Chapter 12
Facilitating Ongoing Civil Justice Review and Reform
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"Managing justice is an ongoing process. There is no simple, once and for all solution to the problems of civil justice systems, no single best practice for managing or resolving disputes."

1. INTRODUCTION

Our terms of reference ask us to have regard to the aims of the Attorney-General’s Justice Statement: New directions for the Victorian Justice System 2004–2014, and in particular the modernisation, simplification and harmonisation of the rules of civil procedure within and across jurisdictions.

The Attorney-General’s Justice Statement identified the following potential areas for procedural reform (among others):

- Reform of the processes for commencing litigation. This may include common commencement forms between jurisdictions and the inclusion of the plaintiff’s statement of claim with the originating process.
- The present variety of procedures in different jurisdictions, all of which fundamentally are directed at getting the parties to state their cases, identify issues in dispute and disclose relevant supporting information, adds to the costs of litigation and clouds the transparency of the processes. Greater harmony between the rules of all three Victorian court jurisdictions should be the goal, provided that this does not encumber the lower jurisdictions with processes more appropriate to more complex litigation.

Our terms of reference also ask us to identify the process by which the courts, the legal profession and other stakeholders can be fully involved in any further detailed review of the rules of procedure. In this chapter we examine the processes by which procedural rules are made and amended in Victoria and other jurisdictions, outline recent moves towards uniform rules of civil procedure, and consider mechanisms for ongoing review and reform of the rules of civil procedure.

In the course of the present inquiry we received numerous submissions proposing reforms in areas outside the matters which have been taken up in stage 1. In this chapter we summarise these reform proposals. Some of these may be taken up in stage 2 of the present inquiry. Some may be matters for consideration by the proposed Civil Justice Council. Others may be implemented, either by legislation or rule change, without the need for further investigation.

2. RULES AND RULE-MAKING POWERS

2.1 VICTORIA

The rules that govern civil procedure in Victorian courts are made by the courts themselves as subordinate legislation. The principal rules are as follows:

- Supreme Court (General Civil Procedure) Rules 2005 (Chapter I)
- County Court Rules of Procedure in Civil Proceedings 1999

The rules of the Supreme and County Courts share a large number of common provisions, which the Supreme Court has noted ‘allows for a common jurisprudence in relation to the application of the rules’. There are some distinctions between the rules, reflecting different case management approaches, and variations in jurisdiction. The Magistrates’ Court rules are simpler and shorter than those that apply in the other courts. The courts also issue practice notes and guidelines to ‘provide more detailed and specialised information on the practices adopted in specialist lists, procedures for certain types of applications or new Court initiatives’.

The judges of the Supreme Court may make rules ‘on any matter relating to the practice and procedure of the Court or the powers, authorities, duties and functions of the officers of the Court’. The judges of the County Court ‘may make rules for regulating and prescribing the pleading, practice and procedure of the court’. In any case not provided for in the County Court Act or Rules, the general principles of practice and the rules observed in the Supreme Court may be adopted and applied. In the Magistrates’ Court, the Chief Magistrate, together with two or more Deputy Chief Magistrates, may jointly make rules of court ‘for or with respect to any matter relating to the practice and procedure of the Court in civil proceedings’.

2 Submission CP 58 (Supreme Court of Victoria).
3 Submission CP 58 (Supreme Court of Victoria).
4 Supreme Court Act 1986 s 25.
5 County Court Act 1958 s 78.
6 County Court Act 1958 s 78(5).
7 Magistrates Court Act 1989 s 16.
A council of the judges or magistrates of each Victorian court must meet at least once in each year to consider the operation of the legislation and rules, and to enquire into and examine any defects that appear to exist in the system of procedure or administration of the law in the court. Each court delegates its rule-making power to a rules committee, which then makes recommendations to the judges or magistrates for any rule change. The legislation does not prescribe who the members of the rules committees should be, or how their deliberations should be conducted.

The courts’ rules committees generally comprise judicial members, masters and registrars, representatives nominated by the Victorian Bar Council and the Law Institute of Victoria and an officer from the Office of the Chief Parliamentary Counsel. During 2005–6 the Magistrates’ Court Rules Committee’s primary focus was the alignment, where possible, of the court’s civil rules with those of the County and Supreme Courts.

The Supreme Court reported in relation to its Rules Committee:

In addition to acting in response to new legislation, the Committee receives suggestions for new rules or amendments from within the Court, from the profession and others. The Court also participates, through the Council of Chief Justices, in the National Harmonisation of Rules Committee which provides a forum for the development of uniform or harmonised rules on common issues across superior courts.

The Rule making power of the Court is an important aspect of the Court’s power to control its own procedure. The composition of the Rules Committee allows matters to be raised by those dealing with the Rules on a day to day basis. It allows expert consideration of any proposed change and an efficient procedure for amendment without recourse to parliamentary or departmental processes.

The Subordinate Legislation Act 1994 governs the status of rules made by the courts. Rules made by the courts are subject to disallowance by the Parliament. A proposed rule that is to be made by, or with the consent or approval of, the Governor in Council must be submitted to the Chief Parliamentary Counsel for the issue of a certificate that the rule is within power and appears otherwise appropriate. The rule must be published in the Government Gazette as soon as practicable after it is made, and within six days must be laid before each House of Parliament.

The Scrutiny Committee may report to Parliament if it appears that any statutory rule laid before Parliament does not appear to be within the powers conferred by the authorising Act, contains principles which should properly be dealt with by an Act and not subordinate legislation, unduly trespasses on rights and liberties of the person previously established by law, etc. The Scrutiny Committee may recommend that a rule should be disallowed or amended.

The Minister may make guidelines for the preparation, content, publication and availability of statutory rules, and the procedures to be implemented and the steps to be undertaken for the purpose of ensuring consultation, coordination and uniformity in the preparation of statutory rules.

The courts are also empowered to make rules under section 50 of the Interpretation of Legislation Act 1984, which provides:

Where an Act or subordinate instrument confers any jurisdiction on a court or other tribunal or extends or varies the jurisdiction of a court or other tribunal, the authority having for the time being power to make rules or orders regulating the practice and procedure of that court or tribunal may, unless the contrary intention appears, make such rules or orders (including rules or orders with respect to costs) as appear to the authority to be necessary for regulating the practice and procedure of that court or tribunal in the exercise of the jurisdiction so conferred, extended or varied.

In addition to express statutory powers, courts have an inherent or implied power to regulate their own procedure. The judges of superior courts and most other courts of record have the power to make rules of court regulating the procedure of the court to ensure the parties use the process of the court fairly and conveniently. The inherent power of the court is rarely used because courts are given wide statutory rule-making power.

As members of the High Court have noted, ‘power’ and ‘jurisdiction’ are not discrete concepts and the distinction between them is often blurred.
These class action procedures allowed the court to assess damages in the aggregate. The relevant the Federal Court's class action procedures contained in the (Cth).

Justice Ormiston found 'rules of practice and procedure', that is, 'they prescribe the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right'. Justice Ormiston (with whom Justices Phillips and Charles agreed) characterised the rules in dispute as rules of court in force on 1 January 1987), or the more general provision, section 25(1)(f)(i).

A rule made under rule-making powers is invalid if it is ‘altogether outside the province’ of the court as a rule-making authority or is ‘patently or absurdly irrelevant’ to the rule-making power. In less extreme cases, a rule will be invalid where it is not ‘capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose’.

In Williams v Melbourne Corp, Dixon J expressed the test for invalidity as being whether the rule goes ‘beyond any restraint which could be reasonably adopted’ for the prescribed purpose.

Section 25(1)(f)(i) of the Supreme Court Act and s 50 of the Interpretation Act enable bodies such as the Supreme Court of Victoria to ensure their efficient operation by providing means for the regulation of ‘practice and procedure’, a term which has been expressed to denote:

the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product.

In Cleland v Baynes, the Full Court of the Supreme Court of South Australia approved the following description of ‘practice and procedure’ given by Falconbridge in his work, Conflict of Laws:

Broadly speaking, it is customary in the conflict of laws to characterise as procedural such matters as forms of action, parties to an action, venue, rules of practice and pleading, proof of facts, admissibility of evidence, rebuttable presumptions and burdens of proof; and it has been suggested that the line between substance and procedure should be drawn on the basis of the general distinction between procedural rules which concern methods of presenting to a court the operative facts upon which legal relations depend, and substantive rules which concern the legal effect of those facts after they have been established.

The members of the High Court who considered the scope of the rule-making power found that section 251(f) only authorises the court to make rules for judicial acts. As the issue of a warrant is an administrative act, section 251(f) could not support the rule prescribing the form of the warrant. However, section 50 of the Interpretation of Legislation Act ‘encompasses administrative as well as judicial functions’ and is ‘sufficient authority’ for the court to prescribe the form of the warrant.

The scope of the Supreme Court’s rule-making power was further considered following the adoption of new class action procedures by that court in 1999. The Supreme Court introduced rules mirroring the Federal Court’s class action procedures contained in the Federal Court of Australia Act 1976 (Cth).

These class action procedures allowed the court to assess damages in the aggregate. The relevant provision was challenged in Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia (Ltd). A majority of the Court of Appeal held that the rules were valid and could have been made pursuant to section 251(a) (which empowers the court to make rules with respect to any matter dealt with in any rules of court in force on 1 January 1987), or the more general provision, section 251(f)(i).

Justice Orrmiston (with whom Justices Phillips and Charles agreed) characterised the rules in dispute as ‘rules of practice and procedure’, that is, ‘they prescribe the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right’. Justice Orrmiston found that the new rules did not alter recognised existing legal principles, and further, any calculation of damages would not amount to a substantive alteration of the law.
Justices Winneke and Brooking dissented, finding that the new rules permitted the court to assess damages otherwise than in accordance with the law. This amounted to a change in the substantive rights of group members. Justice Winneke commented that the scheme needed to be enshrined in legislation (which it subsequently was).

Reform proposals

In Going to Court Sallmann and Wright concluded it was time to devise uniform rules for the three courts as a matter of high priority. They also expressed the view that there was ‘a need for a co-ordinating mechanism to collect management information, to present a public face to the system, and to identify and act on apparent or actual deficiencies in service delivery systems, as well as other matters affecting court performance’. They further concluded that:

A type of civil justice council or courts advisory council is worth pursuing. It should not be armed with powers that could bind the courts but … would need to have a sufficiently important role, and to be supported in such a way, that it could bring about real improvements in the co-ordination and operation of civil justice in Victoria.

In 2004 the Courts Strategic Directions Project advocated review of the rules of procedure to simplify and harmonise them:

A feature of all major recent reviews of civil procedure is the general dissatisfaction with some of the current procedures in civil litigation. The various reviews point to the fact that, where appropriate, simpler initiation processes and simpler unified court rules and procedures can improve accessibility.

The rules and procedures of each of the Courts and VCAT should be reviewed to achieve greater simplicity and, where appropriate, congruity. A Task Force should be established to undertake the initial task of scoping a project and to identify the best form of pre-trial procedure for them.

2.2 OTHER AUSTRALIAN JURISDICTIONS

Rule-making procedures similar to Victoria’s operate in Western Australia, Tasmania, and the Northern Territory and in the Commonwealth courts. That is, each court in those jurisdictions is empowered to make its own rules of court, within the parameters of their enabling legislation. Tasmania is the only one of the above jurisdictions in which the composition of the courts’ rules committees is prescribed in the legislation.

