliminary basis.\(^{371}\)

Victoria Legal Aid expressed general support for the adoption of the practices currently used by the AAT to actively manage cases, including the use of case conferences and listing conferences as an alternative to directions, as long as Charter issues are considered.\(^{372}\)

State Trustees, QBE Insurance, and the Supreme Court expressed general support for the proposal.\(^{373}\)

The submissions included a number of other comments and suggestions:

- Judge Anderson and Steve White considered that if a judge was ‘compromised’ by participating in the case conference process, the trial could, and should, be fixed before another judge.\(^{374}\)
- Judge Anderson also contended that: ‘The preparation the parties do for the conference is important so that counsel are familiar with the case.’\(^{375}\)
- Judge Anderson also suggested that a case monitoring officer would be useful.\(^{376}\)
- Steve White submitted that it would be helpful ‘to be able to use without prejudice material in these conferences which would involve the conference not being held in open Court’.\(^{377}\)
A Supreme Court judge proposed that senior people should be present at the conference—either solicitor or barrister—to sort out and narrow issues. He also noted that there were issues of confidentiality regarding what is said at a case conference when parties are trying to narrow issues or settle disputes.376

One Supreme Court master felt that the court was already conducting case conferences in an informal way. It was also suggested that there is a general reluctance by parties to discuss issues at an early stage.379

8.5 CONCLUSIONS AND RECOMMENDATIONS

Case conferences and listing conferences should be considered as an alternative to directions hearings in all types of disputes both for the purpose of managing the proceeding and as a means for resolving disputes at an early stage of the proceeding. Having the ability to obtain orders from the court following a case conference is useful and should be considered as an option.380

In addition, it would be useful to be able to hold case management conferences in mediation or conference rooms at court instead of in a courtroom, if possible, to ensure the confidentiality of the process is maintained, where appropriate, and to encourage greater candour in an informal setting.

Case conferences and listing conferences by telephone may also be appropriate, to save the parties the time and expense of their lawyer attending in person but this may not be as conducive to settlement as face-to-face interaction.

The commission considers that it is up to the court to decide when a case management conference is appropriate. At any stage, the parties could request a case conference.

A case management sheet as used in the UK’s Technology and Construction Court should be adopted by the courts. Adopting the information sheet would be of benefit because it assists the parties in preparing thoroughly for the conference and provides the court with a significant amount of information about the case prior to the conference. The information sheet would also be useful for the court’s own data collection purposes.

9. EARLIER AND MORE DETERMINATE TRIAL DATES

9.1 THE PROBLEM

This review was prompted in part by widespread concern about the costs and delays associated with litigation. The Bar contended in its submission that delay itself can lead to significantly higher costs of litigation as the additional time allows parties to become involved in protracted interlocutory disputes.381 As Chief Justice Gleeson observed in his State of the Australian Judicature Address:

Litigation is a perfect example of Parkinson’s law: work expands to fill the available time.

At present, particularly in the higher courts, there are significant delays before trial dates are fixed. Moreover, in many cases, trials do not proceed on the dates fixed. There may be many reasons for this, including the unavailability of a judge to hear the matter.

The commission considers that setting trial dates early is one method by which costs and delay may be better managed. Earlier and more determinate trial dates are obviously in the interests of all participants in the civil justice process. It is, however, appreciated that there are many logistical and resource issues that need to be taken into account in fixing trial dates. These difficulties are compounded by the fact that the court does not have control over many of the relevant variables. To a large extent, fixing earlier and more determinate trial dates will be more feasible if a number of the other recommendations in the present report are implemented.

In the submissions there was significant support for the early setting of trial dates.

9.2 POSITION IN VICTORIA

Different courts have different strategies in this regard. The Supreme Court recently decided that in cases that are not managed, trial dates will be set after mediation and after witness statements and court books have been filed with the court.382
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The majority of cases in the Commercial List are offered a fixed listing within three to four months (unless the parties desired otherwise), and the opportunity to be heard even earlier where the parties agreed to prepare in advance and to be placed on a ‘standby listing’. Parties to cases on ‘standby’ are warned their case will be listed on a specified day if time becomes available due to the settlement or adjournment of other cases. 383

The County Court sets trial dates early, as does the Magistrates’ Court.

9.3 OTHER MODELS

Federal Court Fast Track List

The recently introduced Federal Court Fast Track List aims to offer trial dates within six months from the commencement of the proceeding. At the initial directions hearing, known as a scheduling conference,

the presiding judge will set a trial date for the case which, except in urgent cases, will be between two and five months from the date of the Scheduling Conference, depending on the relative complexity of the case. Urgent cases will be heard on shorter notice. 384

The scheduling conference occurs not less than 45 days from the date the application was filed. 385

Ontario

A report by The Hon. Coulter A Osborne, QC to the Ontario Attorney-General (‘the Ontario report’) in November 2007 recommended that the Office of the Chief Justice of the Superior Court and the Regional Senior Justices of each region consider options to:

(a) Eliminate the requirement of personal attendance at Assignment Court and replace it with a new practice for setting trial dates (e.g., vest trial coordinators with the authority to set trial dates; use of an administrative form, jointly submitted by the parties, to permit trial dates to be set; use of teleconference hearings for Assignment Court; use of the Internet for fixing tentative trial dates).

(b) Direct and enforce time limits on trials, to ensure greater certainty in trial duration and improved trial scheduling.

(c) Adopt and consistently enforce a policy with respect to adjournments.

(d) Establish outside time standards within which trials ought to be heard, to be considered when scheduling trials and to provide a benchmark for litigants to know when a trial date is likely to be available upon the case being set down for trial. 386

9.4 RATIONALE FOR THE RECOMMENDATION

Various studies over the past few decades have found that the early setting of trial dates leads to the early settlement of cases, which reduces delay. For example, an inquiry by a Delay Reduction Committee comprising representatives from the NSW Supreme Court, the profession and the Attorney-General’s Department revealed problems of delay in the Common Law Division of the Court. The committee recognised that firm trial dates lead to more effective preparation and settlement. 387

Justice Marks, writing about the Victorian Supreme Court’s Commercial List in 1992, identified that the ‘best lever to settlement’ is the fixture of a firm trial date. 388

United States studies have produced similar results. The results from a Rand study were that an early trial date tends to save money and time. 389 A National Center for State Courts (NCSC) study in the United States found that when firm trial dates were set there was a greater than normal number of settlements just before trial, as a result of increased activity by attorneys. 390 Another study found that the single most effective stimulant to settlement was the scheduling of a firm and unavoidable trial date. 391

As discussed in Chapter 1, Professor Scott identified 10 ‘concerns’ which he contends need to be taken into consideration in connection with the judicial management of litigation. As he notes, proactive judicial case management imposes discipline on the courts and the courts must have the capacity to respond to the demands for their services in accordance with the standards and goals of the case management system. One important element is a firm date for hearings. 392
The commission considers that further consideration should be given to means by which trial dates could be set earlier than at present. It is recognised that there are many ‘variables’ over which the court does not have control and we are mindful that the overwhelming majority of cases do not proceed to trial. It is also appreciated that the courts are very aware of these difficulties and have taken and are continuing to take various initiatives to achieve earlier and more determinate trial dates.\(^393\)

The commission understands that there is a tension between the desirability of setting early trial dates and the necessity to take account of the largely unpredictable factors that influence the availability of judicial officers to hear matters on a designated date. In the higher courts in Victoria this problem is compounded by the fact that judicial officers deal with both civil and criminal cases. In recent years, the increased demands of long criminal trials appear to have had a significant impact on the judicial resources available to deal with civil matters.

To some extent these difficulties would be reduced if the length of civil trials is reduced and more determinate. Again, this is an area where a number of the recommendations in the present report, if implemented, may assist.

One of the practice notes in the Supreme Court provides that ‘at the conclusion of the time estimated for the trial, the trial judge will stop the trial and make arrangements for the resumption of the trial at a later date’.\(^394\) The commission supports this approach as it endeavours to make the parties responsible for trial estimates and it helps ensure that judges are available to hear trials on the date set in circumstances where the immediately preceding trial is likely to exceed the time initially allocated.

The commission also notes that although the County Court sets dates early, it still encounters problems. Once the trial date is set proceedings need careful supervision to ensure that they are ready for trial. It is sensible to have the trial commence as soon as possible after the procedural steps have been completed. However, there may be problems with compliance where there has not been supervision of the interlocutory steps before trial.

**Submissions**

**Submissions in response to the Consultation Paper**

There was significant support in the submission in response to the Consultation Paper for setting earlier trial dates. For example, the Law Institute ‘believes that matters should have trial dates set from the outset, which would encourage greater adherence to timetables for the completion of interlocutory steps’. In addition, the Institute noted that ‘the advantage of setting the trial date early in the process means that when parties attend mediation, they already know when the trial will be and, therefore, prospects of settlement are maximised’.\(^395\)

Slater & Gordon and Hollows Lawyers suggested that the best way to facilitate the early settlement of claims is to fix a trial date at the earliest possible stage. The Building Practitioner’s Society also supported the early allocation of a trial date.\(^396\)

Corrs Chambers Westgarth submitted that to improve the efficiency of the case flow management of matters, particularly in the Supreme Court, it is important to fix a trial date early in the proceeding, or at least as early as circumstances may permit. It further contended that:

> Currently there is great uncertainty and considerable delay in obtaining a date for trial and that when the dates are eventually fixed they extend into periods that often sit uncomfortably with clients’ expectations. Such delay and uncertainty could be removed by fixing a trial date early in the proceeding and giving the parties sufficient time to prepare. Once fixed, a trial date should not be vacated by the court without extraordinary grounds or irreparable prejudice.\(^397\)

The Supreme Court noted in its submission that it has decided that in certain cases trial dates will be set after mediation and after witness statements and court books have been filed with the court.\(^398\)

State Trustees commented that:

> It is often the case that even though parties may have prepared for trial and engaged counsel, they are unable to have the matter heard by a judge on the scheduled day due to a variety of reasons including the unavailability of judges or another matter having exceeded its allocated court hearing days. As a consequence, litigants unnecessarily incur substantial costs. Reform of the court’s listing or case management practices may alleviate this problem.\(^399\)
WorkCover expressed the view that:

A lack of certainty of court hearing dates can cause problems with witness availability or issues of ‘stale’ evidence, particularly in a medico-legal setting … the closer a date can be given once readiness for trial is confirmed the better with regard to both delivery of timely outcomes and cost effectiveness. 400

The Magistrates’ Court noted that it has considered the certificate of readiness process. However, it was felt that the present arrangement of rule-imposed time limits for the taking of steps together with the fixing for trial following the completion of a pre-hearing conference or mediation was considered preferable. It enabled the court to exert greater control over the proceeding by fixing the times for steps and fixing the time of the conference or mediation. 401

Submissions in response to Exposure Draft 2

A number of submissions expressed support for the draft recommendation incorporated in the second exposure draft. Clayton Utz contended that earlier and more determinate trial dates were of ‘critical importance’. 402 Another submission discussed experiences in the Supreme Court:

At our abortive trial date, the Master said that the matter was likely to settle in a day or two not the 8-10 days allocated and she can’t have Judges sitting around doing nothing. We were bitterly disappointed at this attitude plus that the Court couldn’t organize itself one year in advance for our trial, knowing our dire circumstances, and then hitting us with another 9 month wait. 403

Maurice Blackburn submitted that:

It is the prospect of trial and the certainty of getting started on or near that trial date that promotes resolution, which in turn clears court lists. If an insurer considers that a case has reasonable prospects of not getting a start, either because of a clogged court list or lack of judges, there is a good chance that less of an effort will be made by the insurer to resolve the case. 404

Judge Wodak contended that early trial dates should be provided, as is the case in his list. However, as he noted, there are many impediments to the successful maintenance of trial dates allocated. In his view, some of these difficulties may be overcome by judicial management, but not always. 405 Justice Whelan suggested that practitioners may want early trial dates but that they come at a cost to the court where there is large-scale vacation of trial dates. He stated that ‘there is no half-way house’. 406 Master Kings of the Supreme Court said that the practice at the moment is to give late trial dates ‘because so many cases settle’. 407

9.5 RECOMMENDATIONS AND CONCLUSIONS

Despite the concerns raised, the commission considers that further consideration should be given to means by which trial dates could be set earlier than at present to help bring about earlier settlements and reduce delay. We are persuaded that it would be better to set trial dates at the earliest possible opportunity to ensure that there is some certainty in the proceeding for the parties and lawyers. Setting trial dates early places pressure on the parties and lawyers to prepare for trial. In doing so, parties’ and lawyers’ minds are focused on the proceeding, including on the costs of the hearing and potential adverse costs orders. This pressure can lead to parties settling before trial. Also, anecdotally, legal practitioners prepare court books close to trial. Without a set trial date, court books may not be a priority for legal practitioners, which could cause delay.

Once a trial date is set, it is obviously important that the courts should take steps to ensure that there are sufficient judicial resources available to conduct the trial on the designated date(s). It is at this point that problems arise, given the largely unpredictable factors that influence the availability of judges to hear matters on any date. No doubt the expansion of the docket system would help ensure that the trial date is not vacated if the designated docket judge fixed matters for trial on dates when he or she is available.

The commission is not in possession of reliable data on the frequency with which trial dates are vacated because of the unavailability of judges to hear the matter. However, in the course of consultations, this was said to be a matter of significant concern. The costs incurred, the delays...
experienced and the inconvenience and frustration caused when parties prepare for a trial and are informed on the day of the trial that there are no judges available to hear the trial are significant. The consequence can be that the parties receive a trial date many months after the first trial date. Setting trial dates early and ensuring judges are available on the day will ensure that proceedings move through the court process quickly. Early trial dates also place pressure on the parties to settle early, which should reduce delay. There are various means by which judicial resources may be re-deployed where cases settle on or before the date fixed for trial. The approach in the Commercial List could be considered.408

In part, earlier trial dates may be more achievable if the periods allocated for the hearing of trials were fixed and if parties were required to adhere to stricter time limits in conducting the trial. Many parties and lawyers would no doubt more readily accept such limitations on the conduct of trials if they were able to obtain earlier and more determinate (albeit shorter) trial dates. Such greater ‘certainty’ would also be advantageous to the legal profession (and witnesses).

The goal of earlier and more determinate trial dates is likely to be more achievable if a number of the other recommendations in this report are implemented. For example, the proposals in respect of pre-action protocols and ADR are likely to substantially reduce the number of disputes resulting in litigation and proceeding to trial. The proposed overriding obligations may facilitate a narrowing of the issues and a change from the combative ‘adversarial’ conduct which is characteristic of many proceedings. The proposals in relation to case management, expert witnesses and discovery are also likely to have a significant impact on the duration and conduct of trials. The expansion of the docket system may help ensure that the designated docket judge is available to hear the matter on the date which he or she fixes for trial. The commission appreciates that to simply propose earlier and more determinate trial dates in the absence of other procedural and systemic changes would be unrealistic (at least in the absence of an increase in judicial resources).

10 EARLIER DETERMINATION OF DISPUTES

10.1 THE PROBLEM

Claims or defences which are without merit create obvious problems for the parties and the administration of justice. Claims without merit subject defendants to the inconvenience and expense of litigation. Costs may not be recoverable from claimants of limited means. Defendants may choose to pay an amount to settle the claim in order to avoid the expense of litigation. Claimants themselves experience the trauma and cost of losing. Lawyers acting for claimants on a no win, no fee basis will be unreremunerated and not recover the expenses advanced to support the litigation. Where lawyers acting for claimants are being paid regardless of the outcome they do not have any financial incentive to resolve the claim expeditiously or economically.

Defences without merit subject claimants to the cost and inconvenience of litigation. Even if successful, claimants may not recover all of the costs incurred by them. The defence of the claim may induce claimants with meritorious claims to give up or to settle for less than the value of the claim because of a financial inability to pursue the matter or fear of an adverse costs order. Lawyers acting on a no win, no fee basis may advise or pressure clients to settle for less than the claim is worth in circumstances where they have an understandable commercial interest in being paid or in recovering money outlaid to finance the litigation. Where lawyers acting for defendants or insurers are being paid regardless of the outcome they do not have any financial incentive to resolve the case expeditiously or economically.

Apart from the cost and inconvenience to the parties, the pursuit of unmeritorious claims or defences has adverse consequences for the administration of justice. Judicial and other publicly funded resources are expended and diverted from dealing with other cases. Witnesses may be required to expend considerable time and effort, which may not be adequately remunerated. Jurors may be compelled to take time off work or be diverted from other activities. Insofar as legal costs may be tax deductible, there will be a loss of tax revenue. If legal aid is granted, this will also incur public expense.

It is clearly in the interests of the parties to disputes, and in the public interest, that there be appropriate procedural protections designed to ensure that civil claims or defences are only pursued where they have sufficient merit.

400 Submission CP 48 (Victorian WorkCover Authority).
401 Submission CP 55 (Magistrates’ Court of Victoria).
402 Submission ED1 18 (Clayton Utz).
403 Confidential submission ED2 2 (permission to quote granted 17 January 2008).
404 Submission ED2 19 (Maurice Blackburn).
405 Submission ED2 5 (Judge Wodak).
406 Consultation with the Supreme Court of Victoria (9 October 2007).
407 Consultation with the Supreme Court of Victoria (9 October 2007).
408 See the discussion above regarding the ‘standby’ procedure in the Commercial list.
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Where unmeritorious claims or defences are commenced and pursued existing procedural rules and powers of the court provide a variety of means for dismissal, judgment or a stay. Procedures for summary judgment, summary stay or dismissal of claims, the striking out of pleadings, security for costs and other powers conferred on the court may be utilised to prevent unmeritorious claims or defences from being litigated. These are often augmented by the power to impose costs sanctions on the parties and lawyers. The focus of this part of the chapter is on summary disposal.

10.2 SUMMARY DISPOSAL

Procedure

A summary judgment application is an application, usually brought by a plaintiff, for judgment to be entered ‘summarily’ (that is, without trial) on the grounds that there is no real defence to the claim, and therefore there is no triable question of fact or law. In some jurisdictions it is also possible for summary judgment to be obtained by a defendant against a plaintiff.

10.3 POSITION IN VICTORIA

In Victoria, a court’s power to order summary judgment is found in the rules of court. Rules in the same terms apply in the Supreme Court and the County Court. There are some variations between the relevant rules in the Supreme Court and in the Magistrates’ Court.

Supreme Court and County Court

In the Supreme Court summary judgment may be obtained against either a defendant or a plaintiff. However, this is not immediately obvious as different rules apply depending on which party makes application. In respect of an application by the plaintiff rule 22.02 of the Supreme Court (General Civil Procedure) Rules 2005 relevantly provides:

(1) Where the defendant has filed an appearance, the plaintiff may at any time apply to the Court for judgment against that defendant on the ground that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim, or no defence except as to the amount of a claim.

(2) Paragraph (1) shall not apply to a claim for libel, slander, malicious prosecution, false imprisonment or seduction or to a claim based on an allegation of fraud.

As can be seen from subsection (2), certain categories of cases are specifically excluded from the procedure. The rationale for the exclusion is that such cases raise serious questions (for example, fraud) which are more appropriately dealt with at trial.

In respect of an application by the defendant rule 23.03 provides:

On application by a defendant who has filed an appearance, the Court at any time may give judgment for that defendant against the plaintiff if the defendant has a good defence on the merits.

That is, on a summary judgment application brought by a defendant, he or she must show by evidence that he or she has a complete defence on the merits to the claim brought by the plaintiff.

Magistrates’ Court

In the Magistrates’ Court the procedure is only available for a plaintiff to obtain judgment against a defendant. There is no corresponding procedure for application by a defendant. The Magistrates’ Court procedure applies only where the claim is for a debt or liquidated demand.

On a summary judgment application there are a number of options available to the court. In particular, it may:

- give summary judgment;
- give unconditional leave to defend (that is, dismiss the application); or
- give conditional leave to defend.
Conditional leave to defend involves the defendant being given leave to defend provided he or she pays money into court. It is an effective way of screening out unmeritorious claims. That is, a defendant with a dubious defence will have to provide security as a condition of obtaining leave to defend an amount of money. In the event that the defence is unsuccessful, there will be a ready pool of funds that the plaintiff can execute against.

The current test

As a general principle, defendants who show that they have reasonable grounds for setting up a bona fide defence ought to be given unconditional leave to defend. In the Supreme and County Courts the court may on application by the plaintiff give judgment ‘unless the defendant satisfies the Court that in respect of that claim ... a question ought to be tried or that there ought for some other reason be a trial of that claim’. The rule in the Magistrates’ Court is in similar terms.

Where a defendant can establish that he or she has a good defence on the merits the Supreme and County Court may give summary judgment for the defendant against the plaintiff. In the Magistrates’ Court a defendant may obtain summary judgment against the plaintiff on a counter claim.

Apart from the specific rules governing summary judgment for the plaintiff or the summary stay, dismissal or striking out of claims or defences, courts have inherent or implied jurisdiction to prevent the abuse of their processes.

The various formulations of the summary powers to terminate actions were summarised by Chief Justice Barwick in General Steel Industries Inc v Commissioner for Railways (NSW) as follows:

The test to be applied has been variously expressed: ‘so obviously untenable that it cannot possible succeed; ‘manifestly groundless; ‘so manifestly faulty that it does not admit of argument; ‘discloses a case which the Court is satisfied cannot succeed; ‘under no possibility can there be a good cause of action; ‘be manifest that to allow them (the pleadings) to stand would be useless expense’.

The alternative basis on which a defendant may be given unconditional leave to defend is that ‘there ought for some other reason be a trial of [the] claim’. The burden is on the defendant to establish this. Thus where there are circumstances which require the matter to be closely investigated—for example, by allowing defendants to avail themselves of the compulsory processes of the court (such as discovery, interrogation, subpoena), the defendants may be given unconditional leave to defend notwithstanding that they are not able to pinpoint any precise question which ought to be tried.

The High Court has held that the summary judgment procedure should be reserved for ‘actions that are absolutely hopeless’. The court has also stated that:

The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear there is no real question to be tried.

Consistently with this approach, the Supreme Court submitted that the ‘classic approach is that summary judgment should be awarded sparingly’.

Numbers of applications

In its submission in response to the Consultation Paper, the Supreme Court noted that:

No statistics are kept of applications for summary judgment, but the collective experience of the Masters is that applications by plaintiffs are frequent, in the order of 15–20 per week, and principally in relation to applications for possession of land and recovery of capital and interest by mortgagees.

The court undertook a small sample study of summary judgment applications in the course of preparing its submission in response to the Consultation Paper. It reported:

The study found that, of applications for summary judgement listed in March 2004, approximately half were successful before Masters. All of the remaining matters settled before trial. A larger study would be necessary to establish if this settlement pattern was influenced by the summary judgment application.

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409 See, eg, Fancourt v Mercantile Credits (1983) 154 CLR 87, 99.
410 Supreme Court (General Civil Procedure) Rules 2005 r 22.03; Magistrates’ Court Civil Procedure Rules 1999 r 10.07–10.18.
412 Yorke (MV) Motors v Edwards (1982) 1 All ER 1024; 1 WLR 444, 328.
413 Supreme Court (General Civil Procedure) Rules 2005 r 22.06(1)(b).
414 Magistrates’ Court Civil Procedure Rules 1999 r 10.13(1)(b).
415 Supreme Court (General Civil Procedure) Rules 2005 r 23.03.
416 General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, 129 (Barwick CJ).
417 See, eg, Hills v Sklivas [1995] 1 VR 599, 606–607 (Tadgell J), 607 (Ormiston J), 611 (Batt J); and Miles v Bull [1969] 1 QB 258; Charfield v Taranto (Unreported, Supreme Court of Victoria, Murphy J, 9 June 1988) reproduced in Williams (2008) above n 114, [22.06.30].
418 De v Victorian Railways Commissioners (1949) 78 CLR 62, 90–91 (Dixon J).
419 Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87, 89; 48 ALR 1, 2.
420 Submission CP 58 (Supreme Court of Victoria).
421 Submission CP 58 (Supreme Court of Victoria).
422 Submission CP 58 (Supreme Court of Victoria).
423 Submission CP 58 (Supreme Court of Victoria).
Chapter 5
Case Management

Some of the particular questions which the commission considered were:

- whether the classic test should be liberalised. For instance, should there be a move away from a requirement that "there is no real question to be tried"?
- whether there should be an obligation on the court or judicial discretion to initiate the summary judgment procedure where early disposal of a proceeding appears desirable
- whether there should be a restatement and simplification of the rule so that it is made clear that summary judgment may be obtained by both plaintiffs and defendants. In particular, in the Magistrates’ Court should the rule be extended so as to allow a defendant to apply for summary dismissal of the proceeding?
- whether the limitations on categories of cases that are excluded from the procedure should be removed
- whether there should be a residual discretion to allow a matter to proceed to trial even if the applicable test for summary disposal is satisfied.

10.4 OTHER MODELS

England and Wales

In England and Wales, the Civil Procedure Rules 1998 impose an obligation on the court to further the overriding objective by active case management. Rule 1.4 contains a list of 12 matters which ‘active case management includes’. Among these 12 matters is ‘deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others’ (rule 1.4(2)(c)).

The rules provide that the court’s powers of summary disposal of issues which do not need full investigation and trial include:

(a) under rule 3.4, striking out a statement of case, or part of a statement of case (see further below), and
(b) under Part 24, giving summary judgment where a claimant or a defendant has no reasonable prospect of success.

Rule 24.2 sets out the grounds for summary judgment. It provides:

The court may give summary judgment against a claimant or defendant on the whole of the claim or on a particular issue if:

(a) it considers that—
   (i) the claimant has no real prospect of succeeding on the claim or issue; or
   (ii) the defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

According to the relevant Ministry of Justice (UK) practice direction, an application for summary judgment under rule 24.2 may be based on:

1. a point of law (including a question of construction of a document),
2. the evidence which can reasonably be expected to be available at trial or the lack of it, or
3. a combination of these.

This approach to summary judgment reflects the procedure recommended by the Woolf Report, namely to replace a number of existing separate procedures, such as summary judgment and summary determination on a point of law, with a single procedure.

The new procedure incorporates a liberalised test, so that the party making the application has to show, in respect of the defendant, that he or she has no real prospect of successfully defending the claim, or in respect of a plaintiff, that he or she has no real prospect of succeeding on the claim. The party resisting summary disposition has to show more than that its case is merely arguable. Instead, the party has to show that it has a ‘realistic, as opposed to fanciful, prospect of success’. Where a case is ‘entirely without substance’ or completely contradicted by documentary evidence, it is ‘fanciful’. In exceptional circumstances the court can allow a case or an issue to continue although it does not satisfy this test, namely, if it is considered that there is a public interest in the matter being tried.
It is also envisaged that the application for summary judgment may be brought by any party or of the court’s own initiative. It may also be brought at any stage of the proceedings. In their discussion of the Victorian civil justice system, the authors of Going to Court were in favour of the English approach to the summary judgment rules:

_We suggest that the current Victorian approach is too cautious and that Victoria would do well to consider adopting the test recommended by Lord Woolf in the United Kingdom. That would give the courts a stronger basis for sorting out at an earlier stage than usual the unmeritorious cases which would otherwise clog up the case processing system._

However, the test applied in England and Wales has recently been the subject of considerable controversy in light of two large commercial cases, including a ‘mega case’ against the Bank of England (the ‘BCCI case’). That case was ultimately discontinued after years of pre-trial procedures and months of trial during which time enormous costs had been incurred. In the BCCI case an application to strike out the claim had been successful before the Commercial Court judge who heard the application. That decision was upheld in the Court of Appeal but overturned in the House of Lords (by majority).

The case proceeded to trial but was eventually aborted after a lengthy hearing. This led to considerable public and professional controversy, including as to the adequacy of the legal standard relating to striking out and summary judgment. This led to a symposium in October 2006 and in January 2007 the Commercial Court Users Committee set up a working party comprising Commercial Court judges, barristers and solicitors who practise regularly in the court and two clients with wide experience who had been involved in large cases in the court.

In December 2007 the working party produced its report and recommendations. The working party, after considering the present law on the test for granting summary judgment or to strike out, concluded ‘without hesitation’ that the test should remain as set out in the Civil Procedure Rules. However, it was proposed that there should be a procedure for the allocation of a particular Lord Justice (preferably with a Commercial Court background) to deal with applications in dealing with appeals’. It was proposed that there should be a procedure for the allocation of a particular Lord Justice (preferably with a Commercial Court background) to deal with applications in the Court of Appeal and that interim appeals, particularly those concerning summary judgment and/or strike out, should be determined very expeditiously.

The working party also considered problems arising out of a submission of ‘no case to answer’ at the conclusion of the claimant’s case. As the working party noted:

_It is in none of the litigants’ interests unnecessarily to prolong proceedings that are either bound to fail or bound to succeed._

The working party also considered whether there was a need for a change in the law or procedure relating to appeals from decisions of trial judges on an application for summary judgment or to strike out a claim or defence. Although it did not recommend any change in the legal principles, two recommendations were made in respect of ‘practical ways that the Court of Appeal can assist in dealing with appeals’. It was proposed that there should be a procedure for the allocation of a particular Lord Justice (preferably with a Commercial Court background) to deal with applications in the Court of Appeal and that interim appeals, particularly those concerning summary judgment and/or strike out, should be determined very expeditiously.