In South Australia a Joint Rules Advisory Committee has been established, although this is not provided for in the legislation:

The Joint Rules Advisory Committee (JRAC) comprises two Judges, a Master, the Registrar and the Senior Deputy Registrar of the Supreme Court; three Judges, a Master and the Registrar of the District Court; one Magistrate; the President of the Law Society; and three legal practitioners.

The role of JRAC is to prepare, review and revise the Rules of Court, made pursuant to the Supreme Court Act and the District Court Act. The Rules regulate the procedures of and practice in the Supreme and District Courts. JRAC also has a role in preparation, review and revision of the Practice Directions of both the Supreme and District Courts.

It is JRAC’s responsibility to ensure that the Rules of Court and Practice Directions are adequate to deal with the requirements of contemporary litigation, and to assist in the efficient running of the courts.

In order to ensure that the legal profession is informed of amendments made to Rules and Practice Directions, and to ensure that any such amendments reflect practical needs, JRAC liaises directly with the profession by consulting with professional organisations such as the Law Society and the Bar Association.

On 4 September 2006 the Supreme Court Civil Rules 2006 and the District Court Civil Rules 2006, together with new Practice Directions, came into effect. The new Rules represent a major change from the previous Supreme Court Rules 1987 and District...
Courts, their registries or other specified matters. The Chief Justice is empowered to establish a Rules in respect of the practice and procedure of the Supreme Court, District Court, and Magistrates' of the rules committee, may make rules of court, to be known as the Uniform Civil Procedure Rules, provides that the Governor in Council, with the consent

Supreme Court of Queensland Act 1991

order to preserve the substance of the rules.

The Civil Procedure Act 2005 empowers a senior judicial officer of the court to issue practice notes. The practice notes are statutory rules for the purposes of the Interpretation Act 1987 (NSW) and can be disallowed. The Civil Procedure Act 2005 provides for a Uniform Rules Committee comprising 10 members, including:

(a) the Chief Justice of the Supreme Court or a judge of the Supreme Court nominated by the Chief Justice
(b) the President of the Court of Appeal or a judge of appeal nominated by the President
(c) two judges of the Supreme Court appointed by the Chief Justice
(d) the Chief Judge of the District Court or a judge of the District Court nominated by the Chief Judge
(e) a judge of the District Court appointed by the Chief Judge
(f) the Chief Magistrate or a magistrate nominated by the Chief Magistrate
(g) a magistrate appointed by the Chief Magistrate
(h) a barrister appointed by the Bar Council
(i) a solicitor appointed by the Law Society Council.

In addition to the Uniform Rules Committee, a Civil Procedure Working Party exists to develop amendments to the rules and civil forms. It has a cross-jurisdictional composition and in addition to judicial officers it includes representatives from the NSW Bar, Law Society and Attorney-General’s Department. The working party developed the uniform rules and the Civil Procedure Act in consultation with the judiciary, profession and special interest groups. In producing the uniform rules, the working party simplified and consolidated the rules, but retained existing concepts and phrases in order to preserve the substance of the rules.

Queensland

The Supreme Court of Queensland Act 1991 provides that the Governor in Council, with the consent of the rules committee, may make rules of court, to be known as the Uniform Civil Procedure Rules, in respect of the practice and procedure of the Supreme Court, District Court, and Magistrates' Courts, their registries or other specified matters. The Chief Justice is empowered to establish a Rules Committee consisting of the following members:

(a) the Chief Justice, or a Supreme Court judge nominated by the Chief Justice
(b) the President or a judge of appeal nominated by the President
(c) two Supreme Court judges nominated by the Chief Justice
(d) the Chief Judge or a District Court judge nominated by the Chief Judge

By contrast, NSW, Queensland and the ACT each have a single rules committee to develop and monitor rules for all courts within their jurisdiction. These committees have been established in the context of developing uniform or harmonised rules between the courts within those jurisdictions.

New South Wales

Civil procedure in all courts in NSW is now governed by the Civil Procedure Act 2005 (NSW) and the Uniform Civil Procedure Rules 2005 (NSW), which introduced common rules and procedures in civil proceedings in the Supreme, District and Local Courts. The uniform rules apply in all civil proceedings in the Supreme and District Courts; the Dust Diseases Tribunal; and the General Division and Small Claims Division of the Local Court.

To the extent that each court retains the power to make local rules, they are not authorised to make local rules to amend or repeal a uniform rule in its application to that court. The uniform rules prevail over any provision of any local rules unless the uniform rules expressly provide that the provision of the local rules is to prevail.

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In addition to the Uniform Rules Committee, a Civil Procedure Working Party exists to develop amendments to the rules and civil forms. It has a cross-jurisdictional composition and in addition to judicial officers it includes representatives from the NSW Bar, Law Society and Attorney-

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(a) the Chief Justice, or a Supreme Court judge nominated by the Chief Justice
(b) the President or a judge of appeal nominated by the President
(c) two Supreme Court judges nominated by the Chief Justice
(d) the Chief Judge or a District Court judge nominated by the Chief Judge

34 Ibid 232.
35 Ibid.
38 There is a Rules Committee consisting of the judges, the master and four practitioners appointed by the Governor s 202(1). The appointed members of the committee shall hold office for a period of 5 years: s 202(2). The Rules Committee shall meet once at least in each year, and as often as the Chief Justice may direct: s 202(3). Supreme Court Civil Procedure Act 1992 (Tas). See also s 15AE Magistrates’ Court Act 1987 (Tas).
39 The Family Law Act 1975 (Cth) s 124 establishes a Rules Advisory Committee, consisting of such judges of the Family Court, such judges of family courts of states and such other persons as are appointed on nomination by the Attorney-General in consultation with the Chief Judge.
40 Supreme Court of South Australia, Report of the Judges of the Supreme Court of South Australia to the Attorney-General Pursuant to Section 16 of the Supreme Court Act 1935 for the Year Ended 31 December 2006 (2006).
41 Civil Procedure Act 2005 (NSW) s 10.
42 Civil Procedure Act 2005 (NSW) s 11.
43 Civil Procedure Act2005 (NSW) s 15.
44 Civil Procedure Act2005 (NSW) s 152.
45 Civil Procedure Act 2005 (NSW) s 8.
47 Supreme Court of Queensland Act 1991’s 118.
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(e) a District Court judge nominated by the Chief Judge
(f) the Chief Stipendiary Magistrate or a magistrate nominated by the Chief Stipendiary Magistrate
(g) a magistrate nominated by the Chief Stipendiary Magistrate.48

The rules committee may conduct its business and proceedings at meetings in the way it decides.49

Uniform Civil Procedure Rules came into force in Queensland in 1999.50 The rules introduced an
overriding philosophy and promote court control of proceedings.

Australian Capital Territory

In the ACT the Court Procedures Act 2004 (ACT) provides that the rule-making committee may
make rules in relation to the practice and procedure of courts or tribunals in the territory.51 The rules
committee comprises representatives of different courts including the Chief Justice, the President
of the Court of Appeal (or a judge if this is the same person as the Chief Justice), a judge, the Chief
Magistrate and a magistrate. The rule-making committee may conduct its proceedings in the way it
decides, whether by holding meetings or in any other way.52

The Act establishes a Joint Rules Advisory Committee (JRAC), comprised of representatives from both
courts, the court registrars, the ACT Law Society, the ACT Bar Association, the Director of Public
Prosecutions, Parliamentary Counsel, and a public servant nominated by the Chief Executive of the
Department of Justice and Community Safety.53

In some jurisdictions the legislation expressly directs the court to exercise its rule making power in
a way that facilitates the objectives of the civil justice system. For example in Western Australia in
making rules of court (as well as dealing with cases) the court is to ensure that cases are dealt with
justly:

Ensuring that cases are dealt with justly includes ensuring—
(a) that cases are dealt with efficiently, economically and expeditiously;
(b) so far as is practicable, that the parties are on an equal footing; and
(c) that the Court's judicial and administrative resources are used as efficiently as possible.54

Steps have also been taken to increase the level of harmonisation of rules across jurisdictions. The
Council of Chief Justices of Australian jurisdictions has convened the National Harmonisation of Rules
Committee to develop uniform or harmonised rules on common issues across superior courts.55 The
composition of the committee in 2007 was as follows:

- Chair—Justice Kevin Lindgren
- Victoria—Justice David Harper
- NSW—Justice John Hamilton
- Queensland—Justice Margaret Wilson
- Western Australia—Justice of Appeal Neville Owen
- South Australia—Justice Richard White
- Tasmania—Justice Peter Evans
- Australian Capital Territory—Justice Terence Connolly
- Northern Territory—Master Terry Coulahan
- New Zealand—Justice David Baragwanath.56

To date this committee has produced harmonised rules for proceedings under the Corporations Law,
subpoenas and freezing and search orders. The committee has subsequently considered rules about
service out of the jurisdiction, and is to look at whether further harmonisation can be achieved in
relation to discovery.53 The changes recommended by the committee are implemented through each
court’s own rulemaking process. The council has appointed a ‘monitoring committee’ to review the
operation of the new rules and to generate amendments to them where necessary.58

Justice Lindgren has in this context noted the advantages and disadvantages of harmonising rules
across jurisdictions.59
Advantages

3.1 Production of a ‘model’ set of rules based on the pooled experience of all Australian jurisdictions.

3.2 Common language ensures that the same text will fall to be construed in all participating courts, with the consequence of a larger corpus of interpretative decisions.

3.3 Greater certainty and predictability as a result of 3.2.

3.4 It does little to enhance the administration of justice that the same issue is addressed differently in the rules of the various courts, where the difference cannot be supported by reference to local considerations.

3.5 Harmonisation of rules militates against forum shopping based on rule differences.

3.6 Interjurisdictional practice and a ‘national profession’.

3.7 Training programs within ‘national’ firms.

Disadvantages

3.8 Slowing of pace of change because of the strong desirability of an individual court’s taking up proposed amendments through the relevant harmonised rules monitoring committee.

3.9 Perceived interference with local autonomy.

3.10 Discouragement of ‘trials’ of diverse solutions resulting in the emergence of ‘the best’ one; instead, a tendency to compromise and to adopt the ‘lowest common denominator’ factor.

2.3 OVERSEAS JURISDICTIONS

New Zealand

In New Zealand neither the Rules Committee nor the Government has the power to make rules unilaterally. The Judicature Act 1908 (NZ) empowers the Governor-General, with the concurrence of the Chief Justice and two or more members of the Rules Committee (of whom at least one is a High Court judge) to make rules regulating the practice and procedure of the High Court, the Court of Appeal and the Supreme Court. Similar provisions apply in the District Court, although the Rules Committee’s rule-making powers do not extend to proceedings where district courts derive jurisdiction from any statute other than the District Courts Act 1947 (NZ). For rules governing these other forms of proceedings the Ministry of Justice remains the effective governing body, assisted by other committees on a consultative basis.

The Judicature Act provides that the Rules Committee shall consist of:

- the Chief Justice
- the Chief High Court Judge
- two other judges of the High Court appointed by the Chief Justice
- the Chief District Court Judge
- one other District Court judge appointed by the Chief Justice
- the Attorney-General
- the Solicitor-General
- the chief executive of the Department for Courts
- two persons who are barristers and solicitors of the High Court, nominated by the Council of the New Zealand Law Society and approved by the Chief Justice.