The working party also considered problems arising out of a submission of ‘no case to answer’ at the conclusion of the claimant’s case. Other recommendations of the working party are discussed in relevant parts of this chapter.

**Federal Court**

Under the Order 20 (of the Federal Court Rules) procedure an application for summary judgment can only be brought by the applicant. The summary judgment procedure is not available for a respondent against an applicant. The application of this rule in the Federal Court has evolved in a different direction to the procedure in Victorian courts. In a number of decisions, the Federal Court has taken a robust approach, particularly in the context of its case management regime. In _Lenujmar Pty Ltd v AGC (Advances) Ltd_ it was said:

_In this Court, there is just such a [case management] system. From that circumstance we extract two propositions. First, the fundamental differences in procedure render inapplicable most, if not all, of the principles evolved by the English courts in relation to their own procedures. Secondly, the existence of a case management system within this_
Court is the backdrop against which the relevant rules must be considered and applied. That the Court follows the case management approach is well known in the legal profession.438

In the subsequent case of Caterpillar Inc & Anor v Sun Forward Pty Ltd Justice Drummond referred to Lenjimar with approval:

It follows that, from the existence within the procedures of this Court of the case management system, that it is the text of O[order]20 r1 which must govern the outcome of the present application: there is no justification for importing into the Federal Court rule all the detailed restrictions that the cases identify as applicable to the traditional summary judgment rules. But O[order] 20 is not intended to provide an alternative to trial as the ordinary method of resolving litigation in the Court: see Bell v Clare (1989) 23 FCR 274 at 280. Its function is limited to providing an expeditious means of resolving litigation where the applicant can clearly demonstrate that there is no real defence to particular claims made by it.439

These cases suggest that where there is a case management system in place, the summary judgment procedure is to be applied more readily, in order to screen out unmeritorious cases. However, even with the Federal Court’s stated case management approach to summary judgment, there has been debate in different contexts about potential reform of the Federal Court Rules in relation to summary judgment, in particular, about the relaxation of the relevant test.

In Managing Justice the ALRC recommended that the Federal Court of Australia Act 1976 or the Federal Court Rules be amended to allow the test for entering summary judgment against a party to be applied more flexibly and in respect of either party. The ALRC recommended a test similar to that used in England and Wales, where the court may give summary judgment if it considers that the applicant or the respondent has no real prospect of success and there is no other reason why the case should be disposed of at trial.440 A similar recommendation was made in the Federal Civil Justice System Strategy Paper.441

This debate was given impetus with the growth in the volume of unmeritorious litigation in the Federal Court and the Federal Magistrates Court, particularly in migration matters. In that context, in 2005 the Migration Litigation Reform Act 2005 was enacted. By section 7 of that Act a new section 31A was inserted in the Federal Court of Australia Act 1976. It provides as follows:

(1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
   (a) the first party is prosecuting the proceeding or that part of the proceeding; and
   (b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
   (a) the first party is defending the proceeding or that part of the proceeding; and
   (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
   (a) hopeless; or
   (b) bound to fail;
   for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Court has apart from this section.

Section 31A was introduced as part of the package of reforms designed to deter unmeritorious migration proceedings, although it has general application. The provision imposes a lower requirement to dismiss an action by way of summary judgment than that imposed in General Steel Industries Inc v Commissioner of Railways (NSW)442 In that case, the requirement was expressed in terms of ‘manifestly groundless’ or ‘obviously untenable’. In contrast, the new test in section 31A
provides that a court may dispose of a matter summarily if it has no reasonable prospects of success. In this respect the test is focused on the prospect of the success of the claim or defence, rather than whether it is merely arguable. It is akin to the test in the Civil Procedure Rules in England and Wales. Although made in the context of migration litigation, a number of submissions to the Senate Legal and Constitutional Affairs Committee were apparently concerned as a matter of general principle about a shift away from the traditional common law test, which requires that a case be manifestly groundless or hopeless or bound to fail.

Ultimately, the Senate committee concluded that:

*Extended powers of summary dismissal under the Bill represent a significant departure from the existing common law test. While the committee notes the comments of the ARC [Administrative Review Council] in particular that the courts would in all likelihood exercise caution in relation to the extended power, the committee expresses its serious concerns in relation to such an extension. The committee also notes evidence that the courts’ existing extensive powers of summary dismissal are rarely used. Therefore, the committee concludes that the broadened powers of summary dismissal must be subject to review by Parliament after an initial period of operation.*

The committee recommended that to ensure that this occurs, the Bill should be amended to provide that the relevant provisions of the Bill shall cease to have effect after 18 months of operation.

**Queensland**

In Queensland, the *Uniform Civil Procedure Rules 1999* also allow for a procedure for summary judgment for the plaintiff and for the defendant based on a test of ‘no real prospect’ of defending or succeeding on the claim and where there is no need for trial of the claim or part of the claim. The rules in Queensland appear to have much in common with the relevant rules in England and Wales. The plaintiff can obtain summary judgment if the plaintiff can show that the defendant has no real prospect of successfully defending the claim. The defendant can obtain summary judgment if the defendant can show that the plaintiff has no real prospect of succeeding on the claim.

**South Australia**

In South Australia, rule 232 of the *Rules of the Supreme Court 2006* provides slightly differently as follows:

1. The Court may, on application by a party, give summary judgment for that party.
2. Summary judgment may only be given if the Court is satisfied that—
   a. if the applicant is a plaintiff—there is no reasonable basis for defending the applicant’s claim; or
   b. if the applicant is a defendant—there is no reasonable basis for the claim against the applicant.

**New South Wales**

In New South Wales, rule 13.1 of the *Uniform Civil Procedure Rules* provides a more traditional approach to summary judgment as follows:

1. If, on application by the plaintiff in relation to the plaintiff’s claim for relief or any part of the plaintiff’s claim for relief:
   a. there is evidence of the facts on which the claim or part of the claim is based, and
   b. there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed,

the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires.

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440 ALRC (2000) above n 9, [7.212].  
442 (1964) 112 CLR 125  
444 Uniform Civil Procedure Rules 1999 (Qld) see r 292 and 293.  
445 Uniform Civil Procedure Rules 1999 (Qld) r 292.  
446 Uniform Civil Procedure Rules 1999 (Qld) r 293.
Western Australia

Similarly, in Western Australia, Order 14 of the Rules of the Supreme Court 1971 provides:

(1) Where in an action to which this Order applies a statement of claim has been served on a defendant and that defendant has entered an appearance, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, within 21 days after appearance or at any later time by leave of the Court, apply to the Court for judgment against that defendant.

This Rule does not reflect proposals for change of the summary judgment rule made by the Law Reform Commission of Western Australia in 1999. In particular, the WA commission recommended that the test for summary judgment should be reformulated so that it could be used against a party unless that party can show that his or her case has a reasonable prospect of success.

In most jurisdictions there is implied or inherent power, or express provision in the rules, for allegations to be struck out, or for judgment to be given, where the court is satisfied that the pleaded claim does not disclose a cause of action or where a defence does not disclose an answer.

10.5 SUBMISSIONS

Submissions in response to the Consultation Paper

Submissions were divided on the issue of reform.

In its submission in response to the Consultation Paper the Supreme Court of Victoria presented three reasons why it does not favour a reformulation of the rules (that is, a liberalisation of the summary judgment test) in accordance with the position in England and Wales:

1. Injustice may result if a lower threshold encouraged the Master or Judge to be too robust in condemning a claim or defence when he/she may not be in a position to form a definitive view of the merits without trial. Cases that look weak on the pleadings may take on a very different complexion after discovery and cross examination. A recent civil justice review in Hong Kong rejected the English model for this and other reasons.

2. The present test requires the Court to identify whether there is a prima facie or arguable case. There are dangers involved in requiring judicial officers to go further and speculate as to the prospects of success at trial without the benefit of a trial, including the likelihood of more appeals.

3. The House of Lords in the United Kingdom in effect read down the United Kingdom reformulation for precisely these reasons.

The last of these three factors has been the subject of considerable controversy, as noted above, given that in the BCCI litigation the trial was eventually aborted, after significant further costs had been incurred. Moreover, again as noted above, in its recent report the working party appointed by the Commercial Court in England has endorsed the observations made, in dissent, by Lord Hobhouse in the House of Lords:

The volume of documentation and the complexity of the issues raised on the pleadings [in complex litigation] should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which will involve. Indeed it can be submitted with force that those are just the sort of cases which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties.

Following the release of the commission’s proposals in Exposure Draft 2, in a consultation with the Supreme Court, some judges expressed the view that a change in the test might change the culture and that this would be a good outcome.

The recent report of the Commercial Court Long Trials Working Party concluded that a number of problems in relation to the management and conduct of complex litigation arose not out of deficiencies in the rules but a lack of enforcement. Accordingly, the working party
concluded, sadly, that in some cases either the parties or judges or both were not enforcing provisions in the CPR or the Guide with sufficient rigour. We concluded that there needs to be a re-education programme for both practitioners and the Commercial Court, to remind them of the procedures and powers that are already in place and those that we hope might be adopted as a result of this report and to show how they might be used.\textsuperscript{452}

The Magistrates’ Court in its response to the Consultation Paper submitted that it had examined the operation of the Queensland and English models and concluded that there had been ‘no perceptible change in the way decisions over summary judgment applications were made’. Accordingly it concluded that there should be no change to the Magistrates’ Court Rules.\textsuperscript{453}

The Victorian Bar noted alternative views held among its members. It submitted:

\begin{quote}
The current test has a long [sic] and considerable jurisprudential merit. The Bar notes that even a small relaxation of the test could have significant consequences in terms of access to justice.

On the whole, the Bar is in favour of the maintenance of the current test. Suspected unmeritorious cases can be dealt with by the imposition of conditional leave to defend. There is general support amongst the Bar for the view that the courts should be more inclined to order payment into court as a condition of the grant of leave to defend.

An alternative view held by some members of the Bar is that the threshold for obtaining leave to defend should be raised such that a defendant would need to show that the defence raised has ‘some reasonable prospect of success’.
\end{quote}

The Law Institute of Victoria pointed to a reluctance to bring summary judgment applications in some courts. It commented:

\begin{quote}
While it is noted the courts only grant summary judgment applications in clear cases (as is appropriate), the LIV submits that the summary disposal option could be promoted more as an option to litigants in the appropriate circumstances.
\end{quote}

The Mental Health Legal Centre addressed the issue from the perspective of disadvantaged or vulnerable litigants. They contended that:

\begin{quote}
It would be concerning for our clients if the rules of summary dismissal were relaxed. Especially for disadvantaged groups who struggle to prepare for proceedings or access the legal or expert assistance they need, summary dismissal has a dangerous potential to deny redress for legitimate claims.
\end{quote}

\textbf{Submissions in response to Exposure Draft 2}

In later submissions there was some support for the proposal that procedures should be reformed to facilitate the earlier determination of disputes, including the summary disposal of unmeritorious claims and defences.

Steve White considered that the test should be changed so that ‘summary judgment applications have better prospects of success and operate more on an US style basis of summary judgment’. He also contended that ‘there would need to be legislation and not Court rules to revise the test’.\textsuperscript{457}

Victoria Legal Aid supported the commission’s draft proposal and argued that the procedure should be used more often. However, it also suggested that:

\begin{quote}
Where these orders are made, care needs to be taken to adequately explain to the unsuccessful party why the order was made. This would limit their dissatisfaction and may reduce the likelihood of them taking further action …

VLA strongly supports the retention of residual discretion, allowing a judge to continue a trial even where there is no real prospect of success, such as for public interest cases.\textsuperscript{458}
\end{quote}

Other submissions were not in favour of reform. The Federation of Community Legal Centres referred to the finding by the Australian Law Reform Commission that ‘justice is equated in most people’s minds with “fair, open, dignified and careful processes” and that a justice system that

\textsuperscript{447} LRCWA (1999) above n 9.
\textsuperscript{448} Ibid 111.
\textsuperscript{449} Three Rivers DC v Bank of England (No 3) [Summary Judgment] [2001] UKHL 16, [2001] 2 All ER 513.
\textsuperscript{450} Three Rivers DC v The Governor and Company of the Bank of England (No 3) 2 AC 1, HL at [156], quoted in Judiciary of England and Wales (2007) above n 433, [85].
\textsuperscript{451} Consultation with the Supreme Court of Victoria (9 October 2007).
\textsuperscript{452} Judiciary of England and Wales (2007) above n 433, [34].
\textsuperscript{453} Submission CP 55 (Magistrates’ Court of Victoria).
\textsuperscript{454} Submission CP 33 (Victorian Bar).
\textsuperscript{455} Submission CP 18 (Law Institute of Victoria).
\textsuperscript{456} Submission CP 22 (Mental Health Legal Centre).
\textsuperscript{457} Submission ED2 3 (Steve White).
\textsuperscript{458} Submission ED2 10 (Victoria Legal Aid).
over-emphasises matters of cost, speed and “efficiency” may not succeed in delivering “true justice’’.

The submission also noted that the ALRC report goes on to suggest that it is those litigants who feel that they have been unfairly dealt with at the early stages that come back to court with repeat applications:

Today’s summary disposal is tomorrow’s vexatious litigant.\footnote{519}

Maurice Blackburn submitted that:

In large complex cases a liberalisation of the summary dismissal test is likely to become another weapon for a large and determined defendant to run interlocutory skirmishes to exhaust the resources of a meritorious claimant. There is little to lose for a large defendant in making such an application and much to gain. The plaintiff will be required to lay out much of its existing evidentiary basis exposing the claims to greater risk of strike out, and enabling early preparation to defeat the claim. Even if unsuccessful the strategy will cause the plaintiff to spend a lot of money and delay other interlocutory processes by a significant period.

Conversely, there is little point in a plaintiff wasting his or her time trying to have a defence struck out in large complex proceedings even if the defence is unmeritorious. Further the plaintiff obtains no collateral advantage from forcing the defendant to spend its money defending the application.\footnote{520}

Judge Wodak expressed a different view:

One matter that calls out for attention is early identification of frivolous or unmeritorious proceedings or defences. For too long, courts have been reluctant, even timid to summarily stay or dismiss or strike out proceedings or pleadings which do not disclose an arguable case or defence.\footnote{521}

Judge Wodak gave in-principle support to judicial intervention to eliminate claims or defences which lack merit. However, he was not confident that the proposed change in the formulation of the test would make an appreciable difference. He suggested instead that there should be more use of procedures for isolating an issue and trying it ahead of a trial where to do so may dispose of the trial. “Greater use of that approach, often resisted by one or more of the parties, can be an effective way of distinguishing those matters which should be litigated from those which should not.”\footnote{522}

\section*{10.6 The Right to a Fair Hearing}

There may be human rights implications, under section 24 of the Charter (right to a fair trial), where proceedings are disposed of without a final hearing on the merits. Issues include whether the summary disposal of proceedings constitutes a denial of the ‘right’ of access to the courts or the ‘right’ to a fair trial. However, as noted elsewhere in this report, the ‘rights’ conferred by the Charter are not absolute. Even if there is a prima facie incompatibility with certain provisions of the Charter, the Charter itself provides that a ‘human right’ may be subject under law to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors, including’, amongst others ‘(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation’.\footnote{523}

Section 24 of the Charter is based on article 6 of the \textit{European Convention on Human Rights} (ECHR). Professor Zuckerman has commented on this issue in the context of article 6 of the Convention:

\begin{quote}
It is plainly wrong to suggest that a party who has had the benefit of a hearing on the merits in a court of competent jurisdiction has been denied access to court adjudication. The fact that one of the parties is denied access to a more extensive adjudicative process cannot be considered a denial of access. Every modern system has a variety of procedures for disposing of different types of cases depending on their value, complexity, importance and so on. Provided that the procedural requirements are not otherwise unreasonable, unfair or unequal, there cannot be a complaint of denial of access because a claim or defence is decided summarily.\footnote{524}
\end{quote}

As the report of the English Commercial Court Long Trials Working Party has recently noted: the striking out of a claim is not in breach of article 6(1) of the ECHR if an essential element of the cause of action for a claim under domestic law is missing from the statement of case.\footnote{525}
10.7 ARGUMENTS FOR AND AGAINST REFORMING THE TEST

In this as in many other areas of civil justice reform there are competing policy and practical considerations.

It is clearly desirable for unmeritorious claims or defences to be summarily disposed of without subjecting the parties and the court to the cost and inconvenience of protracted interlocutory steps and final adjudication. On the other hand, it may not always be readily apparent, particularly at an early stage of proceedings, whether a claim or defence has merit or whether it is likely to succeed at trial. Many cases involve disputed questions of fact and law which may not be appropriate for summary determination.

There are arguments that the summary judgment procedure is too restrictive, that the applicable test should be liberalised and that the procedure should be used more frequently and flexibly to dispose of claims or defences that are unmeritorious. It has also been noted that the common law standard for ‘a court to grant summary judgment was set in the days before the importance of caseflow management was established in Australian courts’. Case-flow management involves the court taking proactive steps before trial to identify the real issues in dispute and to determine the appropriate interlocutory procedures. Arguably effective case management should require the screening out of unmeritorious cases prior to trial.

Constraints on the summary disposal of proceedings may facilitate unmeritorious claims or defences, including for non-legitimate tactical or commercial advantage. On the other hand, the process of seeking to determine whether a claim or defence has sufficient merit to be allowed to proceed may itself give rise to expense, delay and possible appeal. A party whose claim or defence is summarily disposed of may have a justified feeling of resentment in not being permitted to proceed to trial. If the claim or defence in fact has merit then injustice will result. It may also be argued that more frequent use of the summary disposal of cases may stifle developments in the law. One can only speculate on what may have happened in the development of tort law if the plaintiff’s claim in Donoghue v Stevenson had been summarily dismissed. At the time, the prospects of success, at least at first instance, were remote.

A further complication is that unmeritorious claims or defences may be permitted to proceed, not because of inadequacies in the rules or principles governing summary disposition, but because of the reluctance of parties or courts to invoke or apply them. Liberalisation of the test for summary disposition will not necessarily mean either that the procedure will be utilised more frequently or that it will result in the summary disposal of more cases. At present it would appear that summary disposition is seldom sought and that summary judgment or other orders for summary disposal are seldom made.

The threshold issue is whether there should be a liberalisation of the criteria for summary disposal of a claim or defence. On balance, the commission has concluded that the present requirements to show that there is no defence, or no cause of action, or no real question to be tried are unduly restrictive. Summary disposition should be available where a claim or defence has ‘no real prospect of success’. This is arguably a more liberal test, is consistent with the rules applicable in some other jurisdictions, and a change in the formulation may encourage a more robust approach to be adopted by parties and courts.

As can be seen from the above, a liberalised test applies in the United Kingdom, the Federal Court and Queensland. It was also the formulation of the test supported in Going to Court and in the Federal Civil Justice Strategy Paper and by the ALRC and the Law Reform Commission of Western Australia. In Going to Court it was noted:

The present law and judicial approaches towards the issue often combine to dissuade parties from pursuing the remedy except in rare circumstances. Summary judgment is seen as a primary tool of caseflow management in the United States courts but in Australia it is rarely used and seldom successful. Indeed, in contrast to the United Kingdom and Australian court practice, the United States courts use summary judgment as a primary tool, available to both plaintiffs and defendants, to regulate court lists. Reformers in the civil procedure area such as Lord Woolf and commentators like Adrian Zuckerman have brought attention to summary judgment procedures as a fertile area for change in the way our courts operate.
One consideration is whether there is a real practical difference between the traditional test and the liberalised test. In *Three Rivers District Council v Bank of England*, which considered the rule in England and Wales, Lord Hope said:

*The difference between a test which asks the question ‘is the claim bound to fail?’ and one which asks ‘does the claim have real prospect of success?’ is not easy to determine … While the difference between the two tests is elusive, in many cases the practical effect will be the same.*

A similar attitude has been taken to the rule in Queensland by the Court of Appeal in *Gray v Morris*. In that case, Justice Chesterman concluded:

*In my opinion summary judgment is not to be given either to the defendant or plaintiff, except where it is just to do so and it will not be just to deprive a party of a trial unless it can be seen that their case is hopeless, or bound to fail. Unless that can be said of it, the conclusion cannot be reached that a claim or defence has no ‘real’ prospect of success.*

As can be seen from these judgments, all statutory provisions are subject to judicial interpretation and a change in language does not necessarily give rise to a change in approach. Even with a change in formulation, courts would still be likely to exercise a cautious approach, given concerns about access to justice issues and right to a hearing. This is reinforced by the submission by the Supreme Court of Victoria in response to the Consultation Paper.

Also, in public interest or test case litigation, there may be an event greater disinclination to exercise powers of summary disposal.

This perhaps highlights that the more important consideration is whether a change in the test would bring about a change in attitude and make parties more inclined to seek summary disposition and courts more prepared to grant it than is presently the case.

We are of the view that changing the threshold may serve as a catalyst to a change in attitude, particularly where it is coupled with explicit case management objectives.

**Other reforms**

To reinforce a change of attitude to the summary judgment process, we propose that there should be in the rules of court a statement of an explicit case management objective along the lines of the objective stated in rule 1.4(2)(c) of the UK Civil Procedure Rules. The objective should provide that the court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.

In keeping with this case management objective there should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding, or an issue in a proceeding, appears desirable.

We also propose that there should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants based on the same principle. In particular, in the Magistrates’ Court the rule should be extended to allow a defendant to apply for summary dismissal of the proceeding or summary judgment (and not merely summary judgment on a counter claim).

Further, the limitations on categories of cases that are excluded from the procedure in the Supreme and County Courts should be removed. The current list of exceptions appears to have an historical basis. The exceptions are not part of the Federal Court, Queensland rules or the rules in England and Wales. Also, the Magistrates’ Court rule should not be limited in its application to where the claim is for a debt or liquidated demand.

In relation to the types of cases presently exempted from the rule in the County and Supreme Courts, the undesirability of excluding from the ambit of powers of summary disposal claims based on fraud is perhaps illustrated by the recent BCCI litigation referred to above. In that case, proceedings against the Bank of England and 22 of its present and former staff were brought by the liquidators of the Bank of Credit and Commerce International (BCCI). The claim, for misfeasance in public office required proof of bad faith amounting to dishonesty or fraud on the part of the defendant bank and individual officials. Other allegations of dishonesty were made. BCCI had been closed by the Bank of England in 1991 after major frauds became known.
The action was announced in 1993 and the trial commenced in the High Court in London in January 2004. The proceedings had been struck out by the trial judge but reinstated following a decision of the House of Lords (3:2) in March 2001. The trial continued until November 2005 although no witnesses were called by the plaintiff. Senior counsel for the plaintiff addressed the court for 86 days. Senior counsel for the Bank of England addressed the court for 119 days between July 2004 and June 2005. In November 2005, the action was discontinued, without notice. In January 2006 the judge ordered the liquidators to pay the Bank of England’s costs on an indemnity basis. Interlocutory appeals also went to the Court of Appeal on two occasions in respect of issues of privilege. In the course of the proceedings, the trial judge, Justice Tomlinson, had consulted and warned the then Lord Chief Justice, Lord Woolf, that ‘the case was a farce’. It would also appear that the trial had proceeded on grounds different from those which the House of Lords had considered fit to allow to proceed.

Residual discretion
As referred to above, in Victoria a court may be satisfied not to give summary judgment where ‘there ought for some other reason be a trial’.\(^{472}\)

There is also residual discretion in Queensland where the court must be satisfied that ‘there is no need for a trial of the proceeding’ or the part of the proceeding.\(^{473}\)

The Woolf Report proposed a residual discretion in the court to allow a case to continue if there is a reason for the matter to proceed to trial. This would allow for a full hearing of the matter, for example, in cases of public interest. The discretion has been retained in rule 24.02(c) of the UK Civil Procedure Rules.

On the other hand the retention of this discretion was not supported by the Law Reform Commission of Western Australia.\(^{474}\)

On balance, we think it should be retained. There may be many situations where there may be utility in allowing a matter to proceed to trial, even though it may not appear, at that time, that a claim or defence has sufficient merit. For example, in test cases or public interest litigation or in other situations an adjudication of the issue(s) may provide guidance to other persons with similar claims or defences.

We are, however, mindful that retaining a discretion to allow matters to proceed in circumstances where they do not appear to have merit may subvert the objective of liberalising the threshold criterion for summary disposition.

However, as we are proposing that the limitation on categories of cases that are excluded from the procedure be removed, the retention of this discretion provides an important safeguard. It is also an important safeguard for use in matters where one party may be unrepresented and the process may be used in an oppressive way by a more resourceful or powerful party.

10.8 CONCLUSIONS AND RECOMMENDATIONS

A more liberal test applies in the United Kingdom, the Federal Court and Queensland. It was also supported in Going to Court and in the Federal Civil Justice Strategy Paper and by the ALRC and the Law Reform Commission of Western Australia. Although submissions were divided on the issue of reform, there was support for the commission’s draft proposal.

One important consideration is whether a change in the test would bring about a change in attitude and make parties more inclined to seek summary judgment and courts more prepared to grant it than is presently the case. The commission is of the view that changing the test may facilitate a change in attitude and may bring about a change in practice, particularly where it is coupled with explicit case management objectives.

In considering the proposed criterion for summary disposal of unmeritorious claims or defences it should be borne in mind that one of the elements of the proposed overriding obligations (outlined in Chapter 3) provides that all relevant participants in the civil litigation process shall not make any claim or respond to any claim in the proceeding, or assist in the making of any claim or response to any claim in the proceeding, where a reasonable person would believe that the claim or response to the claim (as appropriate) is frivolous, vexatious, for a collateral purpose, or does not have merit.

It is to be hoped that the imposition of such a requirement will filter out many unmeritorious claims and defences rather than require them to be disposed of through procedures for summary disposition. The proposed certification requirements outlined in Chapter 3, together with the proposed sanctions for breach of the overriding obligations, should serve to increase the threshold of merit and decrease the necessity for more proactive use of summary disposal powers.
The commission proposes that:

1. The test for summary judgment in Victoria should be changed to provide that summary judgment can be obtained if the other party has ‘no real prospect of success’.
   
   Comment: It may be that this provision, and the provisions below, should not be limited to summary judgment but should extend to other methods of summary disposal, including a stay, dismissal or striking out of proceedings.

2. There should be in the rules of court a statement of an explicit case management objective that the court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.

3. There should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding appears desirable.

4. There should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants and the rules should be based on the same test. The Magistrates’ Court rule should be extended to permit a defendant to apply for summary dismissal of the proceeding or summary judgment.
   
   Comment: Also, the rule in the Magistrates’ Court should not be confined in its application to cases where the claim is for a debt or liquidated demand. The present rule permits a defendant to seek summary judgment against a plaintiff on a cross claim.

5. The categories of cases that are excluded from the procedure in the Supreme Court and the County Court should be removed.

6. The court should retain a residual discretion to allow a matter to proceed to trial even if the applicable test for summary disposition is satisfied.

11. CONTROLLING INTERLOCUTORY DISPUTES

11.1 THE PROBLEM

Interlocutory applications add to the duration and cost of litigation. There are a number of measures which can be utilised to limit interlocutory applications. They fall into two broad categories:

1. measures restricting interlocutory steps in a proceeding and
2. measures to reduce unnecessary interlocutory applications.

Interlocutory proceedings may also add to cost and delay when procedural decisions are the subject of appeals or applications for leave to appeal.

There are a number of complex considerations which will have an impact on the incidence of interlocutory applications. Such applications may arise out of disputes, or procedural requirements, in relation to any aspect of pre-trial procedures, including pleadings, discovery, subpoenas, compliance with timetables and arrangements for disclosure of witness statements or affidavits.

In part, the incidence of interlocutory applications will be influenced by whether parties are entitled to take procedural steps, or require leave of the court in the exercise of discretion; the attitude and conduct of other parties and the procedural rules governing pre-trial steps in the proceedings. More proactive judicial management of litigation is also likely to increase the number of procedural hearings.

11.2 REDUCING INTERLOCUTORY STEPS IN PROCEEDINGS

There are a number of means by which interlocutory applications may be reduced or restricted.

11.2.1 Removing interlocutory steps in certain proceedings

This approach is currently employed in small claims disputes in the Magistrates’ Court for claims under $10,000, and seems quite effective. Where factual issues are confined there is less need for discovery processes, and because the final hearing can occur within a relatively short time from the commencement of proceedings and will consume only a small amount of time, strike-out or summary judgment applications are not necessary.

This approach is also a feature of the Small Claims Track cases in England and Wales under the Woolf reforms.475
While this option works well for certain cases, its usefulness is limited to situations in which factual issues are narrow and relatively uncomplicated and where proceedings can be brought to hearing swiftly. Where cases are more factually complex, depriving parties of early discovery is likely to both prejudice the just resolution of cases and unduly lengthen trials as previously unseen material emerges. It may also increase the courts’ workload by reducing early settlements and summary disposition of cases.

Another model is the recently introduced ‘rocket docket’ introduced in the Federal Court, which is discussed earlier in this chapter. This involves a significant reduction in the number of procedural steps and interlocutory hearings before trial.