United Kingdom

The Civil Procedure Act 1997 (UK) provides that there are to be rules of court governing the practice and procedure to be followed in the civil division of the Court of Appeal, the High Court, and county courts. The power to make Civil Procedure Rules is to be ‘exercised with a view to securing that the civil justice system is accessible, fair and efficient and the rules are both simple and simply expressed’. 62

48 Supreme Court of Queensland Act 1991’s 118C(1).
49 Supreme Court of Queensland Act 1991’s 118B(3).
51 Court Procedures Act 2004 (ACT) s 7(1).
52 Court Procedures Act 2004 (ACT) s 9.
53 Court Procedures Act 2004 (ACT) s 11.
54 Supreme Court Act 1935 (WA) s 13.
55 Submission from Supreme Court of Victoria. See also Justice Kevin Lindgren, ‘Harmonisation of Rules of Court in Australia’ (Paper presented at AIJA Annual Conference, Sydney, 17–19 September 2004).
57 Ibid.
59 Ibid.
60 Judicature Act 1908 (NZ) s 51C(1).
61 District Courts Act 1947 (NZ) s 122.
62 Civil Procedure Act 1997 (UK) s 1.
Civil Procedure Rules are to be made by a committee known as the Civil Procedure Rule Committee, which consists of:

(a) the Master of the Rolls
(b) the Vice-Chancellor
(c) one judge of the Supreme Court
(d) one circuit judge
(e) one district judge
(f) one Supreme Court master
(g) three persons who have a Supreme Court qualification (within the meaning of section 71 of the Courts and Legal Services Act 1990), including at least one with particular experience of practice in county courts
(h) three persons who have been granted by an authorised body, under Part II of that Act, the right to conduct litigation in relation to all proceedings in the Supreme Court, including at least one with particular experience of practice in county courts,
(i) one person with experience in and knowledge of consumer affairs, and
(j) one person with experience in and knowledge of the lay advice sector.63

The prescribed membership of the rule committee reflects the recommendation by Lord Woolf that:

The new rule-making authority which will be needed to enact the new combined rules should contain in its membership people who can advance consumer, advisory and other lay viewpoints, as a counterbalance to the professional legal interests.64

The Civil Procedure Rule Committee publishes annual reports. The 2005–6 Annual Report notes that:

The meeting of 19th May was the committee’s first open public meeting. 30 guests attended to watch the committee at work, and questions were taken at the end of the meeting. The event was considered very successful.65

Civil Justice Council

Lord Woolf also recommended that a civil justice council be set up to contribute to the development of his proposed reforms.66 The Civil Justice Council was established under the Civil Procedure Act 1997 (UK):

(1) The Lord Chancellor is to establish and maintain an advisory body, to be known as the Civil Justice Council.

(2) The Council must include—

(a) members of the judiciary,
(b) members of the legal professions,
(c) civil servants concerned with the administration of the courts,
(d) persons with experience in and knowledge of consumer affairs,
(e) persons with experience in and knowledge of the lay advice sector, and
(f) persons able to represent the interests of particular kinds of litigants (for example, businesses or employees).

(3) The functions of the Council are to include—

(a) keeping the civil justice system under review,
(b) considering how to make the civil justice system more accessible, fair and efficient,
(c) advising the Lord Chancellor and the judiciary on the development of the civil justice system,
(d) referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and
(e) making proposals for research.
The Lord Chancellor may reimburse the members of the Council their travelling and out-of-pocket expenses.\(^{(4)}\)

The Civil Justice Council comprises a full council of 26 members. In addition, it has eight committees comprising around 100 members. The committees undertake the council’s day-to-day activities in the following areas: ADR, access to justice, housing and land, clinical negligence and serious injury, experts, costs, rehabilitation policy, and rehabilitation rules.

The council is supported by a small secretariat, including a chief executive officer.

The Civil Justice Council describes its modus operandi as follows:

The CJC policy model provides for genuine stakeholder consultation, before the Government consultation paper is written. Work must initially be undertaken to identify who the key stakeholders are, in terms of organisation, and influence within that organisation.

A broad range of stakeholders are invited to a series of CJC events aimed at:

a) Identifying the precise nature of the policy issue
b) Agreeing the key components of the problem
c) Agreeing how those problems will be addressed, and by who
d) Distilling the generic problems into individual or clustered issues
e) Acquiring and agreeing data to inform on the individual problems (if appropriate)
f) Establishing smaller representative groups to develop proposed models to solve the problems
g) Where necessary, mediating solutions with properly mandated representatives of all main interested parties.
h) Reporting back to ‘constituencies’ for broader ‘buy-in’
g) Making recommendations to Government ministers, supported by the senior judiciary, and major stakeholders
h) Overseeing rules of court.

The process is essentially overseen by Government officials, who can report to ministers on the inclusiveness of the consultation, and confirm that the methods used were appropriate.

Research or economic analysis is conducted by agreed or recognised independent academics.\(^{(63)}\)

The council adopts a number of different strategies in the development of negotiated policy outcomes: stakeholder forums (to discuss generic issues, mediated by CJC members and chaired by a senior judge or law commissioner, and conducted under the Chatham House protocol), Big Tents (a more focused stakeholder group convened to develop a detailed description of the nature of the specific problem in issue, to draft a model or plan to resolve the problem and to identify any data that may be required), CEO group (a senior management group established to manage a policy program), data (commissioned from independent academics), forensic group (a small group of six to eight people to examine proposed data collection models), mediation (a complex mediation involving multiple parties, overseen by government officials, staged over a number of meetings), agreement (the mediated agreement is sent to the Lord Chancellor by the Master of the Rolls with formal advice to make it law, and the Lord Chancellor instructs the Civil Procedure Rule Committee to make rules of court), Civil Procedure Rule Committee (the rule committee drafts the rules and refers back to the CJC on any matter requiring clarification). Mini consultations may also be conducted in circumstances where a mediated solution is not required (the CJC conducts consultations, works up proposals with government officials and submits them to the Lord Chancellor for implementation).\(^{(69)}\)

The federal judiciary in the United States is authorised by Congress to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules.\(^{(70)}\)
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The Judicial Conference, a statutory body, assists the Supreme Court by researching and recommending rules changes. The Judicial Conference has authority to ‘carry on a continuous study of the operation and effect of the general rules of practice and procedure’,[72] and may recommend amendment to the rules to promote:

- simplicity in procedure
- fairness in administration
- the just determination of litigation and
- the elimination of unjustifiable expense and delay.

The Judicial Conference’s Committee on Rules of Practice and Procedure (the Standing Committee) reviews and coordinates the recommendations of five advisory committees, and in turn makes recommendations for changes to the rules to the Judicial Conference.

Meetings of the standing committee and its advisory committees are open to the public and are widely publicised. All minutes of meetings, reports, public submissions and other documents are publicly available, and proposed amendments are published on the Judicial Conference website.[73]

Canada

In 1996 the Canadian Bar Association’s Taskforce on Systems of Civil Justice recommended that:

An independent national organization on civil justice reform be created for the purposes of:

(a) collecting in a systematic way information relating to the system for administering civil justice;

(b) carrying out in-depth research on matters affecting the operation of the civil justice system;

(c) promoting the sharing of information about the use of best practices;

(d) functioning as a clearinghouse and library of information for the benefit of all persons in Canada concerned with civil justice reform;

(e) developing liaison with similar organizations in other countries to foster exchanges of information across national borders; and

(f) taking a leadership role on information provision concerning civil justice reform initiatives and developing effective means of exchanging this information.[74]

The Canadian Forum on Civil Justice was created under the Canada Corporations Act 1998 as a result of the above recommendation. The formal objects of the forum are to seek to improve the civil justice system in ways and means including but not restricted to the following:

- collecting in a systematic way information relating to the system for administering civil justice
- carrying out in-depth research on matters affecting the operation of the civil justice system
- promoting the sharing of information about the use of best practices
- functioning as a clearinghouse and library of information for the benefit of all persons in Canada concerned with civil justice
- developing liaisons with similar organisations in other countries to foster exchanges of information across national borders and
- taking a leadership role in providing information concerning civil justice reform initiatives and developing effective means of exchanging this information.

The forum consists of a board and advisory board, members of which include leading members of the Bar, government, court administration, the judiciary, legal academia and the lay public.[75]
3. SUBMISSIONS AND CONSULTATIONS

3.1 CONSULTATION PAPER

Rule-making power

Submissions generally supported maintaining the courts’ rule-making powers, and observed that the current system works reasonably well in ensuring the rules are amended as required.76 The Supreme Court said of its rule-making power:

It is an important part of maintaining the Court’s independence from other arms of government. The rule-making process operates in a responsive, practical and expeditious manner. The ability to draw on the collective experience of members of the Court in a range of practice areas is a great asset. When combined with the valuable input from the profession through the Rules Committee and specific consultations, the process allows informed, responsive and considered reform. The judges of the Court regard retention of the rule-making power as an inherent characteristic of their judicial function.77

The Transport Accident Commission (TAC) queried whether ‘institutional users of the court system, with large volumes of litigation, should also have a role in this process’.78 The Law Institute of Victoria stated that it ‘believes that greater collaboration between the rules committees of the various courts will promote and facilitate harmonisation of the court rules’.79

The Victorian Bar’s submission stated:

There is no good reason to disturb the existing mechanisms in which the Courts are given the autonomy to make their own rules, and revise them. The Victorian Bar is strongly of the view that rule making should remain the province of the Court itself and not the legislature. Each Court has a Rules Committee which consults and deals responsively with any problems that may arise from time to time with any deficiency in the Rules or any ways to improve the operation of the Rules.80

Harmonisation and simplification

Submissions generally supported the principle that the rules of civil procedure in each jurisdiction should be uniform:

The rules of Civil Procedure in the Supreme Court, the County Court and the Magistrates’ Court require reform. The change that should be implemented is that the current cumbersome rules should be in plain English and standardized so that they are uniform regardless of the jurisdiction.81

The LIV supports greater consistency or uniformity in the rules of civil procedure in all courts to enable the just, timely and cost efficient resolution of issues in civil proceedings. The LIV considers that this fundamental principle should underlie any reforms proposed and developed out of the VLRC’s Civil Justice Review. Feedback from practitioners indicates support for a consistent set of rules across all court jurisdictions, including enforcement rules and a single set of common forms across all Victorian courts.82

The Forensic Accounting Special Interest Group (FASIG) within the Institute of Chartered Accountants of Australia would strongly encourage greater consistency between the rules of civil procedure for the Supreme Court, the County Court and the Magistrates’ Court in Victoria, particularly in respect the use of expert witnesses. The FASIG would also like to see greater consistency in such procedures between Victorian courts and tribunals and those of other State and Federal jurisdictions.83

WorkCover raised the need for consistency between the courts in relation to the initial steps for commencing and defending proceedings.84

76 Submissions CP 37 (Transport Accident Commission), CP 48 (Victorian WorkCover Authority), CP 33 (Victorian Bar), CP 55 (Magistrates’ Court of Victoria).
77 Submission CP 58 (Supreme Court of Victoria).
78 Submission CP 37 (Transport Accident Commission).
79 Submission CP 18 (Law Institute of Victoria).
80 Submission CP 27 (Victorian Aboriginal Legal Service).
81 Submission CP 18 (Law Institute of Victoria).
82 Submission CP 25 (Institute of Chartered Accountants in Australia).
83 Submission CP 48 (Victorian WorkCover Authority).
TurksLegal and AXA Australia listed the advantages of having a uniform set of rules as has been implemented in NSW and Queensland:

- standardisation of court forms, lessening costs
- standardisation of timetables for procedural steps
- uniform interpretation of the application of rules across the inferior and superior courts
- simplification of the process of reviewing and amending rules.