11.2.2 Requiring leave for certain procedural steps

Requiring leave of the court before certain interlocutory steps can be taken may reduce the incidence of such steps. However, this may result in an increase in the number of interlocutory hearings. The introduction of a leave requirement for procedural options which the parties may presently pursue as of right is likely to increase the incidence of interlocutory applications and hearings. However, litigation, like life, is infinitely variable. Where interlocutory steps may be taken as of right, without leave, there still may be interlocutory applications by another party seeking to limit such steps or in the event of non-compliance, eg with a request for discovery of documents or for answers to interrogatories, etc.

As discussed above, the greater regulation of discovery processes is a feature of modern case management. At present, rule 34A.17 of the County Court Rules provides for discovery and interrogatories only by leave. There may be no additional cost incurred in seeking leave where this is done at a scheduled directions hearing. The leave requirement forces parties to justify the need for the interlocutory processes, facilitates greater judicial control over such processes and enables the procedural steps to be tailored to the requirements of the individual case.

11.2.3 Altering the costs arrangements for such processes

The costs consequences of taking procedural steps may have an important influence on the frequency with which such steps are taken.

Rule 26.05 of the Magistrates’ Court Rules provides that unless the Court otherwise orders, the party requiring discovery, interrogatories or particulars must bear the costs of and incidental to those processes. No doubt this operates as a disincentive to unnecessary interlocutory processes. However, this may also be a practical impediment to invoking those processes, in appropriate circumstances, where a party does not have the resources to bear such costs. This may be overcome by the exercise of judicial discretion to ‘otherwise order’ but this may necessitate a hearing which may be contested.

11.2.4 More proactive judicial case management

In England and Wales the aim of reducing the need for interlocutory applications is part of the overriding objective of the Civil Procedure Rules. Rule 1.4(2) requires the court actively to manage a case by, among other things:

(i) dealing with as many aspects of the case as it can on the same occasion; [and]
(ii) dealing with the case without the parties needing to attend at court.

As discussed above under active case management, the Magistrates’ Court has adopted a substantially similar rule.

If the commission’s active case management recommendations are implemented this may facilitate more proactive judicial control and management of interlocutory proceedings.

11.3 REDUCING UNNECESSARY INTERLOCUTORY APPLICATIONS

11.3.1 Mandatory requirements that parties seek to resolve a dispute before issuing an interlocutory process

Prudent practice dictates that practitioners make attempts to resolve interlocutory disputes prior to making application to the court. At present, whether attempts have been made is a relevant matter in the exercise of judicial discretion in relation to costs (see below).
The commission’s proposals in respect of overriding obligations (discussed in Chapter 3) include an obligation on relevant participants in civil litigation to not take any step in the proceeding unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding. Also, relevant participants would also be under an obligation to resolve such issues as may be resolved by agreement and to narrow the issues remaining in dispute. Furthermore, participants would have a duty to cooperate with the parties and the court in connection with the conduct of the proceedings. These obligations are broad enough to encompass both the substantive matters in dispute in the proceedings and ancillary procedural or interlocutory issues.

The problem of interlocutory disputation may also be addressed by amendment to court rules governing certain procedural steps.

Order 59.09 of the Rules of the Supreme Court 1971 (WA) provides that:

No order shall be made … in chambers unless the application was filed with a memorandum stating—

(a) that the parties have conferred to try to resolve the matters giving rise to the application; and

(b) the matters that remain in issue between the parties.

The US Federal Rules of Civil Procedure take this a step further by not only requiring, in certain situations, certification of the applicant’s good faith confer or attempt to confer in an effort to resolve the issue without court action, but also backing this up by explicit costs consequences for both lawyer and client.

Requiring formal confirmation of confer prior to making application for interlocutory orders, as a precondition for obtaining relief, will help ensure that the practice is followed and will reinforce a culture of cooperation, with application to the court becoming a matter of final resort.

In addition to the proposed overriding obligations, the commission is of the view that there should be a separate requirement that the parties confer prior to the issuing of any interlocutory application to determine whether the dispute can be resolved or whether the issues in dispute can be narrowed.

In England and Wales, ‘[a]voiding applications by encouraging the parties to agree to sensible procedural arrangements’ is part of the overriding objective. Thus, rule 1.4(2)(a) includes in the court’s case management duties encouragement of the parties ‘to co-operate with each other in the conduct of the proceedings’. Rule 1.3 places an obligation on the parties to ‘help the court to further the overriding objective’. Thus, as noted elsewhere, ‘unreasonableness which leads to an interlocutory application puts the unreasonable party at risk as to the costs of that application’.476

11.3.2 Costs consequences for unnecessary as well as unsuccessful applications

In Victoria, an applicant may be deprived of the costs of a successful application if there has been a failure to attempt to resolve the issue prior to bringing the application.471 However, this is not explicit in the rules.

Under rule 37 of the US Federal Rules of Civil Procedure, where a successful application has been made for discovery, costs may be awarded against the unsuccessful party and/or his or her lawyer.478 However costs will not be awarded where the court finds that there was no good-faith effort by the applicant to obtain discovery without court action.479 Where an application is unsuccessful, there may be costs consequences (against client and/or lawyer). The court may also make ‘protective orders’ to protect a party or non-party from annoyance, embarrassment, oppression or undue burden or expense including orders limiting disclosure requirements (rule 26(c)).480 The incorporation into US civil procedural rules of explicit costs sanctions is of interest given that the costs indemnity rule does not generally apply in civil litigation before US courts. However, the absence of the costs indemnity rule may be the rationale for the adoption of such costs sanctions.

The commission is of the view that making the potential costs consequences explicit in the rules is likely to provide greater incentive for the parties and lawyers to reach agreement on interlocutory issues and reduce the need for judicial adjudication of such issues. Although this may reduce the incidence of contested interlocutory hearings it will not necessarily reduce costs. In some instances, endeavours to reach agreement may be as time consuming, and expensive, as applications to the court for orders.
11.3.3 Certification of merits and bona fides of applications

Rule 11 of the US Federal Rules of Civil Procedure requires lawyers to sign both pleadings and motions and provides that in signing the motion or later advocating for it they certify that to the best of their knowledge, after reasonable inquiry, it is not being presented for an improper purpose (such as causing unnecessary delay or needlessly increasing the costs of litigation), and that the claim has the requisite degree of merit.471 Sanctions can be imposed on both lawyers and parties if there is false certification.472 Lawyers are made directly responsible for inquiring into both the merits of an application and the bona fides of their client in bringing it, balancing their duty to the client with the duty to the court and the administration of justice.

Although it would seem that these provisions have improved standards in the conduct of civil litigation, and reduced the incidence of unnecessary or inappropriate interlocutory motions, there have been expressions of concern that on occasions such sanctions have been sought inappropriately and for collateral forensic reasons. Also, the use of economic sanctions will have a different impact on litigants depending on their financial circumstances.

In Chapter 3 we have proposed that each party to a proceeding and each lawyer acting for a party should be required to ‘certify’ as to the merits of allegations made in any ‘pleading’. It is also suggested that ‘court documentation’483 may be preferable to the term ‘pleading’. Although these recommendations relate to the primary allegations made in respect of the causes of action in the proceedings (including claims and defences to claims), a similar certification requirement could be adopted for ‘court documentation’ filed in connection with applications for interlocutory orders.

11.4 SUBMISSIONS

Submissions in response to the Consultation Paper

IMF identified recent developments in Western Australia that aim to focus the parties’ attention on the real issues.484 In 2006, Chief Justice Martin introduced a new list called the Commercial and Managed Cases List. In the relevant practice direction there is reference to the goals of quickly narrowing issues in dispute, encouraging mediation and reducing time-consuming interlocutory disputes. Chief Justice Martin, in explaining his motivation for introducing such a list, said:

 Prior to my appointment as Chief Justice, I had come to the view from long experience that perhaps the most effective way of improving access to justice in the longer term is by improving the processes and procedures of the Courts so that the real issues are identified and resolved earlier and with an absolute minimum of interlocutory processes.485

To date there have been a number of similar developments in Victorian courts, which are referred to in this chapter.

Submissions in response to Exposure Draft 2

Support for the commission’s draft proposal was expressed in a confidential submission.486 However, Maurice Blackburn contended that the additional measure proposed to reduce interlocutory disputation did not go far enough. The firm expressed the view that although forcing the parties to confer may slightly reduce interlocutory skirmishes, the reality in large complex class actions is that the disputation is often a device to exhaust the plaintiff’s resources. It also argued that conferences will not resolve this problem but strong judicial management, and sanctions, may do so.487

By way of contrast, Steve White did not support additional control of interlocutory disputes. He argued that, in his experience, interlocutory disputes lead to the resolution of matters sooner than later. In his view, the alternative is to deal with all issues unsatisfactorily and expensively at trial and hope that cross-examination will extract some relevant information or concessions.488

Victoria Legal Aid did not support requiring certification of the merits of applications.489

477 Williams (2008) above n 114, 63.02.95–63.02.100.
478 Fed R Civ P 27(a)(5).
479 Fed R Civ P 27(a)(5)(A).
481 Fed R Civ P 11(a) and (b).
482 Fed R Civ P 11(c).
483 See, eg, s 347(4) Legal Profession Act 2004 (NSW).
484 Submission CP 57 (IMF (Australia) Ltd).
486 Submission ED1 5 (Confidential submission, permission to quote granted 17 January 2008).
487 Submission ED2 19 (Maurice Blackburn).
488 Submission ED2 3 (Steve White).
489 Submission ED2 10 (Victoria Legal Aid).
11.5 CONCLUSIONS AND RECOMMENDATIONS

The proposed overriding obligations seek to limit and control interlocutory disputation. The commission considers that despite the concerns raised, the following proposals have merit and should be implemented by the courts to help limit interlocutory applications:

- parties should be required to confer and encouraged to reach agreement on an issue before making an interlocutory application
- there should be more determinate costs consequences for unnecessary as well as unsuccessful applications and
- there should be a requirement for certification of the merits of applications.

The commission also considers that the proposed Civil Justice Council could develop guidelines and education programs on appropriate ways of dealing with interlocutory disputes.

12. POWER TO MAKE DECISIONS WITHOUT GIVING REASONS

12.1 THE PROBLEM

From time to time various concerns have been expressed about the nature and extent of the obligation on judges to give reasons for decisions, particularly in interlocutory matters.

As noted in Chapter 1 this is an important element of judicial accountability and a safeguard against capriciousness. However, like all safeguards, it comes at a price. Particularly in complex matters, the task may be onerous and time consuming. This almost inevitably increases delays in many if not most cases. As noted elsewhere in this report, there are obligations not only on judges to give adequate reasons, but also on arbitrators and referees.

This issue was raised with the commission during the review by Justice Maxwell of the Court of Appeal. Other Australian judges in recent times have expressed concern about what they perceive to be the increasing length of written reasons for judicial decisions. As noted in Chapter 1, in the aftermath of the C7 ‘mega case’, Justice Sackville has suggested that judges should be required to provide summary reasons only in determining any contested interlocutory issue. The problem is compounded in many appellate court decisions where different judges may give lengthy recitations of the same facts and legal principles.

Other concerns relate to the ‘amount of time which can be involved in preparation of reasons for judgment, outside the hours spent in open court or hearing applications in chambers. The time taken in the writing of reasons for judgment [can] affect the capacity of judges to deal with their overall caseloads within reasonable time’. There is also an expectation that judgments be delivered ‘within a reasonable time’. Victoria Legal Aid suggested in its submission that there should be time limits on the delivery of judgment. Further concerns relate to the time spent by legal advisors in reading reasons and the consequent costs. One commentator noted that ‘[n]ot all litigants … wish to read the reasons for judgment which have been given in their cases’.

We have identified two possible methods to address some of the concerns raised above—firstly, giving the courts the power to make (some) decisions without giving reasons and second, giving the courts power to provide short-form reasons.

12.2 POSITION IN VICTORIA

There are ‘few statutes which deal with judges’ duties to give reasons for their judgments’. As Campbell notes, ‘[t]heir duties in this regard are … left to be defined by the judges themselves and principally by courts of appeal and superior courts having supervisory jurisdiction over lower courts’. In practice, in the County and Supreme Courts, the courts give reasons when finally deciding a matter. In contrast, in interlocutory applications, the Supreme and County Courts often do not give reasons for judgments in interlocutory applications. Also, reasons are generally not given in leave to appeal decisions in the Court of Appeal. Further, the Court of Appeal has advised that it is delivering ex tempore judgments as often as possible.

In the Magistrates’ Court, reasons for decisions are normally given in open court and are recorded on the transcript. Parties need to apply to the court for a record of the transcript. For small-claim arbitrations in the Magistrates’ Court, awards are in writing, but the reasons for the award may not...
be in writing.\textsuperscript{502} If a statement of reasons was not included in the award, one must be furnished on request within a reasonable period.\textsuperscript{503}

The common law duty to give reasons and the relevant provisions of the Charter are discussed in detail below.

12.3 THE INITIAL PROPOSAL

The commission raised for consideration whether, in certain circumstances, the courts should have the power to make decisions without giving reasons, unless the parties request reasons. The commission also noted that:

- It is necessary to specify what types of decisions should be able to be delivered without reasons. Should this encompass interlocutory decisions, final judgments, decisions on applications for leave? Different considerations apply to decisions that finally determine a matter compared with those that are interlocutory.
- In some situations, it may be appropriate to require only ‘limited’ or ‘short’ reasons.
- If there is no requirement to give reasons unless the parties require it, it may be contended that this will impede the development of new law.
- In some jurisdictions, for certain matters, reasons are not required.\textsuperscript{504}

Submissions in response to the initial proposal

There was some support among judges of the Supreme Court for the view that courts should be permitted to make decisions without being required to give reasons, with the consent of the parties. Presumably at present parties may waive any rights they have to obtain reasons.

Some of the judges indicated that they already give decisions without reasons in the Practice Court. It was noted that if any party requests reasons in the Practice Court they will be provided. However, it would appear that parties do not often request reasons. One judge stated that the power would be useful where the judge knows the answer ‘but it takes 2 months to write the decision’.\textsuperscript{505}

Maurice Blackburn contended that in some cases ‘reasons are unnecessary’. The firm suggested that the ‘default position should be that no reasons be given for interlocutory matters unless reasons are sought within 14 days’.\textsuperscript{506}

However, many submissions were not supportive of the proposal. Judge Wodak contended that the ‘absence of reasons creates a risk of decisions to be given arbitrarily and without a proper basis’. Further, he suggested that ‘[w]hat reasons are needed varies according to what has to be determined, but reasons need to be adequate’.\textsuperscript{507}

The Federation of Community Legal Centres contended that the legal process must be seen to be ‘fair, open and transparent’. It asserted that a fair, open, dignified and careful justice system is preferable to a justice system that over-emphasises quick, cheap ‘case management’, summary disposals and decisions without reasons. It also noted that

These concerns have sometimes been associated with the time which can elapse between the conclusion of a hearing and the giving of a judgment which has been reserved. It has also been suggested that the increasing length of judgments stems in part from ‘excessive citation of previous cases’, from wordiness in argument, from presentation of several separate opinions in cases (where) a single opinion would … have been sufficient and ‘from excessive reporting of judgments’. Enid Campbell, ‘Reasons for Judgment: Some Consumer Perspectives’ (2003) 77(1) The Australian Law Journal 62, 63. See also John Doyle, ‘Judgment Writing: Are There Needs for Change?’ (1999) 73 The Australian Law Journal 738, and Harry Gibbs, ‘Judgment Writing’ (1993) 67 The Australian Law Journal 494. Research has found that the length of reasons of the High Court has increased from the beginning of the 1990s. Matthew Groves and Russell Smyth, ‘A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001’ (2004) 32 Federal Law Review 255.

Campbell (2003) above n 490, 64.

Ibid. What is reasonable will vary depending on the circumstances but the time taken for a judgment to be delivered may be unnecessarily prolonged if judges insist on writing separate opinions.

Submission CP 31 (Victoria Legal Aid).

Campbell (2003) above n 490, 64. The concern being that the longer the reasons and the more number of separate reasons to be considered, the greater the overall cost to the client.

Ibid. Campbell suggests that ‘[s]ome may be interested only in the outcome of the case and its effects. Some may expect no more than that the gist of the reasons be explained to them by their legal adviser. Some may seek legal advice on whether the judgment is appealable, and, if so, whether an appeal should be lodged and with what prospects of success’.

Ibid, 62. The only reference to reasons for judgment in the Supreme Court (General Civil Procedure) Rules 2005 and the County Court Rules of Procedure in Civil Proceedings 1999 is in s 59.04, which provides that where the court gives any judgment or makes any order and the reasons are written, ‘it is sufficient to state the result orally without reasons, but the written reasons shall then and there be published by delivery to the Associate’. The commentary on this rule by Williams is that if the court ‘gives oral reasons for judgment, it is permissible for the court to revise the reasons to reflect what the court intended to say or to correct any infelicity of expression. However the court cannot alter the substance of its reasons’: Williams (2008) above n 114, l 59.04.5.


The Magistrates Court Act 1989 sets out a scheme for mandatory arbitration of small claims under $10 000—see discussion in Chapter 3 under mandatory arbitration.

Magistrates Court Act 1989’s 104(1)–(2).

Magistrates Court Act 1989 s 104(4).

For example in the Victorian Supreme Court and County Court Practice Courts in interlocutory applications reasons are not always given.

Consultation with the Supreme Court of Victoria (9 October 2007).

Submission ED2 19 (Maurice Blackburn).

Submission ED2 5 (Judge Wodak).
Chapter 5

Case Management

[...]

Similar concerns were raised by Steve White and Legal Aid, who argued that providing reasons is an 'important part of ensuring the administration of civil justice is both fair and transparent'.

One Supreme Court judge suggested that it was a 'big step' to permit decisions without reasons. His concern was that if the practice went outside the area of party consent, it would be difficult to specify the circumstances where reasons may not be required. Although a judge in a lower court might consider a certain case to be hopeless and therefore not require reasons, a higher court may not agree that it was a hopeless case and this may leave the parties and the court in a difficult position. It was also suggested that reasons were particularly necessary for the purpose of appeals. Accordingly, it was suggested that if there is a right to appeal, reasons should be required to be given. In his view, what amounts to sufficient reasons will depend on the issues litigated.

Another Supreme Court judge questioned whether there would be any real advantage in changing the requirement to give reasons. In his view, the briefest reasons can be prepared quickly and it was noted that masters tend to give reasons, even short ones. In the submissions, there was some support for permitting short reasons in certain situations.

Submissions in response to the Consultation Paper

Question 44 of the Consultation Paper asked:

Are there reforms which would reduce the time taken for the delivery of judgment after a trial?

The TAC considered that '[e]xpedition in the delivery of a judgment carries risks which would need to be carefully balanced against the potential for appeal and re-hearing if the delivered judgment is deficient in the scope and adequacy of its reasoning'. The TAC noted that the ‘Court of Appeal has, in the last 2 years, allowed a series of appeals from County Court judges (… beyond the personal injury context) because trial judges’ reasons have been inadequate'.

WorkCover noted that its experience is that ‘the absence of written judgments or … easy access to authorised transcripts … significantly impedes decision making with regard to appeal issues and may necessitate [the lodgement of appeals] based on verbal advice’. WorkCover regarded ‘timely access to written judgments in civil litigation as an ‘access to justice’ issue for all parties’. It also noted that it would ‘encourage an expectation … that judgments be delivered within four weeks of trial (excluding any period of leave taken by a judge)’.

The Magistrates’ Court advised that it expects that ‘no decision should be reserved for longer than three months’. Hollows Lawyers similarly considered that decisions should be handed down within three months, ‘other than in exceptional circumstances’. Victoria Legal Aid suggested that ‘there should be time limits on the delivery of judgement’ and that ‘[t]his strategy could be supplemented by judicial education and performance standards for judicial officers’.

eLaw suggested that ‘[a]lthough this would not detract from the time necessary for the judge to adequately reflect upon the evidence and make a decision … having all the material in a case available electronically would enable easier location and retrieval of information, especially from transcripts (which the judge could mark up with notes) and the tendered exhibits’.515

12.4 DISCUSSION

The common law duty to give reasons

It is well established in Australia that reasons are required to be given by courts. As Chief Justice Gleeson has observed:

This form of accountability is not to be taken lightly. The requirement of giving a fully reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from judges, how many other decision makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Most decisions, other than those by judges, are made by people who may choose whether or not to give their reasons.
The Charter

The Charter may impact on the judicial duty to give reasons. As discussed in Chapter 1 and above, section 24(1) provides that a party to a civil (or criminal) proceeding ‘has the right to have the … proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.’ Section 24(3) provides that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise require or a law other than this Charter otherwise permits’. The right to a fair trial under section 24 may be conducted in public. There are exceptions to this principle but they are few and are strictly defined. This principle requires that a court should do nothing to ‘discourage the making of fair and accurate reports of what occurs in the courtroom’. The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties. Justice McHugh has noted that this has as its ‘foundation’ the principle that ‘justice must not only be done but it must be seen to be done’. Chief Justice Gleeson has observed that the requirement to conduct judicial proceedings in public promotes ‘good decision making and the acceptability of the outcome of the judicial process, and they are consistent with the idea that democratic institutions should conduct their affairs in a responsible manner’.

Reasons are important for a variety of reasons. They focus the mind of the person making the decision. They provide an explanation to the losing (and winning) party of the rationale for the outcome. They enable the decision to be considered by an appellate court to determine whether an error has been made. However, in some cases, a judge may come to what is in fact the correct conclusion, but may give incorrect or inadequate reasons. In some instances this may be taken into consideration by appellate courts, without necessarily requiring a retrial.

Another important principle is that judicial proceedings must be conducted in public. There are exceptions to this principle but they are few and are strictly defined. This principle requires that a court should do nothing to ‘discourage the making of fair and accurate reports of what occurs in the courtroom’. The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties. Justice McHugh has noted that this has as its ‘foundation’ the principle that ‘justice must not only be done but it must be seen to be done’. Chief Justice Gleeson has observed that the requirement to conduct judicial proceedings in public promotes ‘good decision making and the acceptability of the outcome of the judicial process, and they are consistent with the idea that democratic institutions should conduct their affairs in a responsible manner’.

The duty to provide reasons is a function of due process, and therefore of justice. Its rationale has two principle aspects. The first is that fairness surely requires that the parties—especially the losing party—should be left in no doubt why they have won or lost. This is especially so since

506 Submission ED2 9 (Federation of Community Legal Centres).
507 Submission ED2 10 (Victoria Legal Aid). See also submission ED2 3 (Steve White).
508 Consultation with the Supreme Court of Victoria (9 October 2007).
509 Consultation with the Supreme Court of Victoria (9 October 2007).
510 Submission CP 37 (Transport Accident Commission) citing Fletcher Construction Australia v Lines Macfarlane & Marshall (No 2) (2002) 6 VR 1, 31, [34].
511 Submission CP 48 (Victorian Workcover Authority).
512 Submission CP 55 (Magistrates’ Court of Victoria).
513 Submission CP 52 (Holllows Lawyers).
514 Submission CP 31 (Victoria Legal Aid).
515 Submission CP 19 (qc.law. Australia Pty Ltd).
518 Scott v Scott [1913] AC 417; Dickason v Dickason (1913) 17 CLR 50, 51; Russell v Russell (1976) 134 CLR 495, 520; Raybas Australia Pty Ltd v Jones (1985) 2 NSWR 41, 50–3. A court may not even agree to hear a case in camera by consent (Scott v Scott [1913] AC 417, 436 and 481).
524 This echoes other provisions on human rights. Article 6(1) of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), provides that everyone has the right to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) provides, inter alia, that: ‘In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.
525 Charter of Human Rights and Responsibilities Act 2006 s 32(1).
527 Charter of Human Rights and Responsibilities Act 2006 s 42(2).
528 Provides that ‘[d]espite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter’. The note to subsection (2) provides: ‘For example, section 19 of the Supreme Court Act 1986 sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also County Court Act 1958 s 80AA and Magistrates’ Court Act 1989 s 126.’

See also, for a good discussion of the obligation to give reasons: Gibbs (1993) above n 490, 494–502.
520 This echoes other provisions on human rights. Article 6(1) of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), provides that everyone has the right to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) provides, inter alia, that: ‘In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

525 Charter of Human Rights and Responsibilities Act 2006 s 32(1).
527 Charter of Human Rights and Responsibilities Act 2006 s 42(2).
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without reasons the losing party will not know … whether the court has misdirected itself, and thus whether he [or she] may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.529

However, the European Court of Human Rights and English law has ‘accepted that the extent of the court’s duty to give reasons varies according to the nature of the decision and the circumstances of the case’.530

Professor Zuckerman notes that ‘[a]ccording to the European Court of Human Rights, the court need only address specifically those points raised by a party which would be decisive if accepted … [Under English law, full reasons] must be given for a decision on the merits, although it is not necessary to address … every point made by the parties’.531

The right to a public hearing is part of the section 24 right to a fair trial under the Charter. As mentioned above, the section 24 right to a fair trial is, in part, based on article 6 of the European Convention on Human Rights. The European Court of Human Rights has articulated the reasons for the right to a public hearing:

> The public nature of the proceeding helps to ensure a fair trial by protecting the litigant against arbitrary decisions and enabling society to control the administration of justice. This possibility of supervision by the public, even if frequently theoretical or potential, is a guarantee to the parties to a dispute that a real endeavour will be made to establish the truth through hearings conducted by a judge whose independence and impartiality can be verified by the way in which he [or she] conducts the hearing, summons and questions witnesses and experts, considers the relevance of proposed evidence, and respects the right to be heard.532

There are limits on the right to a public hearing, however. The European Court of Human Rights has found that article 6 ‘requires that judgments should be pronounced publicly, but it is not necessary that a judgment should be read out in public, it is enough that it is made public’.533

Section 24 is also, in part, modelled on article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR General Comment No. 32 ‘Article 14: Right to equality before courts and tribunals and to a fair trial’ provides as follows:

> 28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing. The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities.

Professor Zuckerman argues that considerations of time and resources are relevant to shaping the extent of the requirement for public proceedings just as they are relevant to other aspects of procedure. He notes as an example that ‘[l]ack of publicity at one stage is acceptable if there was ample publicity at a different stage in the same case’.534

**The nature and extent of the duty**

The extent to which the court must account for the reasons depends on the nature of the proceedings. The Full Federal Court in *Fry v McGufficke*535 observed:

> The failure to explain the basis of a crucial finding of fact involves a breach of the principle that justice must not only be done but must be seen to be done … The extent of the obligation to give reasons based on particular findings of fact will depend upon the circumstances of each case. It is, however, only the critical or crucial reasoning that must be exposed: … It is in that sense that what is sufficient will depend upon all the circumstances of the particular case.536
The Victorian Court of Appeal recognised in Kapiris Bros (Vic) v Zausa & Giummarra that:

*While justice must be seen to be done, that necessary goal must be achieved without the unnecessary expenditure of the limited time judges have available, and with an appreciation of the interests of those who have occasion to read reasons for judicial decisions … The judge has the often difficult task of finding the correct balance, which of course will vary according to the circumstances, including the place which the court occupies in the judicial hierarchy.*

In considering the obligation to give reasons it is necessary to distinguish different types of judicial decisions.

**Dismissal of appeals**

There is a case for a less onerous obligation where an appeal is dismissed. For example, the *Uniform Civil Procedure Rules 2005* (NSW) provide that the court may, when dismissing an appeal, exercise its power to give reasons for its decision in short form.

In a number of contexts, legislative provisions enable courts to give short reasons, in dismissing an appeal, where no important question of law is involved.

**Applications for leave to appeal**

Applications for leave to appeal give rise to different considerations. As Professor Zuckerman has observed, such applications

> involve a different type of decision-making process than a decision on the merits (not least because the right to a fair trial does not guarantee a right to appeal) … All the court needs to do is indicate in broad terms the grounds on which the decision was reached which may involve no more than an endorsement of the lower court’s decision.

The High Court does not usually provide reasons when deciding leave to appeal applications.

**Where there are novel questions of law**

Justice Beaumont has suggested that for trial and appellate purposes, extended treatment should be reserved for those cases only where what is involved is ‘novel law’.

**Leave to commence proceedings**

In the TAC context, applications for leave to commence proceedings are interlocutory. The TAC in *Petkovski v Galetti* noted in its submission that Justice Brooking was critical of this process contemplated by section 93

>given.

Although questions relating to costs are usually within the discretion of the court such decisions are often of considerable significance to the parties and may be the subject of appeal. Reasons are usually given. However, as Professor Zuckerman has observed in the English context:

> [The English] Court of Appeal has recognised that European Court of Human Rights jurisprudence requires the court to provide reasons for cost decisions. But the Court of Appeal did not regard the need for an explanation for a costs decision to be as important as an explanation for a decision on the merits.
Arbitrator’s decisions

Two important decisions of the Victorian Supreme Court recently dealt with the issue of the duty to give reasons in arbitration. The statutory obligation of an arbitrator to provide ‘a statement of reasons for making the award’ is found in section 29(1) of the Commercial Arbitration Act 1984. In *Oil Basins Ltd v BHP Billiton Ltd* the Victorian Court of Appeal upheld a decision of Justice Hargrave, who found that the arbitrators in the arbitration, one of whom was a retired Supreme Court judge, were under a duty to give reasons of a standard equivalent to the reasons expected from a superior court judge deciding a commercial case.