The Mental Health Legal Centre observed that ‘different forms, processes and language in different jurisdictions no doubt only increase people’s confusion and incomprehension’ and submitted that originating processes and defences should be simplified.85

However, even when advocating uniformity in court processes, most people acknowledged the importance of maintaining simplified procedures in the Magistrates’ Court, and procedures adopted to achieve specific objectives in particular areas.86

For example, The Supreme Court stated that it supports efforts to harmonise Rules between courts, both within Victoria and across Australia. Harmonisation brings benefits of greater consistency of application across jurisdictions, shared jurisprudence and efficiencies for practitioners and their clients. However, the Court recognises that the differences in the types, volumes and complexity of cases brought in Victorian courts mean that strict uniformity of Rules and procedure is not appropriate.87

Similarly, WorkCover submitted:

Any harmonisation of the rules should … have regard to any efficiencies, including costs benefits, which may be peculiar to a jurisdiction and supported by its rules and that harmonisation does not add complexity in a jurisdiction at the expense of efficiency and cost.88

The Victorian Bar made similar observations:

The Magistrates’ Court has a simplified set of rules along the same general lines as those of the Supreme and County Court, which are adapted to deal with the smaller or less complex civil disputes which are normally determined in the Magistrates’ Court. Its field of work and its limited jurisdiction89 makes it necessary that it has its own rules very much designed to minimise procedural requirements in order to dispose of the volume of work passing through that Court system. It would be inappropriate to burden litigants in the Magistrates’ Court with the additional costs of compliance that would flow from the rules required from Supreme and County Court proceedings.90

The Bar, however, did not believe there is a need for a greater degree of uniformity in the rules of the Victorian courts, ‘nor any pressing need to simply them, or to introduce a simpler initiation process. Further, any harmonisation or simplification of the various rules of courts can be achieved through existing mechanisms’. It argued it should not be assumed ‘a uniformity of rules would result in reduction of costs for litigants or reductions in delays’. The Bar did support uniformity or harmonisation of rules of court across jurisdictions in Australia ‘given that the market for legal services is now undeniably a national legal market (and to some extent an international legal market), particularly in complex commercial litigation’.

The Magistrates’ Court reported that it has been reviewing its rules to align them with those of the other courts except in arbitrations for a small claim.91 It has developed a set of new draft rules, substantially similar to the rules in the other courts, and with the same rule and form numbers. The court submitted that this will have the following benefits for litigants, whether represented or not:

(a) They will no longer need to ascertain whether a procedural rule in this court is different from the corresponding rule in the other courts. In practice, the existence of differences is often overlooked to the disappointment of litigants. It is unwise, at least in our court, to assume that legal practitioners know of the differences between the rules of the courts.
(b) The learning in relation to the meaning of a rule will be common. There will be no need for a separate jurisprudence to develop in our court in relation to a particular rule, especially through litigation in the Supreme Court.

(c) The use of common forms. This will save costs as the same document can be used in each of the courts. The only change is that of the name of the court.91

The court considered whether to abandon its notice of defence in favour of the dual process of appearance and defence. It decided not to adopt the procedure that applies in the higher courts ‘because it was felt that the need to take two steps in order to defend a complaint would confuse some litigants in person’. The court identified one area specific to that court that should be retained (its judgment debt recovery process), and several areas where the court either lacks jurisdiction or where such procedures would not be used in the court (such as Orders 18 and 18A, which provide for representative and group procedures).

The Magistrates’ Court noted that the potential alignment of its rules with those of the other courts ‘provides an opportunity to modernise the language used to describe processes in the courts … This is an opportunity to use more accessible language’.93

The Consumer Action Law Centre recommended that Magistrates’ Court procedures should be reviewed and redesigned, and the terms used to describe forms should be reconsidered.94 Similarly, Edison Masillamani submitted that the ‘system should be simplified to prevent a litigant in person from being intimidated by complicated rules, forms and paperwork’.95

3.2 RESPONSES TO DRAFT PROPOSALS

Civil Justice Council

In the Second Exposure Draft published on 6 September 2007 the commission set out various proposals for reform, including in respect of ongoing review and reform of the civil justice system. This included a draft proposal for the establishment of a new body, the Civil Justice Council.

The following individuals, organisations and agencies expressed support for the establishment of a Civil Justice Council in submissions: the Supreme Court, the Magistrates’ Court and Dispute Settlement Centre of Victoria, AXA and TurksLegal, the Environment Defenders Office, the Federation of Community Legal Centres, IMF, the Legal Services Commissioner, PILCH, Springvale Monash Legal Service, State Trustees, the Law Institute of Victoria, Judge Wodak, Victoria Legal Aid, the Consumer Action Law Centre and QBE Insurance.

The Federation of Community Legal Centres thought ‘the Council would play an important role in monitoring civil law issues and ensuring that access to justice remains a priority area for Victoria’s legal community’.96

The following agencies expressed a desire to be represented on the council: Legal Services Commissioner, PILCH, the Federation of Community Legal Centres, the Australian Corporate Lawyers Association, Victoria Legal Aid, the Magistrates’ Court and the Dispute Settlement Centre of Victoria.

A number of organisations emphasised the need for the council to reflect the range of participants in the civil justice system.97 The Australian Bankers’ Association said that ‘it is critical that not only business and financial services groups are represented on any such Council but also the processes and means by which decisions are reached by that body are truly representative of the majority of views of those participating on the Council’. The Federation of Community Legal Centres called for ‘a strong community presence’, and the Australian Corporate Lawyers Association said the interests of in-house lawyers and the organisations they are employed by should be represented on the council. Clayton Utz said that ‘it would … be important to ensure that the composition of both Councils adequately reflects the interests of all classes of litigant, across the full range of civil dispute resolution’.

A number of submissions made suggestions for research and analysis that should be carried out by the council, and also proposed some additional functions:

- The council should have responsibility for reviewing VCAT as well as the courts.98
- The council should undertake an analysis of statistics relating to the number of default judgments made by courts and the circumstances in which they are made.99

85 Submission CP 22 (Mental Health Legal Centre).
86 Submission CP 22 (Mental Health Legal Centre).
87 Submission CP 58 (Supreme Court of Victoria).
88 Submission CP 48 (Victorian WorkCover Authority).
89 Where the amount in dispute is less than $100 000 (original note).
90 Submission CP 33 (Victorian Bar).
91 Submission CP 55 (Magistrates’ Court of Victoria).
92 Submission CP 55 (Magistrates’ Court of Victoria).
93 Submission CP 55 (Magistrates’ Court of Victoria).
94 Submission CP 43 (Consumer Action Law Centre).
95 Submission CP 15 (Edison Masillamani).
96 Submission ED1 9 (Federation of Community Legal Centres).
97 For example, Submissions ED1 18 (Clayton Utz), ED1 29 (Australian Bankers’ Association).
98 Submissions ED1 31 (Law Institute of Victoria), ED2 12 (Consumer Action Law Centre).
99 Submissions ED1 9 (Federation of Community Legal Centres), ED1 26 (Springvale Monash Legal Service).
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- The council should undertake research on the financial, legal, psychological and social impact on parties both represented and self-represented, their families and the community. The Springvale Monash Legal Service reported that its ‘experience is that the impact of pursuing civil litigation on individuals and families can be dire. Individuals can be left in financial hardship, unable to provide for their families, maintain or seek employment. In the interests of justice, this should be thoroughly analysed’.  
- The council should have responsibility for considering how the civil justice system operates with respect to the Charter of Human Rights and Responsibilities.  
- The council should assist in the education of the legal profession and judiciary about developments in all aspects of the civil justice system.

Judge Wodak noted that ‘In order to effectively monitor the performance of the civil justice system, proper information gathering is needed on all aspects of civil court and tribunal activity … Without such information, it is very difficult, if not impossible to accurately report on what does, and what does not assist in the timely, effective and cost efficient delivery of civil justice’.  
Similarly, Judge Anderson said in relation to the proposal that the Civil Justice Council would have responsibility for monitoring: ‘It is important to clearly articulate the objectives for each proposal and the standards against which the success or otherwise of the changes are to be measured.’

Some stakeholders queried whether the council would oversee the provision of ADR services and schemes.  
In a supplementary submission the Victorian Bar said there was a need for the acceleration of civil justice reform as well as the creation of system wide reform that ensures that reforms support each other and there is education, professional collaboration as well as a clear articulation of overall aims and objectives. In addition, it emphasised the need for funding and resourcing as well as government leadership and public support. The Bar also called for a significant increase in the Supreme Court’s capacity to track and analyse the throughput of cases under a reformed process. In particular, the Bar recommended that the previously proposed Court’s Statistics and Information Resources Centre be pursued with urgency.

Harmonisation of rules

The Institute of Chartered Accountants in Australia and the Consumer Action Law Centre both supported the commission’s proposal for greater harmonisation and simplification of court rules and forms.

In particular, the Consumer Action Law Centre called for review of the Magistrates’ Court Form 4A Complaint, which it believes is confusing and provides insufficient information to defendants about their options. The centre proposed that information about obtaining interpreting and legal assistance be annexed to and served with all complaints, in an effort to reduce the number of ‘default judgments for unmeritorious claims against vulnerable Victorian consumers’.  

Rules committees

During consultations it was suggested that a delegate of each rules committee, rather than the chair, be made an ex-officio member of each other rules committee.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1 RULE-MAKING PROCESS

The rules that govern civil procedure in Victorian courts are made by the courts themselves as subordinate legislation. Each court delegates its rule-making power to a rules committee which then makes recommendations to the judges or magistrates for any rule change. The legislation does not prescribe who the members of the rules committees should be, or how their deliberations should be conducted. During the course of our consultations concerns were expressed about the inefficiencies inherent in having three separate committees considering amendments and reforms to identical, or substantially similar, rules.
Although it would be desirable in principle to have a single rules committee to review and amend rules in all three courts, as is the case in NSW, Queensland and the ACT, because each court deals with discrete practice areas the commission believes it makes sense to retain separate rules committees, although arrangements should be put in place to ensure there is appropriate communication between the committees.

In some jurisdictions provision is made for the appointment of consumer or non-legal representatives. For example, the Civil Procedure Rules Committee established in England comprises representatives of not only the courts and the profession, but also a consumer affairs member and a lay advice member. Given the proposal for broad representation on the Civil Justice Council (see below), we do not consider any need to recommend such a provision in relation to the rules committees.

The commission notes that the UK Civil Procedure Rules Committee (referred to above) has recently resolved to conduct open public meetings and to allow people to ask questions and make contributions at their meetings. In the United States meetings of the federal rules committees are open to the public and their documents are published on the internet. Insofar as this does not happen at present, the rules committees may wish to consider whether it would be useful to them, and more transparent, if meetings were open to be attended by non-members with a relevant interest.

4.2 Harmonisation and Uniformity of Rules

Other jurisdictions in Australia have recently undertaken major reviews of their court rules in order to achieve greater simplification, modernisation and harmonisation. New South Wales, Queensland and the ACT now have a single set of rules that apply in all courts. In 2006 a new set of rules came into effect in South Australia.