Justice Hargrave followed previous authorities in finding that the effect of an arbitrator’s failure to include an adequate statement of reasons could constitute a manifest error of law and hence render an award susceptible to being set aside. However, commentators have noted that the *BHP Billiton v Oil Basins* decisions represent a departure from previous authorities regarding the standard to be applied when assessing the adequacy of the reasons and that some were surprised, even disappointed, by the decisions.

According to one commentator:

> If the parties choose to resolve their dispute by arbitration (as opposed to litigation), why should they be taken to require the same standard of reasoning as that which they could expect from a superior court judge simply because they have chosen as their arbitrator a retired Supreme Court Judge or they have agreed (or the arbitrator has determined) to adopt the same sorts of procedures as would have applied if they had chosen litigation? ... The better view is that as a matter of statutory construction section 29(1) of the CAA requires a standard of reasoning which is less than the standard of reasoning required by a superior court judge. After all, a much prized advantage of arbitration is the speed of the process. The requirement of lengthy reasons is inimical to a speedy dispute resolution process.

Other models

The President of the Institute of IAMA, Laurie James, has said that the approach taken in IAMA Fast Track arbitrations is that (as mentioned above):

> [With respect to] the awards given by arbitrators, [arbitrators] are expected to provide detailed written reasons which are proportionate to the time available.

Where for example judges in court write voluminous reasons, it usually takes them many months, and the Fast Track can’t allow for that … The parties [should] acknowledge that in 30 days an arbitrator would probably give a fairly comprehensive award. But if the parties reduce that to 14 days, then obviously they would still have to get an outline, but [not every] detail about what was said in the case.

The Federal Court Fast Track List allows for judgments to be delivered quickly in urgent matters, with reasons to follow.

12.5 RECOMMENDATIONS

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

In light of the opposition to our initial draft proposal in submissions and given the issues concerning the impact of the Charter on the duty to give reasons, we are of the view that this matter requires further detailed consideration. This should be a matter for review by the proposed Civil Justice Council.
13. MAKING DECISIONS ON THE PAPERS

13.1 RATIONALE FOR THE PROPOSAL

At present, in a number of instances, decisions may be made ‘on the papers’ without the necessity for oral argument. Giving decisions on the papers could reduce costs and delay. Alternatively, it may be appropriate to only allow the parties a very limited time to expound orally on submissions made in writing. It would appear that US courts, in hearings before judges (ie without a jury), including at an appellate level, rely more on written ‘briefs’ than oral argument.

13.2 POSITION IN VICTORIA

It would appear that the only provision expressly empowering the courts under review to make decisions on the papers is rule 65.10 of the Supreme Court (General Civil Procedure) Rules 2005. Rule 65.10 provides that an application may be determined by the Court of Appeal without the attendance of the parties, and without a hearing, provided that the parties are given more than three days notice that they are not required to attend.554 Where an application is determined on the papers, the parties can apply to the court to set aside the decision or vary the decision.555 There may be serious cost consequences, however, if such an application is dismissed.556 The President of the Court of Appeal, Justice Chris Maxwell, has endorsed the use of this rule:

The preparation for and hearing of civil applications is very time-consuming. I am convinced that we can use judges’ time more effectively. To that end, I am looking … to facilitate applications being dealt with on the papers (a procedure which is currently available under rule 65.10(2), but rarely used).557

The commission also notes that the ‘new approach’ in the Supreme Court Building Cases List provides that interlocutory applications, where possible, will be determined on the papers.558

13.3 OTHER MODELS

Australia

Some Australian courts and tribunals have express power to make decisions on the papers. For example, the Administrative Appeals Tribunal Act 1975 (Cth) was amended in 1995 to make provision for decisions on the papers. The Act now provides that if the Administrative Appeals Tribunal (AAT) is satisfied that the issues can be adequately determined without an oral hearing and the parties consent, the AAT may review the decision by considering the documents before it and without conducting a hearing.559

Similarly, in Victoria, VCAT may conduct all or part of a proceeding entirely on the basis of documents, without requiring the presence of parties, their representatives or witnesses, if the parties agree.560

In NSW, the Administrative Decisions Tribunal may make decisions on the papers. Section 76 of the Administrative Decisions Tribunal Act 1997 (NSW) provides that the tribunal may determine proceedings by considering the documents or other material lodged with or provided to it and without holding a hearing if it appears to the tribunal that the issues for determination can be adequately determined in the absence of the parties.

Similarly, the Migration Review Tribunal may make decisions on the papers. Under the Migration Act 1958 (Cth), applicants are required to appear before the tribunal to give evidence or present arguments, except in the following circumstances:

a) where the tribunal considers that it should decide the review in the applicant’s favour on the basis of the material before it; or
b) where the applicant consents to the tribunal deciding the review without the applicant appearing before it; or
c) where the applicant has been invited to give additional information and has failed to do so and in these circumstances, the tribunal has made a decision.561

The Child Support (Registration and Collection) Act 1988 (Cth) allows for applications for leave to appeal decisions from the Federal Magistrates Court to the Family Court to be dealt with, subject to the standard rules of court, without an oral hearing.562
Chapter 5

Case Management

Under the Legal Aid Scheme of Queensland, arbitration hearings are conducted on the papers. As the Family Law Council of Australia has noted, ‘[w]hile there is no right of physical attendance the parties do have the opportunity to make oral submissions by telephone. The arbitrator will issue an arbitral award within 28 days of oral submission or tendering of final documents’. The Workers Compensation Scheme (NSW) also allows for ‘a simple arbitration on the papers. Arbitration … is conducted in the absence of the parties, and is based on written information submitted by each of the parties prior to the arbitration. The information the arbitrator relies on will come either from forms such as a Form 13 financial statement, or the conciliation conference document, or documents of a similar nature’.

As described in this chapter under the individual docket system, in all but urgent cases in the Federal Court’s Fast Track List, interlocutory hearings are substituted by interlocutory applications to be dealt with on the papers. Oral hearings are allowed in limited circumstances.

Finland

In numerous countries, various types of judicial decisions may be made without the requirement of a formal hearing. It is beyond the scope of the present report to consider each of these in detail. However, in Finland, Ervo comments that:

> From 2003 onwards, it has been possible in Finland for a court to decide cases during the preparatory stage on the basis of documentary merits. The purpose of the rule is to make it possible to decide disputed matters on the papers without an oral hearing or any substantive hearing at all. The requirements are that the parties give their consent, or that, having regard to the nature of the case, there is no use to be derived from a substantive hearing.

England and Wales

Another measure aimed at reducing the number of interlocutory applications is the power given to the court to deal with matters of its own initiative. In England and Wales:

> Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

Where it decides to do so, the court is specifically absolved from any duty to hear the parties. However, after an order is made, a party affected may, within a specified time, apply for the order to be set aside, varied or stayed.

Ontario

One of the recommendations made in a recent report on the Ontario Civil Justice System was to allow for speedy mechanisms to obtain direction and orders on procedural matters from the managing judge, master or case management master for cases that are governed by rule 37.15. These mechanisms may include a telephone or in-person case conference or a simplified process for motions to be made in writing with or without affidavits.

13.4 DISCUSSION

ALRC review of the adversarial system of litigation

As part of its review of the adversarial system, the ALRC considered decisions on the papers with respect to tribunals. The ALRC proposed that ‘[d]ecisions on the papers should be more widely available in review tribunal proceedings, but only following appropriate consideration, investigation and after procedurally fair opportunities have been afforded to the parties to respond’. The ALRC also considered that ‘[m]embers should be encouraged to use decisions on the papers more often to resolve review applications’. Several submissions to the ALRC review were supportive of expanding the practice of making decisions on the papers.

The Administrative Review Council in its submission to the ALRC’s review recommended that ‘review tribunals should not convene an oral hearing of a matter if they consider that the issue may be determined adequately without an oral hearing, and provided that the applicant gives informed consent’.

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In its submission to the ALRC’s review, the AAT observed that decisions on the papers ‘can offer significant savings’, however, it was contended that oral hearings may be necessary where:

- the application raises an issue of general importance to Commonwealth administration
- the application involves complex questions of law or fact
- the outcome of the application is likely to have significant financial or other repercussions for the applicant
- there are questions as to the credit of the applicant or a witness
- there is significant conflict as to the facts or the correct interpretation of the law, or
- an unrepresented applicant, by reason of cultural or linguistic background or for other reasons, cannot present a cogent argument in writing or does not understand the tribunal’s role.\(^{575}\)

The AAT also submitted to the ALRC that the informed consent of the parties should be obtained before a review tribunal makes a final determination without an oral hearing.\(^{576}\)

**The Family Law Council’s review of arbitration in family law matters**

The Family Law Council has endorsed decisions on the papers. In its view, the Legal Aid Queensland approach to decisions on the papers (described above) offers a good service to rural and remote areas of the state ‘because neither the parties nor the arbitrator are required to travel’.\(^{577}\)

The Family Law Council also noted that the main disadvantage of arbitration on the papers is that there may be circumstances in which an arbitrator ‘does not have enough information on the papers to make a decision’.\(^{578}\) In addition, it was noted that although the arbitrator may be able to ‘request further evidence if necessary, this still poses a significant practical problem’.\(^{579}\) It suggested, therefore, that arbitration on the papers should be ‘limited only to matters of the least complexity’.\(^{580}\) It was further noted that: ‘Such a system would have obvious efficiency advantages, and would conform with the principle of proportionality with respect to allocation of court resources between more and less complex cases.’\(^{581}\) However, according to the Family Law Council, even if arbitration on the papers is allowed for, ‘it should not be the normal litigation pathway’.\(^{582}\)

**Hong Kong civil justice review**

In its Interim Report and Consultative Paper, the Working Party of the Chief Justice of Hong Kong commented that the power to determine matters on the papers was useful and, if used wisely in cases where the order is plainly needed and unlikely to lead to a contentious hearing, could avoid interlocutory hearings and save the parties costs.\(^{583}\)

**The right to a public hearing**

The discussion above about common law and Charter considerations in respect of decisions without reasons\(^{584}\) is also relevant to decisions on the papers.

The ALRC noted in its Issues Paper\(^{585}\) that ‘common law rules of procedural fairness do not require that in all cases an oral hearing be offered’.\(^{586}\) However, requirements of procedural fairness may require an oral hearing where, for example, ‘real issues of credibility are involved or it is otherwise apparent that an applicant is disadvantaged by being limited to [written] submissions or responses to the decision maker’.\(^{587}\)

**When are decisions on the papers appropriate?**

Different approaches have been taken by various bodies as to when decisions on the papers may be appropriate:

- **ALRC approach:** if there has been appropriate consideration, investigation and after procedurally fair opportunities have been afforded to the parties to respond and there are no credibility issues
- **AAT approach:** if the court is satisfied that the issues can be adequately determined without an oral hearing and the parties consent and there are no credibility issues
- **ADT approach:** if it appears to the court that the issues for determination can be adequately determined in the absence of the parties and there are no credibility issues.
13.5 SUBMISSIONS

Several submissions contended that there should be greater scope for decisions to be made on the papers. For example, Judge Wodak commented that:

- he ‘regularly and frequently give[s] decisions on the papers, mostly in ex parte procedural applications, such as for leave for discovery, or to interrogate or to amend a pleading’
- if he considers that the application may fail, ‘the applicant party is offered the opportunity for oral argument, absent which the application will fail’
- ‘if the party wishes to be heard, all other interested parties can participate in the hearing’
- he makes orders, on the papers, ‘where all parties consent to the proposed orders, and where [he considers] the orders sought appropriate’
- he has found that ‘on some occasions, parties, anticipating an unfavourable outcome of an application on the papers put contentious matters in a letter addressed to [his] Associate ... In such cases, [he always insists] on a hearing, so that the matters can be ventilated’. 588

There was support for the proposal among some judges of the Supreme Court, as long as it was by consent. One judge commented that such a procedure could be useful where there are arguments about scheduling; for example, if there is a difference of one week. Another Supreme Court judge was supportive of the proposal but also said that it might encourage judges to ‘put-off’ making decisions and that decisions could ‘pile up’. His view was that if there is a court hearing, a decision has to be made quickly. 589

Maurice Blackburn commented that ‘[t]here are many occasions on interlocutory matters where we consider decisions on the papers should be possible’. 590

Christopher Enright commented that there is a ‘good case for a court to allow issues of law to be argued by written submissions, even if in appropriate cases they are supplemented by an oral hearing’. 591

The TAC considered that ‘[f]acilitated pre-trial interlocutory processes on the papers … would reduce the need for pre-trial appearances’. 592

Victoria Legal Aid expressed concern that imposing limits on hearings may simply ‘shift costs rather than reduce costs’. For example, it was submitted that ‘instead of making submissions orally, parties may be required to file written submissions’. It was said that this could ‘disadvantage self-represented litigants, who may not be capable of presenting their evidence and arguments as efficiently as legal practitioners’. 593

The Consumer Action Law Centre did not support any changes that would allow determinations to be made on the papers, unless all parties consented. The centre noted that the default judgment facility in the Magistrates’ Court already causes ‘significant detriment to consumers, and it is not in the interests of consumers (or of justice) to allow more determinations to be made on the papers’. 594

A number of other comments were made in the submissions:

- Judge Wodak noted that in order to assist parties in seeking orders on the papers, there is a practice note which contains some guidelines on matters which may be the subject of such applications. He also commented that he has reservations about determining contentious matters on the papers:
  
  *Even where all parties who have an interest in the subject matter of the application have a right to make written submissions, it can be a cumbersome process, and may not take significantly less time than a short contested application in court.* 595

- Victoria Legal Aid commented that it was important to ensure that ‘proposals to increase the proportion of decisions made “on the papers” do not unfairly disadvantage self-represented litigants, or those who may have legitimate cases that would otherwise have been properly explored at trial’. 596

- One Supreme Court judge commented on the US procedure where a draft order or judgment is emailed to the parties and if they do not agree with the draft, they can request a hearing. A Supreme Court master queried whether in fact such a procedure
would add to costs as there may be ‘reams of paper’. A further query was made regarding who would hear the application to contest the draft—whether it should be the same judge (as in the US) or a different judge.597

At present in the English High Court procedural directions are often made by masters in chambers, on the papers, after the parties have submitted comments on draft directions, by e-mail.

13.6 CONCLUSIONS AND RECOMMENDATION

The commission is of the view that making decisions on the papers in appropriate cases should be encouraged as a means of reducing costs and delay. However, further consideration should be given to the question of whether there should be a requirement for consent of the parties and there is a need to specify in some detail the circumstances in which an oral hearing may be dispensed with. We consider that these matters should be examined by the proposed Civil Justice Council.

14. DETERRING OR CURTAILING UNNECESSARY LITIGATION

14.1 PROTHONOTARY REFUSING TO SEAL A DOCUMENT

Rule 27.06 of the Supreme Court (General Civil Procedure) Rules 2005 provides:

(1) The Prothonotary may refuse to seal an originating process without the direction of the Court where the Prothonotary considers that the form or contents of the document show that the document was to be sealed the proceeding so commenced would be irregular or an abuse of the process of the Court.