The commission is not persuaded that a ‘uniform’ set of rules is required in Victoria, having regard to the variety of areas of law and types of litigation conducted in each court. In any event, during the course of the present inquiry the Magistrates’ Court was in the process of drafting amendments to the Magistrates’ Court Rules with a view to achieving greater uniformity with the rules applicable in the County and Supreme Courts.

However, we do believe that additional steps should be taken to achieve a greater level of harmonisation between the rules of the various courts, in particular in relation to terminology and forms. Greater harmonisation should not compromise the procedures adopted in particular courts or subject areas to achieve specific objectives, for example the procedures for dealing with small claims in the Magistrates’ Court. We also believe the rules of the Victorian courts would benefit from a further detailed review aimed at simplifying their structure and language, and bringing them in line with procedural rules in other jurisdictions.

A number of the areas where specific proposals for reform are recommended in this report, for example in relation to expert evidence and discovery, would result in new rules which are more closely aligned with those presently in force in a number of other Australian jurisdictions.

4.3 Rule-Making Power

In various parts of this report it is proposed that the courts should have additional express powers to manage and control civil litigation, including interlocutory processes and hearings, in a variety of ways. For example, there are recommendations in respect of discovery, expert evidence, case management and time limits on parties at hearings, etc. A number of the recommendations include draft statutory provisions to facilitate this.

It may be that many of the commission’s proposals could be implemented by the courts themselves, through new rules, rather than through legislation. This would permit any future changes to be made more expeditiously and with greater flexibility. However, there may be scope for argument as to whether some matters are within the existing rule making powers of the courts.

A number of the commission’s recommendations seek to facilitate greater and more proactive judicial control of proceedings and to explicitly permit courts to impose limits on procedural steps or the conduct of parties, including at hearings. Legal controversy may arise as to whether some matters may be properly characterized as ‘procedural’ or concerned solely with the regulation of ‘practice and procedure’ in the courts in question. Also, as noted in chapters 1 and 5, case management decisions...
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may be subject to appellate scrutiny if considered to be inconsistent with the dictates of justice, and case management powers may give rise to contentions of incompatibility with the right to a fair hearing provided for in section 24(1) of the Charter of Human Rights and Responsibilities Act 2006. Insofar as a number of the proposals are able to be implemented through rules of court the existing rule making power may be adequate to facilitate this. However, the commission is of the view that there would be utility in broadening the existing legislative rule making power.

Accordingly, it is proposed that the rule making power itself should be amended to explicitly authorize judges of the court to make rules of court in respect of any matter relating to: (a) the powers, authorities, duties and functions of the court in imposing limits, restrictions or conditions on any party in respect of any aspect of the conduct of proceedings, or (b) the management of cases, or (c) the referral (with or without the consent of the parties) to any form of alternative dispute resolution, or (d) the means by which the [proposed] overriding purpose may be furthered.

In the case of the Supreme Court, such amendments would be to section 25 of the Supreme Court Act 1986.

4.4 ONGOING REVIEW AND REFORM

Review and reform of the civil justice system is a complex undertaking. It is necessary to take into account the rights and interests of a diverse range of participants, including litigants large, small and self-represented, the legal profession, government and the courts. Reform initiatives may have unforeseen consequences, or may require modification in light of practical experience. They should therefore be subject to ongoing review and evaluation to ensure their objectives are being met. The collection of relevant data is also required to inform the reform and policy process.

The commission proposes the establishment of a new body to carry out these responsibilities. Similar bodies exist in different forms in England (the Civil Justice Council), Canada (Canadian Forum on Civil Justice), the United States (the Judicial Conference and its standing and advisory committees) and, in a more limited capacity, New South Wales (Civil Procedure Working Party). The Civil Justice Council in England and Wales was established in accordance with the recommendations of Lord Woolf. It plays a pivotal role in the development of civil justice policy. It brings all stakeholders together to debate possible reforms and attempts to reach agreement, often through mediation, on particular initiatives that are then presented to the courts and government for implementation.

It is worth noting that there are several bodies, at state and federal level, that have ongoing responsibility for reviewing or investigating aspects of the criminal justice system, including the Sentencing Advisory Committee, the Department of Justice’s Criminal Justice Steering Committee, Ombudsman Victoria, and the Australian Institute of Criminology. Although the courts’ rules committees and the Australasian Institute of Judicial Administration play an important role in contributing to the development of the civil justice system, we believe there is a need for a broad-based consultative and research body dedicated to ensuring the system is able to meet the needs of Victorian litigants on a long-term basis.

RECOMMENDATIONS

Rule-making process and powers

164. The courts’ governing legislation should make provision for the constitution and operation of each court’s rules committee. The chair of each rules committee (or the chair’s nominee) could be made an ex-officio member of each other committee entitled to attend the other committees’ meetings. This would provide for increased communication between the three jurisdictions.

165. The rules committees should meet jointly when considering rules and procedures which apply in more than one jurisdiction. This may involve a joint meeting of two or three rules committees.

166. The power to make rules should be broadened and exercised so as to further the courts’ overriding purpose. A draft amendment to section 25 of the Supreme Court Act 1986 is as follows:
The Judges of the Court […] may make Rules of Court for or with respect to the following:

…

(f) Any matter relating to—
   (i) the practice and procedure of the Court; or
   (ii) the powers, authorities, duties and functions of the officers of the Court;
   (iii) the powers, authorities, duties and functions of the Court in imposing limits, restrictions or conditions on any party in respect of any aspect of the conduct of proceedings; or
   (iv) the management of cases; or
   (v) the referral (with or without the consent of the parties) to any form of alternative dispute resolution; or
   (vi) the means by which the Overriding Purpose may be furthered.

Equivalent amendments to the County Court Act and the Magistrates’ Court Act would also be required.

Court rules

167. The legislation and rules of civil procedure in all three courts should be reviewed to:

- achieve greater harmonisation between courts, including standardisation of the terminology used to describe procedural steps, and standardisation of court forms. In particular there should be one form for commencing proceedings and one for making interlocutory applications
- simplify the structure and ordering of the rules
- make greater use of plain English.

168. Each court should clarify the circumstances in which practice notes and directions are made, and consolidate and organise the content and publication of existing practice notes and directions.

Ongoing reform

169. A new body, called the Civil Justice Council, with ongoing statutory responsibility for review and reform of the civil justice system, should be established. Its purpose would be to investigate ways to make the civil justice system more just, efficient, and cost effective.

170. The Civil Justice Council would have the following functions:

- to monitor the operation of the civil justice system generally
- to identify areas in need of reform
- to conduct or commission research
- to bring together various stakeholder groups with a view to reaching agreement on reform proposals, including through the use of mediation and other methods
- to recommend reforms, including amendments to statutory provisions and rules governing the civil justice system
- to facilitate education programs about developments in the civil justice system.

171. The Civil Justice Council should also assist in the implementation of the reforms proposed by the Victorian Law Reform Commission and monitor the impact of such reforms, which may include:

- developing specific pre-action protocols for each relevant area (for example, commercial disputes, building disputes, medical negligence, general personal injury, etc)

An alternative formulation is: ‘To allow obligations, prohibitions and restrictions to be imposed on any party for the purpose of furthering the [proposed] overriding purpose’.
monitoring the operation of the protocols and general standard of pre-action conduct so that any modifications considered necessary in the light of practical experience can be implemented

overseeing and developing further the operation of pre-trial examinations, including:
- developing a general code of conduct in respect of examination conduct
- developing codes of practice to govern the use of pre-trial examinations in particular litigation contexts
- overseeing the establishment of education and training programs to assist practitioners and other interested parties to develop good examination practices
- reviewing the provisions relating to pre-trial examinations with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The Council should also consider and make recommendation on the question of whether pre-trial examinations should be permissible in matters within the jurisdiction of the Magistrates’ Court, and if so, whether any modifications to the general scheme are required in relation to such matters;
- constituting a specialist Costs Council to oversee and monitor issues to do with legal costs

- reviewing ADR processes in all three courts
- scrutinising the operation of the Justice Fund
- assisting in a review of the rules of civil procedure.

172. The Civil Justice Council should comprise members from a broad range of participants in the civil justice system and stakeholder groups, including:
- members of the judiciary
- members of the legal profession
- public servants concerned with the administration of the courts
- persons with experience in and knowledge of consumer affairs
- persons with experience and expertise relevant to particular types of litigation (for example representatives from the business community, insurance industry, consumer organisations, and the community legal sector).

173. The chair and members of the Civil Justice Council should be appointed by the Attorney-General after calling for nominations from the courts and relevant stakeholder groups.

174. Members of the Civil Justice Council would be appointed for their expertise and experience, and not necessarily as representatives of the entities or organisations for which they work.

175. Members of the Civil Justice Council would serve in an honorary capacity but would be reimbursed for expenses etc. There would be a secretariat comprising a chief executive officer and support staff.

176. The Civil Justice Council should be able to co-opt people to form committees to focus on specific areas under review.

177. The Civil Justice Council should be entitled to an allocation of funds from the Justice Fund to assist it to carry out its functions.
5. ISSUES FOR FURTHER CONSIDERATION

5.1 INTRODUCTION
In the Consultation Paper we sought views on whether reform was needed in a range of areas, including the following:

- the rules about pleadings in civil proceedings
- the rules and procedures which allow non-parties to participate in civil proceedings
- rules about enforcement of judgments and orders
- the rules and procedures for appeals from pre-trial decisions
- the rules and procedures for civil appeals
- the law relating to tax deductibility of legal costs.

Views were sought on the problems with the current rules in the above areas and what changes should be implemented. A summary of the views expressed to the commission is set out below together with additional concerns and reform suggestions that have been raised in the submissions. These matters are not dealt with in the commission’s final recommendations. They may be considered in the second phase of the commission’s civil justice review or by the proposed Civil Justice Council. In some areas reforms could be implemented without the need for further inquiry.

5.2 PLEADINGS
A complaint common to a number of submissions was that serious problems with pleadings are frustrating the fundamental role that pleadings are intended to play in the litigation process.