(2) Where a document for use in the Court is not prepared in accordance with these Rules or any order of the Court—

(a) the Prothonotary may refuse to accept it for filing without the direction of the Court;

(b) the Court may order that the party responsible shall not be entitled to rely upon it in any manner in the proceeding until a document which is duly prepared is made available.

(3) The Court may direct the Prothonotary to seal an originating process or accept a document for filing.

From time to time, the prothonotary may rely on sub-section (1) as a basis for refusing to issue an originating process. The power is not one to ‘arbitrarily refuse to seal the document but a power to refuse it without the direction of the Court’.598

Although there are no available figures about how often this power is exercised, anecdotally it would appear that the process is most usually relied on where the person seeking to issue the originating process is a self-represented litigant.599 We understand from consultations that as a matter of practice, the prothonotary will generally refer the matter to the judge in the Practice Court.600 The power is not one to ‘arbitrarily refuse to seal the document but a power to refuse it without the direction of the Court’.598

The process under rule 27.06(1) should properly be reserved for matters where there is clearly no possibility that the plaintiff will succeed.601 It is nonetheless a useful tool for the court to employ as a means of ‘pre-emptive control’ or early intervention in matters which are an abuse of process. It is particularly useful where the judge determining the matter is able to hear it in open court and the person seeking to commence the proceeding has the benefit of hearing the judge’s reasons. We are of the view that there is scope to extend the operation of rule 27.06(1) to apply to applications as well as originating process. This would give the court the same power to dispose of interlocutory matters which are irregular or an abuse of process, before the application is issued.

It may also be that the rule should specifically provide for the court to have the option to determine the matter in open court.

588 Submission ED2 5 (Judge Tom Wodak).
589 Consultation with the Supreme Court of Victoria (9 October 2007).
590 Submission ED2 19 (Maurice Blackburn).
591 Submission CP 50 (Christopher Enright).
592 Submission CP 37 (Transport Accident Commission).
593 Submission CP 31 (Victoria Legal Aid).
594 Submission ED2 12 (Consumer Action Law Centre).
595 Submission ED2 5 (Judge Wodak).
596 Submission ED2 10 (Victoria Legal Aid).
597 Consultation with the Supreme Court of Victoria (9 October 2007).
598 Williams (2008) above n 114, 1 [27.06.5]. See also Federal Court Rules 1979 O 46 r 7A, which essentially provides that a registrar may refuse to accept or issue a document if the document appears to the registrar on its face to be an abuse of the process of the court or to be frivolous or vexatious.
599 Grant Lester and Simon Smith, ‘Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia’s Vexatious Litigant Sanction 75 Years On’ (2006) 13 Psychiatry, Psychology and Law 1, 18.
600 Consultation with Bronwyn Hammond, Self Represented Litigants Coordinator, Supreme Court of Victoria (26 July 2007).
601 Little v Victoria [(Unreported, Supreme Court of Victoria, Gillard J, 17 June 1997), and Little v Victoria (Unreported, Supreme Court of Victoria, Gillard J, 18 July 1997).
Recommenation

It is proposed that the operation of rule 27.06(1) of the Supreme Court (General Civil Procedure) Rules 2005 be extended to apply to applications. One method by which this could be achieved is as follows:

- In sub-paragraph (1) insert the words ‘or summons’ between ‘originating process’ and ‘without’; and ‘or interlocutory application so made (as may be the case)’ between ‘commenced’ and ‘would be irregular’.

- In sub-paragraph (3) insert the words ‘or summons’ between ‘process’ and ‘or accept’.

An additional sub-paragraph could be inserted as follows:

(4) The Court may make a determination pursuant to sub-section (3) in open court.

Rules in similar terms apply in the County Court and the Magistrates’ Court of Victoria. It is proposed that amendments to similar effect should be made to the rules in these courts.

It is also proposed that, to the extent that it is not already provided for in the rules, such provisions be extended to apply to appeals or applications made in connection with appeals.

14.2 Submissions

Submissions were divided on this issue. Victoria Legal Aid noted the ‘important distinction made between vexatious litigants and the needs of the majority of self-represented litigants’. It also supported some of the proposals ‘to ensure vexatious litigation is reduced within the civil justice system’.

The Federation of Community Legal Centres also noted the important distinction made between vexatious litigants and the needs of the majority of self-represented litigants. The Federation contended, however, that any extension of the court’s power to refuse documents would disadvantage its clients, ‘who almost always have “irregular” paperwork, regardless of the merits of their case’. The Federation questioned the ability of court staff to make those ‘determinations on the spot, especially when confronted with a non-English speaking litigant, a litigant with poor verbal skills, a mentally ill litigant with a legitimate issue, or any unrepresented litigant with poorly drafted paperwork’. It felt that this could leave self-represented litigants ‘out of time as they attempt to re-draft their submissions to an acceptable form’.

A number of other comments were made in the submissions:

- Legal Aid said that ‘care needs to be taken to provide proper advice to vexatious litigants to explain the reasons why their case may have been disallowed, otherwise these proposals may simply transfer the problem to another agency in the civil justice system (for example, leading the vexatious litigants to seek redress through Victoria Legal Aid or other agencies)’.

- The Supreme Court noted that the Self-Represented Litigants Co-ordinator provided materials to unrepresented litigants to assist them with preparing documents in accordance with court rules, so as to avoid the operation of rule 27 (which enables the registry to refuse a document for filing).

14.3 Conclusions

We consider that the following proposals should be implemented:

- broadening preliminary control by expanding the court’s power to refuse to seal or accept documents

- improving procedures for the earlier determination of disputes, in particular the disposition of unmeritorious claims and defences (referred to above)

- improving legislative provisions with respect to vexatious litigants or proceedings (discussed below).

The operation of r 27.06(1) of the Supreme Court (General Civil Procedure) Rules 2005 should be extended to apply to applications. The rule should specifically provide for the court to have the option to determine the matter in open court.
Rules in similar terms apply in the County Court and the Magistrates’ Court of Victoria. Amendments to similar effect should be made to the rules in these courts. To the extent that it is not already provided for in the rules, such provisions should be extended to apply to appeals or applications made in connection with appeals. Registry staff would require training and it may be appropriate for a senior registry member to be responsible for exercising this power.

15. OTHER COMMENTS IN SUBMISSIONS

Other comments made in submissions regarding the conduct of pre-trial procedures and trial procedures included the following:

- The Bar recommended (in the absence of the introduction of a docket system) that most civil cases of any complexity (say, cases with a duration of trial of five or more days) should be subject to a pre-trial review conference (as well as an initial early case management conference). The Bar’s position was also that witness statements generally work well and efficiently, and now are well established in the civil justice system.608

- By way of contrast, one confidential submission stated that using witness statements or affidavits as the evidence-in-chief in superior courts is ‘useless [and] ought to be scrapped’.609

- The Magistrates’ Court commented that it has resisted the introduction of witness statements in civil litigation, mainly due to their expense.610

- Victoria Legal Aid suggested that court fees should be amended to ensure that poorer litigants are not disadvantaged. For example:
  a. fees should be waived for legally assisted litigants
  b. fees should be proportionate to the quantum of claim.611

- The Law Institute contended that the main problem is one of resources. Not enough judges means that cases are sometimes not heard within an appropriate time frame, leading to increased costs and delays.612

- The Legal Practitioners’ Liability Committee advocated the efficient use of time in court. It is suggested that much greater use be made of written submissions, particularly in relation to opening and final submissions in non-jury trials.613

- State Trustees said that ‘[c]onsideration ought to be given to the appointment of a judge or judges to the Practice Court for the sake of continuity, consistency and integrity of that court’.614

- The Police Association submitted that ‘[h]earings would be potentially shortened if there were to be [an] ‘Agreement on Certain Facts’ alleged by the plaintiff [and] by the defendant … [Furthermore,] any informal pre-trial discussion between representatives of the parties may alleviate the need for trials’.615

- The TAC and WorkCover contended that the requirement for preparation and delivery of bulky voluminous court books should be removed as they are ‘costly and time consuming to produce and environmentally unfriendly in terms of paper consumption’.616

- The Law Institute suggested the introduction of a ‘central registry to enable courts to allocate cases on the basis of the proceeding [given that] current jurisdictional limits of the courts now overlap to a large degree’.617 The Magistrates’ Court supported this proposal and stated that ‘[t]o work effectively, one would need trained staff and detailed guidelines for the staff to determine out of which court a proceeding should be issued’.618

- One submission argued that: ‘Thought should be given to ensuring that the various court personnel are used in the most effective manner; there seems to be scope to reengineer the court processes and reallocate work from judges to associates, registrars and masters, which would enable judges to focus their time more effectively on trials and writing judgements.’619

- It was also suggested that a “‘one size fits all’ approach to case management is likely to be counterproductive and … the body best placed to manage the conduct of civil litigation is the Court itself.”620
RECOMMENDATIONS

Chapter 5: Case Management

Judicial power

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

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

Rule making power

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

The rule making power is discussed further in Chapter 12 and is addressed in recommendation 166.

Active judicial case management

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

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

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

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

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

Section/Rule X: ‘Directions as to conduct of hearing’

(1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.

(2) The court may, by order, give directions as to the order in which questions of fact are to be tried.

(3) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(4) Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:

(a) limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,

(b) not allowing cross-examination of a particular witness,

(c) limiting the number of witnesses (including expert witnesses) that a party may call,

(d) limiting the number of documents that a party may tender in evidence,

(e) limiting the time that may be taken in making any oral submissions,

(f) that all or any part of any submissions be in writing,

(g) limiting the length of written submissions,

(h) limiting the time that may be taken by a party in presenting his or her case,

(i) limiting the time that may be taken by the hearing,

(j) with respect to the place, time and mode of trial,

(k) with respect to the giving of evidence at the hearing including whether evidence of witnesses in chief shall be given orally or by affidavit, or both,

(l) with respect to costs, including the proportions in which the parties are to bear any costs,

(m) with respect to the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing,

(n) with respect to the taking of evidence and receipt of submissions by video link, or audio link, or electronic communication, or such other means as the court considers appropriate,

(o) that evidence of a particular fact or facts be given at the hearing:

I by statement on oath upon information and belief,

II by production of documents or entries in books,

III by copies of documents or entries; or

IV otherwise as the court directs,
(p) that an agreed bundle of documents be prepared by the parties,
(q) that evidence in relation to a particular matter not be presented by a party, or
(r) that evidence of a particular kind not be presented by a party.

(5) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party and/or the court a memorandum stating:
(a) the estimated length of the trial, and the estimated costs and disbursements, and
(b) the estimated costs that the party would have to pay to any other party if they were unsuccessful at trial.

34. There should be more clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures. Set out below is a draft provision that specifies the types of directions orders the court could make including as to pre-trial procedures.

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

(1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

(2) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(3) Without prejudice to the generality of subsection (1) the Court may give such directions or make such orders as it considers appropriate with respect to:
(a) discovery and inspection of documents, including the filing of lists of documents; either generally or with respect to specific matters;
(b) interrogatories;
(c) inspections of real or personal property;
(d) admissions of fact or admissibility of documents;
(e) the filing of pleadings and the standing of affidavits as pleadings;
(f) the defining of the issues by pleadings or otherwise; including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions;
(g) the provision of any essential particulars;
(h) the joinder of parties;
(i) the mode and sufficiency of service;
(j) amendments;
(k) counterclaims;
(l) the filing of affidavits;
(m) the provision of evidence in support of any application;
(n) a timetable for any matters to be dealt with, including a timetable for the conduct of any hearing;
(o) the filing of written submissions;
(p) costs;
(q) the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding;
(r) the attendance of parties and/or legal practitioners before a Registrar/Master for a conference with a view to satisfying the Registrar/Master that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in
preparation for and at the trial;

(s) the attendance of parties and/or legal practitioners at a case management conference with a Judge or Registrar/Master to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the Judge or Registrar/Master may give further directions;

(t) the taking of specified steps in relation to the proceedings;

(u) the time within which specified steps in the proceedings must be completed;

(v) the conduct of proceedings.

(4) If a party to whom such a direction has been given or against whom an order is made under subsection (1) or (2) fails to comply with the direction or order, the court may, by order, do any one or more of the following:

(a) dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,

(b) strike out or limit any claim made by a plaintiff,

(c) strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly,

(d) strike out or amend any document filed by the party, either in whole or in part,

(e) strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,

(f) direct the party to pay the whole or part of the costs of another party,

(g) make such other order or give such other direction as it considers appropriate.

(5) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given or order made by the court.

(6) The Court may revoke or vary any direction or order made under subsection (1) or (3).

Methods to enhance party compliance with procedural requirements and directions

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

Expansion of Individual Docket Systems

36. The Commission considers that there is merit in giving further consideration to the extension of the individual docket system in the Supreme and County Courts.

The courts should retain a consultant or consultants to examine the feasibility of implementing a docket system in the County and Supreme Courts. If the individual docket system is extended, the courts should determine the method of implementation.

Any changes should be monitored or evaluated by the Chief Justice in the Supreme Court, the Chief Judge in the County Court and the proposed Civil Justice Council.

Greater use of telephone directions hearings and technology

37. The County Court could consider adopting the Supreme Court’s approach to e-litigation. The Magistrates’ Court may wish to consider adopting the Supreme Court’s approach to e-litigation in more complex cases, including where there is a substantial portion of the discoverable material in electronic form.

38. There could be more use of telephone directions hearings to save the parties the time and the cost involved of legal practitioners attending a directions hearing. Email directions hearings and internet online messaging systems should also be considered, subject to appropriate security arrangements.
Chapter 5

Case Management

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

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

Earlier and more determinate trial dates

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

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

41. The test for summary judgment in Victoria should be changed to provide that summary judgment can be obtained if the other party has ‘no real prospect of success.’

42. There should be in the rules of court a statement of an explicit case management objective that the Court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.

43. There should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding appears desirable.

44. There should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants and the rules should be based on the same test. The Magistrates’ Court rule should be extended to permit a defendant to apply for summary dismissal of the proceeding.

45. The limitations on categories of cases that are excluded from the procedure in the Supreme Court and the Magistrates’ Court should be removed.

46. The court should retain a residual discretion to allow a matter to proceed to trial even if the applicable test is satisfied.

Methods for controlling interlocutory disputes

47. There should be additional measures to reduce the interlocutory steps in proceedings. This may be facilitated by:

- requiring parties to confer and encouraging parties seek to reach agreement on an issue before making an interlocutory application;
- more determinate costs consequences for unnecessary as well as unsuccessful applications;
- requiring certification of the merits of applications.

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

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

50. This matter requires further detailed consideration and should be a matter for review by the proposed Civil Justice Council.
49. Making decisions on the papers

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

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