Problems
The main complaints brought to the commission’s attention were:

- pleadings are frequently word processed precedent documents
- pleadings are often vague, formulaic and too broad to be of any assistance in identifying the fundamental issues between the parties
- pleadings are deliberately evasive and disguise the real issues to be determined between the parties or omit fundamental information due to inadequate instructions or tactics
- pleadings are sometimes prolix and do not set out in summary form the material facts as prescribed by the rules in the various courts
- damages claims are often not properly quantified
- pleadings do not adequately inform a party of the case they have to meet, do not assist in the supervision of a case and do not assist with the operation of the doctrines of issue estoppel and res judicata
- the pleadings process does not properly facilitate the information that a case generates
- pleadings are frequently ignored as the litigation progresses
- significant resources are devoted to interlocutory fights about pleadings—for example, sufficiency of pleadings, whether a claim should be allowed to stand at all, amendment of pleadings and compliance with the rules
- pleadings are often interpreted strictly by the court and this encourages interlocutory disputes
- the cost of interlocutory proceedings to enforce compliance is significant, inefficient and not productive to bringing about an early resolution of the dispute
- interlocutory fights take place at the formalistic level and do not deal with the substance of the issues

112 Submissions CP 37 (Transport Accident Commission), CP 21 (Legal Practitioners’ Liability Committee), CP 48 (Victorian WorkCover Authority).
113 Submission CP 37 (Transport Accident Commission). Similar criticism was made by the Victorian Bar (submission CP 33). The Victorian WorkCover Authority noted that pleadings are precedent driven and are expressed sufficiently broadly so as to apply to most common claims but provide little substantive information as to the key allegations made by the plaintiff: Submission CP 48 (Victorian WorkCover Authority).
114 See submissions CP 33 (Victorian Bar), CP 37 (Transport Accident Commission). The Australian Law Reform Commission has suggested that ‘lawyers frequently use pleadings tactically and, for example, fail to admit matters pleaded that they know to be true or make allegations that they cannot prove at hearing’: See Australian Law Reform Commission, Managing Justice: A Review of the Federal Civil Justice System (2000) [7.166].
115 See submission CP 33 (Victorian Bar). Christopher Enright also noted that pleadings often fail to give a good description of the case or to define the issues accurately and precisely: submission CP 50 (Christopher Enright).
116 Submission CP 21 (Legal Practitioners’ Liability Committee).
117 Submission CP 50 (Christopher Enright).
118 Submission CP 50 (Christopher Enright).
119 Submissions CP 33 (Victorian Bar), CP 47 (Group Submission), CP 37 (Transport Accident Commission).
120 Submissions CP 33 (Victorian Bar), CP 47 (Group Submission), CP 37 (Transport Accident Commission).
121 Submission CP 50 (Christopher Enright).
122 Submissions CP 37 (Transport Accident Commission), CP 47 (Group Submission).
123 Submission CP 33 (Victorian Bar).
Fights about pleadings are often brought by defendants seeking to delay the process and discourage plaintiffs by forcing them to incur costs at an early stage. A practice has developed of serving requests for further and better particulars that are oppressive and serve no real purpose because the parties are already aware of each other’s cases and are able to properly prepare. Amendments to pleadings occur frequently and sometimes as late as at trial. The courts are reluctant to require further and better particulars to be provided in relation to matters under the Accident Compensation Act on the basis or assumption that the parties by and large know what the matter is about, by reason of the pre-litigation process.

Reform suggestions

The submissions were divided about the best way to address these problems. The commission notes that significant reforms have been made to pleadings rules in other jurisdictions. These reforms have informed many of the suggestions made in submissions. Some of the reform ideas proposed in the submissions are summarised here.

Abolition of pleadings

It was suggested that consideration should be given to abandoning the use of pleadings altogether. Instead, a plaintiff’s cause of action could be articulated in a summary with an affidavit deposing to the relevant evidence relied upon to prove the case. It was recommended that this occur before a proceeding is filed in court. Generally, however, the abolition of pleadings was not supported in the submissions.

Reform to the way pleadings are drawn

A range of reform ideas was proposed in relation to the way pleadings are drawn including:

- Simplifying and focusing the scope of pleadings
- The standardisation and simplification of rules about pleadings in all jurisdictions
- Consideration of whether the use of terms other than ‘complaint’ and ‘default’ might lead to better understanding
- The inclusion of information about legal and other services (for example, financial counselling) with a complaint as well as other documents relating to enforcement
- Consideration of a more narrative form setting out the factual matters on which a claim or defence is based. Pleadings could include legal arguments or contentions of law that emerge from the facts alleged. In addition, relevant legal principles could be set out as well as a more comprehensive statement of the relief that is sought.
- A more narrative style of pleadings was opposed in some of the submissions.
- The introduction of a requirement in the rules, or a practice note, that the parties prepare a list of agreed issues which are the core issues falling for determination in the proceeding. To the extent that the parties cannot agree they should file a separate list of additional core issues which they contend fall for determination.
- The use of standard forms of referral of disputes to the courts in discrete circumstances such as those under the Accident Compensation Act.
- The use of a more abbreviated pleadings process in some situations perhaps comprising points of claim and points of defence. However, it was noted that this may be a matter better considered in case management.
- Consideration as to whether the more abbreviated approach of the Family Court should be adopted in civil proceedings generally.
- The use of a short statement of claim or defence and a basic affidavit in support. It was suggested that this would enable the court to give summary judgment (on the papers) where appropriate.
- Whether issues in dispute could be narrowed by requiring the parties to expressly admit or deny allegations, and where a denial occurs to provide sufficient particulars.
One submission cautioned against pleadings reforms that would “front-load” the work to be undertaken in a litigation process.142

Greater use of case management and overriding objectives to control pleadings

It was suggested that:

- the use of overriding obligations would be “useful in regard to disputes concerning pleadings and particulars”143
- an early directions hearing to define issues would be useful for improving comprehensibility of pleadings144
- a docket judge conducting general supervision and case management would be in a better position to comment on or point out to parties any deficiencies or inadequacies of pleadings and to address any concerns;145
- a rule should be adopted in complex cases that would enable the court to take action against seriously inadequate pleadings146
- the connection between the admissions of fact and law in pleadings and exchanged material in the pre-litigation process needed to be recognised in any subsequent docket or other management process. It was suggested that at present the two processes occur without reference to each other.147

The commission has recommended the introduction of overriding obligations as well as considerably broader case management powers generally.

Verification or certification

The submissions were divided about whether the certification or verification of pleadings is a good idea. On the one hand it was suggested that verification focuses the mind of the practitioner on the merits of the case at the outset and limits the possibility that spurious claims or defences will be filed.148

On the other hand verification was opposed for the following reasons:

- significant care is exercised in preparing pleadings which are often settled by counsel149
- if disciplinary action is needed there are sufficient professional and ethical obligations on legal practitioners which could be utilised150
- when counsel ‘signs’ a pleading he or she is already subject to various ethical obligations concerning the veracity and accuracy of the pleading which in practical terms have a similar effect on the practitioner151
- if the claim is unmeritorious the usual expectation is for an order for costs and possibly indemnity costs152
- the certification requirements in NSW have made little difference to the types of claims which are commenced or defended153

124 Submission CP 50 (Christopher Enright).
125 Submission CP 33 (Victorian Bar).
126 Submissions CP 47 (Group Submission), CP 50 (Christopher Enright).
127 Submission CP 48 (Victorian WorkCover Authority).
128 The key reforms were canvassed by the Victorian Bar: see Submission CP 33. Reforms have been implemented in the UK and recommended by the Law Reform Commission of Western Australia: Review of the Criminal and Civil Justice System in Western Australia, Final Report No 92 (1999). See also the Supreme Court of NSW, Practice Note No. SC Eq 3: Supreme Court Equity Division—Commercial List and Technology and Construction List (2007) <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc/nswat/a15f50afb1aa22a9ca2570ed000a2b08/275aca41d6304e6c4a25731ee025894370?openDocument> at 11 February 2008, and Magistrates’ Court Civil Procedure Rules 1999 r 9.02 as well as the processes in the Australian federal courts.
129 Submission CP 5 (Confidential, permission to quote granted 4 February, 2008).
130 See Submissions CP 33 (Victorian Bar), CP 47 (Group Submission), CP 4 (Travis Mitchell), CP 21 (Legal Practitioners’ Liability Committee).
131 Submission CP 27 (Victorian Aboriginal Legal Service).
132 Submission CP 43 (Consumer Action Law Centre).
133 Submission CP 43 (Consumer Action Law Centre).
134 Submission CP 47 (Group Submission). This submission notes that this approach may require some relaxing of the traditional distinctions between pleading of fact and law and also between pleadings of fact and matters of evidence, although it noted that the distinction is less observed today than in the past.
135 Submission CP 33 (Victorian Bar), CP 42 (Confidential submission, permission to quote granted 16 January 2008).
136 Submission CP 33 (Victorian Bar).
137 Submission CP 48 (Victorian WorkCover Authority). It was suggested that this may be possible where a jurisdiction is largely governed by a statutory authority (such as the Victorian WorkCover Authority) and where there is extensive consultation and liaison processes between the WWA, plaintiff lawyer groups, the Law Institute of Victoria and the courts.
138 Submission CP 47 (Group submission). AXA and TurksLegal also suggested that particular cases may be suitable for a short form of pleadings: see submission EDI 22 (AXA and Turks Legal).
139 Submission CP 10 (Peter Mair).
140 Submission CP 31 (Victoria Legal Aid).
141 Submission EDI 22 (AXA and TurksLegal).
142 Submission CP 47 (Group Submission ).
143 Submission CP 33 (Victorian Bar).
144 Submission CP 33 (Victorian Bar).
145 Submission CP 42 (Confidential Submission, permission to quote granted 16 January 2008).
146 Submission CP 33 (Victorian Bar). The Bar provided the example of r 18 of the UK Civil Procedure Rules that enables the court to order a party to: a) clarify any matter which is in dispute in the proceeding; and b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.
147 Submission CP 37 (Transport Accident Commission).
148 See submissions CP 47 (Australian Corporate Lawyers Association), CP 46 (Telstra Corporation). It was suggested that Victoria should introduce certification provisions similar to s 47 of the Legal Profession Act 2004 (NSW).
149 Submission CP 47 (Group Submission).
150 Submission CP 47 (Group Submission).
151 Submission CP 33 (Victorian Bar).
152 Submission CP 18 (Law Institute of Victoria).
153 Submission CP 21 (Legal Practitioners’ Liability Committee). This comment was based on the committee’s litigation experience in NSW and Victoria.
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because parties often have an imperfect understanding of what is contained in their pleadings (even when they have read them before filing), verification would need to involve a practitioner explaining the contents of pleadings and ensuring that the party understood the explanation and agreed with the contents of the document. The Magistrates’ Court argued that this would be a very time consuming and expensive exercise for little overall result.  

The commission’s recommendations in relation to the certification of the merits of allegations made in pleadings are set out in Chapter 3 of this report.

Defences

Some of the submissions supported the recent Magistrates’ Court defence reforms. The Magistrates’ Court now requires defendants who deny an allegation to state their reasons for doing so, and if they intend to put forward a different version of events from that given by the plaintiff, they must state their own version. It was argued that consideration should be given to adopting these reforms in the superior courts. An alternative view was that these reforms should be abolished in the Magistrates’ Court because they were complicated in practice and added little, if any, value. Instead it was argued that the length of the notice of defence had been extended without providing any substantive information to either the plaintiff or the court.

Another submission cautioned against providing court registries with the power to reject defences summarily out of concern that the registry may fail to understand that certain denials are unable to be supported by particulars.

Limitation on the amendment of pleadings

The Law Institute called for greater limitation on the amendment of pleadings. A contrasting view was that the existing rules were satisfactory and that there was a significant body of case law concerning when amendment may or may not be granted. It was further argued that costs orders adequately compensated any prejudice or disadvantage suffered by amendment. It was suggested, however, that consideration should be given to whether and in what circumstances a party seeking to amend a pleading should be called on to justify that request.

Annexing documents

Some submissions expressed support for annexing documents to pleadings, while others argued it was too difficult to define the type of documents to annex or to contain the documents to a reasonable limit. It was further suggested that annexing documents may lead to vague pleadings or require parties to go on a ‘search and find’ mission if large documents are annexed to pleadings.

Enforcement and interlocutory disputes

Generally the submissions called for a more robust approach to interlocutory disputes about pleadings. The Victorian Bar, the Legal Practitioners’ Liability Committee, the Law Institute and Slater & Gordon were all in favour of stricter compliance with procedural timetabling requirements. A further suggestion was to amend the rules so that parties initiating a pleadings dispute would not be awarded costs unless they could show that the pleading caused substantial prejudice to the running of the trial.

Other general suggestions

Mr Enright called for consideration of a new pleadings process comprising statements of representation, law, evidence, facts, discretions, claim and disclosure as well as the preparation of amalgamated statements for court. This process would require the plaintiff to plead arguments in support of propositions and provide evidence in support of material facts. The defendant would be required to offer an alternative version of the facts and indicate evidence that might prove it. Enright suggested that if there was information relevant to the case that was not otherwise disclosed, it should be contained in a statement of disclosure. He emphasised that pleadings reforms should focus on the management of information that was generated.

The submission from e-law suggested that the electronic preparation and exchange of pleadings with the court and by the parties would save costs.

5.3 NON-PARTY PARTICIPATION IN PROCEEDINGS

The commission has received numerous detailed submissions relating to the issue of non-party participation in litigation, with particular emphasis on the role of amicus curiae (friend of the court).
Background

An amicus curiae offers the court advice in relation to questions of law or fact which may not otherwise have been brought to its attention. This person is not a party to the proceedings and typically cannot file pleadings, lead evidence, examine witnesses or be interrogated. An amicus curiae is not bound by the outcome of the proceedings, has no right of appeal and is not liable for costs.

No specific provision is made for the appointment of amici curiae in the Supreme, County or Magistrates’ Court rules in Victoria. Nor is there any guidance in the various court rules about what factors will be considered by the court in its assessment of an amicus curiae application. The court has an implied or inherent power to grant an amicus curiae leave to make a submission on a question of fact or law.

Two submissions suggested that the introduction of the Victorian Charter of Human Rights and Responsibilities Act 2006 (The Charter) has increased the urgency of the need for reform. Although the Charter makes provision for the involvement of interveners and amici curiae, and joiner by the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission, it was suggested that the expertise of other non-parties is also likely to be useful in the context of the development of Charter jurisprudence. The submissions referred to the increase in non-party participation in litigation in countries where human rights legislation has already been introduced. It was predicted that a similar increase will occur in Victoria and that it is therefore timely to consider reform.

Concerns raised in the submissions

Generally, the submissions supported a broader role for amici curiae in public interest litigation and were critical of the status quo. Criticism was directed at the vagueness of the law and costs rules, all of which were seen to discourage legitimate ‘public interest’ participation in court processes. Fitzroy Legal Service suggested that ‘[a]micus applications are rarely made because those who may consider making them are unable to ascertain with any degree of certainty the likelihood of their application succeeding’.

The submission from the Human Rights Law Resource Centre and Blake Dawson Waldron identified some of the problems:

- There is a lack of clear rules or procedures with respect to applications for leave to appear as amicus, and the factors the court will consider in determining such applications. It argued that this has led to inconsistent approaches being adopted by the courts. Amicus curiae applicants are often community organisations or non-government organisations with limited resources and are put to significant expense in preparing an application without the benefit of clear guidelines.

- The court often fails to provide reasons to explain why an amicus application is granted or refused and this makes it difficult to determine the weight given by the court to the factors it did consider in reaching its decision.

154 Submission CP 55 (Magistrates’ Court of Victoria).
155 Submissions CP 33 (Victorian Bar), CP 47 (Group Submission). The Magistrates’ Court now requires a defendant who denies an allegation to: a) state their reasons for doing so; and b) if they intend to put forward a different version of events from that given by the plaintiff, they must state their own version.
156 Submission CP 47 (Group Submission).
157 Submission CP 48 (Victorian WorkCover Authority). WorkCover did, however, indicate that the particular requirement should be maintained.
158 Submission CP 4 (Travis Mitchell).
159 CP 18 (Law Institute of Victoria).
160 Submission CP 47 (Group Submission).
161 Submissions CP 18 (Law Institute of Victoria), CP 27 (Victorian Aboriginal Legal Service). Also see Submission CP 11 (Dibbs Abbott Stillman), which proposed an alternative regime for the issuing of proceedings requiring an affidavit in support of proceedings setting out the facts that give rise to a cause of action and exhibiting all supporting documents.
162 Submission CP 55 (Magistrates’ Court of Victoria). By way of example the Magistrates’ Court referred to a dispute involving a joint venture agreement which could run into hundreds of pages and would simply be too much to attach to a complaint.
163 Submission CP 33 (Victorian Bar).
164 Submissions CP 33 (Victorian Bar), CP 21 (Legal Practitioners’ Liability Committee), CP 20 (Satter & Gordon).
165 Submission CP 14 (Confidential, permission to quote granted 13 February 2008). It was suggested that amendment to pleadings before trial is commonplace and that allowing amendment two years before trial seems useless.
166 Submission CP 50 (Christopher Enright).
167 Submission CP 50 (Christopher Enright).
168 Submission CP 19 (<e.law> Australia Pty Ltd).
170 See Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
171 The rules do make provision for the addition or pinding of a party. However, these rules do not strictly apply to an amicus, who is not a party to a proceeding. Instead, the appointment of an amicus is entirely within the discretion of the court. The court has an implied or inherent power to grant an amicus leave to represent an interest or make a submission on a question of fact or law. See comments by Brennan CJ in Levy v The State of Victoria & Ors 1997] 189 CLR 579.
172 See Submissions CP 30 (Tanya Penovic), CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
173 Submission CP 30 (Tanya Penovic). She noted that the Charter is to be interpreted with reference to international law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights. She suggested that the small amount of domestic human rights jurisprudence means that it is likely that experts in international law will be called on to participate in proceedings concerned with the Charter.
175 See Submissions CP 22 (Mental Health Legal Centre), CP 30 (Tanya Penovic), CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), CP 44 (Fitzroy Legal Service), CP 31 (Victoria Legal Aid), CP 50 (Christopher Enright). The submissions from WorkCover and the TAC indicated that the incumbent regime is adequate to deal with issues relating to the intervention of non-parties.
176 Submissions CP 30 (Tanya Penovic), CP 43 (Consumer Action Law Centre), CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), CP 44 (Fitzroy Legal Service), CP 50 (Christopher Enright).
177 Submission CP 44 (Fitzroy Legal Service).
• Applicants must attend court on the day of the heading fully prepared to participate in the proceeding (with both written and oral submissions, if both are sought to be made) with no certainty about whether they will be granted leave. In addition, parties are also likely to have prepared a reply which will not be needed if leave is not granted.
• The cost of participating as amicus curiae is significant (even if as a component of a pro bono budget). If the application is not granted there is a significant waste of resources that could have been otherwise allocated.
• If leave is granted an adjournment may be sought resulting in further delay.
• The court must hear an amicus curiae application in full rather than by outline prior to the substantive hearing.
• There is a risk that an amicus applicant could be subject to a cost order. This may act as a deterrent to participation.

Reform ideas proposed in the submissions

The submissions suggested the following ideas for reform of the relevant rules:

• Clear guidelines should be introduced (either through rules of court or practice note) about the pre-conditions that need to be met before amicus curiae participation is allowed, as well as parameters for participation, timelines and the appropriate form of the application.178
• The guidelines should provide that an amicus curiae application is made by way of summons and supporting affidavit which annexes a copy of the submissions.179
• Written submissions should be preferred unless particular circumstances indicate the need for oral submissions.180
• The guidelines should set out the factors that the court will take into account in considering whether or not to grant leave.181 The submission from the Human Rights Law Resource Centre suggested that such factors should include:
  – whether the case raises issues of public importance, or formulates or elucidates principles of law
  – whether the applicant has some expertise, knowledge, information or insight that the parties are not able to (‘could’) or willing to (‘would’) provide
  – whether the court will be significantly assisted by the submission of the amicus curiae
  – whether it is in the interests of justice that the amicus curiae be permitted to make its submissions (taking into account issues of efficiency of the court process, delay to the parties, cost to other parties)
  – the particular circumstances of the case.
• The court should be required to provide reasons for its decision on an amicus curiae application.182
• The appointment of amicus curiae should occur at least two weeks prior to the substantive hearing.183
• The court should have discretion to grant leave on a conditional basis or otherwise impose conditions on the scope of amicus curiae participation (for example limiting participation to written submissions or the time that will be allowed for oral submissions).184
• There should be clear guidance as to the effect of multiple amicus applications being made in respect of a single proceeding.185
• Costs relating to the application should not be awarded against an amicus curiae applicant whose application is in the ‘public interest’ unless the application comprises an abuse of the amicus process.186

The commission notes that Tanya Penovic supported protecting litigants from bearing the cost of non-party participation. She suggested this may involve the introduction of costs orders against amici curiae with respect to the matters raised in their submissions.187
Penovic recommended that the commission have regard to previous Australian Law Reform Commission conclusions in relation to the intervention of non-parties, as well as to the proposals put forward by Justice Kenny.

Other submissions called for formal amendments to the rules of civil procedure in relation to the participation of non-parties generally. Victoria Legal Aid suggested that ‘the rules should be amended to allow non-parties to pro-actively intervene in test cases when it is in the public interest to do so.’ Christopher Enright’s submission proposed that the role of amicus curiae be institutionalised through the Office of the Public Advocate (OPA). He argued that the OPA could make a public interest contribution to any questions of law and ensure that issues that the court may have missed are brought to its attention.

5.4 ENFORCEMENT OF JUDGMENTS AND ORDERS

We received numerous submissions raising concerns about the enforcement of judgments through the Victorian courts and the Sheriff’s Office. It was suggested that the enforcement system should be reviewed to ensure that it functions fairly and more efficiently. It was further suggested that the current civil debt enforcement process is being abused and is unable to serve the interests of both creditors and debtors.

Reform ideas proposed in the submissions

The seizure of property issued by the Magistrates’ Court

The Law Institute argued that consideration should be given to amending section 111 of the Magistrates’ Court Act 1989 to ‘remove the restriction which currently limits the execution to amending section 111 of the Magistrates’ Court Act’.

This amendment was also supported by the Magistrates’ Court, which noted that ‘the existing restriction probably reflects the historical situation of a very limited civil jurisdiction. But a current jurisdictional limit of $100,000 renders the restriction pointless’.

The Law Institute argued that the Sheriff should be required to sell personal property in order to satisfy a judgment debt before selling any real property. In addition, it suggested that it would not oppose a limitation on the right to sell real estate if the amount owed to the judgment creditor was a ‘trifling sum’.

The seizure and sale of property in the Supreme and County Courts

Pursuant to section 42 of the Supreme Court Act 1986 the Sheriff is prevented from seizing any property of a judgment debtor which would be exempt from seizure if the debtor were made bankrupt. The Law Institute expressed concern about the lack of a mechanism to challenge certain decisions of the Sheriff. It recommended that rules similar to those for third parties claiming ownership of seized goods should be introduced in Victoria. The Law Institute also expressed some concern about the complex procedures that are required to achieve the Sheriff’s sale of a judgment debtor’s interest in real estate.

178 Submissions CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), CP 30 (Tanya Penovic).
179 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
180 Submission CP 30 (Tanya Penovic).
181 Submissions CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), Submission CP 30 (Tanya Penovic).
182 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
183 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
184 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
185 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
186 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).
187 Submission CP 30 (Tanya Penovic).
190 Submission CP 31 (Victoria Legal Aid).
191 See submission CP 50 (Christopher Enright). Sir Anthony Mason suggests the establishment of an office of Advocate General to widen advice to the court and indirectly provide a mechanism for receipt of advice from experts. He acknowledges that the idea might not receive much support. See Sir Anthony Mason, ‘Interveners and Amici Curiae in the High Court: A comment’ (1998) 20 Adelaide Law Review 173, 176.
192 Submissions CP 18 (Law Institute of Victoria), CP 59 (Springvale Monash Legal Service), CP 43 (Consumer Action Law Centre).
193 Submissions CP 59 (Springvale Monash Legal Service), CP 43 (Consumer Action Law Centre).
194 Submission CP 18 (Law Institute of Victoria).
195 See Submission CP 55 (Magistrates’ Court of Victoria).
196 Submission CP 18 (Law Institute of Victoria).
197 The Law Institute argued that an action in trespass is not the appropriate mechanism for testing whether or not goods should be exempt, and that a Sheriff should not be at risk of an action in damages: Submission CP 18 (Law Institute of Victoria).
198 Submission CP 18 (Law Institute of Victoria).
Chapter 12

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General concerns
The Law Institute suggested the following issues be considered:

- Civil warrants issued by judgment creditors should be regarded as less important than warrants executed by the Sheriff.
- The priority with which civil warrants are executed: the Law Institute recommended that a creditor who incurs costs should gain priority.
- The Sheriff’s limited right of entry: subject to some qualifications judgment debtors are entitled to refuse the Sheriff entry to their home. The Law Institute submitted that forced entry should be permitted to seize non-exempt property where it is known that there are valuable assets in the house of a debtor. It argued that such entry should be approved by the court, with the judgment debtor being given an opportunity to reply.
- The Sheriff’s powers of entry, seizure and sale should be no less than those in other states and there should be uniformity of processes.
- Adequate resourcing of the Sheriff’s office to enable it to execute civil warrants in Victoria: The Law Institute was concerned that without adequate resources, judgment creditors may increasingly turn to bankruptcy and winding up or recovery processes outside the legal system.

5.5 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
The Victorian Civil and Administrative Tribunal (VCAT) did not fall within our terms of reference, but as it plays an important role in the civil justice system, people with whom we consulted raised a number of issues about its operation and jurisdiction. Concerns were expressed about VCAT’s inability to enforce its judgments and about its jurisdiction overlapping with that of the courts.

Enforcement of orders
VCAT does not have any statutory power to enforce its orders. As such, enforcement of VCAT orders must occur through the Victorian courts.

Pursuant to section 121(1) of the Victorian Civil and Administrative Tribunal Act 1998 the appropriate court for enforcement of a monetary order that does not exceed $100,000 is the Magistrates’ Court. In order to enforce orders through the Magistrates’ Court, creditors must file a copy of the VCAT order certified by a presidential member or the principal registrar and an affidavit as to the amount not paid under the order. On filing, the order is deemed to be an order of the Magistrates’ Court and may be enforced through the Magistrates’ Court processes. If the order is a non-monetary order it must be enforced through the Supreme Court pursuant to a similar process (section 122 of the Victorian Civil and Administrative Tribunal Act 1998).

It has been suggested that the process of lodging VCAT orders with the Magistrates’ Court or the Supreme Court for enforcement purposes is time consuming, costly and unnecessary.

Overlapping jurisdiction
VCAT does not have an inherent jurisdiction. The Victorian Civil and Administrative Tribunal Act 1998 provides VCAT with both original and review jurisdiction. In some matters VCAT has shared jurisdiction with courts. Where VCAT has exclusive jurisdiction, its jurisdiction is unlimited.

Legislative provisions enable VCAT to make an order striking out all or any part of a proceeding if it considers that the subject matter of the proceeding would be more appropriately dealt with by a body other than VCAT. However, this provision cannot be used to refer a matter to another body if it is a matter over which VCAT has exclusive jurisdiction. In addition, pursuant to section 29 of the Act a judge of the Supreme Court may be appointed as an acting member of VCAT on a temporary basis. VCAT’s president is a Supreme Court judge and its vice presidents are County Court judges. Each division is headed by a County Court judge. As full time members the president and vice presidents are able to exercise the powers of the Supreme and County Courts respectively.

It has been submitted that problems arise where VCAT has exclusive jurisdiction over parts of a broader dispute pending in another court. Although it may be undesirable for claims to be brought in different forums, it is often difficult to ascertain the most appropriate forum for the case.
Other concerns raised in the submissions
It has been suggested the following issues should be further considered:

- whether any VCAT processes and procedures need reform\(^\text{204}\)
- the issue of transfers of matters under the Fair Trading Act 1999 to VCAT. It was submitted that there is uncertainty surrounding the award of Magistrates’ Court costs where a matter is transferred to VCAT.\(^\text{205}\)
- extending to the courts VCAT’s powers in relation to consumer credit, to address the problem of many defensible claims being uncontested.\(^\text{206}\)

Specifically, the Consumer Action Law Centre recommended that the courts should have power to set aside all, or part, of a debtor’s obligations where the debt arises from inappropriate or reckless lending.\(^\text{207}\)

Supreme Court Judge Kevin Bell has recently been appointed as the President of VCAT and will undertake a review of VCAT to ‘assess its current directions and future needs’. It may be that some of the matters referred to above may be appropriate for consideration in the course of that review.

5.6 APPEALS
We received a number of submissions regarding the various appeal mechanisms in the Victorian courts, and in particular about delays encountered in the appeal processes.

Appeals from the Magistrates’ Court
Section 109(1) of the Magistrates’ Court Act 1989 provides that an appeal may be made to the Supreme Court on a question of law from a final order of the Magistrates’ Court. The Magistrates’ Court contended that further appeal from the Supreme Court to the Court of Appeal should be prevented. It also favoured limiting the number of appeals to one.\(^\text{208}\)

Appeals from interlocutory orders of the Magistrates’ Court
The Law Institute argued that the historical barring of appeals from interlocutory orders of the Magistrates’ Court was inappropriate, particularly given the recent increase in that court’s jurisdiction, and should be revisited. It submitted that a better approach might be to allow interlocutory appeals to a Supreme Court judge with leave. It suggested that an application for leave could be brought initially in the Practice Court with the fixture of the appeal set thereafter. The preparation of a simple appeal book was also recommended.\(^\text{209}\)

Alternatively, the Law Institute raised the possibility of removing civil appeals from the Supreme Court to a single judge of the County Court. It noted that criminal appeals proceed to the County Court, and sees little justification for a distinction to remain for civil appeals.\(^\text{210}\) This was not supported by the Magistrates’ Court. The court noted that if an appeal is by way of hearing de-novo, it would consume significant resources of the County Court.\(^\text{211}\) The court argued that an analogy with criminal appeals was inappropriate because a...
criminal appeal usually related to a sentence which had often been imposed after a guilty plea. In this situation the proceeding before the magistrate would have only taken a matter of minutes and the appeal before the judge would not take significantly longer.\textsuperscript{212}

**Supreme Court**

The Bar recommended that section 17A of the *Supreme Court Act 1986* be amended to enable the Court of Appeal to rescind a grant of leave to appeal granted by a primary judge. It argued that the existing process was cumbersome.\textsuperscript{213}

The Supreme Court called for reform to the procedure governing appeals from interlocutory decisions in the Supreme and County Courts.\textsuperscript{214} The court suggested that the general requirement for leave to appeal had obliged the courts to define when a decision is final or interlocutory. It argued that this distinction was difficult and that applications for leave ‘may be brought out of an abundance of caution, when it serves little practical purpose’.\textsuperscript{215} It proposed a number of reform ideas. Justice Maxwell, President of the Court of Appeal, noted that this uncertainty ‘is undesirable, it creates additional costs for the parties and additional burdens for the Court’. He also observed that the term ‘interlocutory’ is not well understood by many lawyers, and is meaningless to lay people.\textsuperscript{216}

WorkCover cautioned against automatic appeal rights in all interlocutory disputes. It argued that such an extension may overburden the court. It did not have any concerns about the rules relating to appeals from damages verdicts and did not support any reform to those rules.\textsuperscript{217}

**Appeals from non-judicial members of VCAT to the Supreme Court**

The TAC suggested that consideration should be given to revising the rules relating to appeals from non-judicial members of VCAT to the Trial Division of the Supreme Court.\textsuperscript{218} It argued that the process would be more efficient if an application for leave to appeal was returnable directly to a judge of the Trial Division.

At present, applications for leave to appeal from VCAT are generally heard by a master in the first instance. A party can appeal to a judge in the Trial Division against a decision made by a master and this is usually heard in the Practice Court. The TAC and Law Institute suggested that in their experience the master’s decision is often appealed to the Practice Court. They argued that omitting this step in the appeal process may be more efficient and bring about a reduction in costs. The Law Institute also indicated that appeals from non-judicial members of VCAT should be streamlined.\textsuperscript{219}

**Costs and the appeal process**

The Group submission stated that an appeal from a first instance judgment in Victoria does not remove the unsuccessful party’s obligation to pay the amount of the judgment unless a stay is ordered by the trial judge or appeal court or an agreement is reached with the judgment creditor. The submission expressed concern that if a stay is not granted, a prohibitive judgment debt (for example a judgment debt that is large enough to bankrupt the defendant or severely curtail its business activities) may act to bar an appeal right, even where the prospects of the appeal are good. It further suggested that an inability to appeal might persuade a party to settle rather than litigate even if a case has merit.

To address this concern the Group submission recommended the introduction of an appeal bonding scheme. It argued that such a system would result in greater fairness between parties by limiting the difficulties defendants face when they wish to appeal a first instance judgment.\textsuperscript{220} It suggested that a cap on the amount to be paid pending appeal could be determined either as a fixed sum (because of the smaller size of judgments in Australia the submission suggested that a cap of $1 million was appropriate) or as a set percentage of the judgment debtor’s net assets, whichever was the lesser. It was also recommended that the bonding system include protections for plaintiffs where it was demonstrated that defendants were deliberately dissipating assets.\textsuperscript{221}

The need to examine the appeal process with the aim of reducing costs, in particular the cost of appeal book documents, was also raised. It was suggested that court books should be constrained if they are to be required.\textsuperscript{222}

**Section 110 of the Magistrates’ Court Act**

Magistrate Jillian Crowe also raised a concern about the operation of section 110 of the *Magistrates’ Court Act 1989.*\textsuperscript{223} This provision empowers the court to set aside a final order and to rehear the proceeding where a final order is made against a person who did not appear in the proceeding.
Ms Crowe indicated that the matter typically arises where the court has made final orders on an undefended claim and at some time later the court receives a request to set aside the order without conducting a hearing on the merits. This is often because the defendant realises that the judgement debt precludes him or her from acquiring a credit facility, or the order poses some other commercial problem for the defendant. The request is usually accompanied by a letter from the judgment creditor consenting to the process, as the debt under the order has been fully paid.

Ms Crowe suggested there is some uncertainty and inconsistency with the interpretation of section 110. In order to address this, she proposed that a simple amendment be made to section 110 to clarify that parties to concluded litigation be able to consent to have the final order set aside and the proceedings struck out.

Other reform suggestions

In addition to the issues identified above, the commission was also asked to consider the following:

- simplifying the rules and procedures for appeals: in particular, the submission from Legal Aid suggested that the distinctions between appeals on questions of law, appeals de novo and judicial review are confusing for self-represented litigants.
- the implementation of an appeal guarantee system.

5.7 TAX DEDUCTIBILITY OF LEGAL COSTS

The commission has received a number of submissions regarding the tax deductibility of legal fees and expenses in civil litigation. This issue falls within the jurisdiction of the Commonwealth, and any reform in this area would require Commonwealth involvement.

The Consumer Action Law Centre expressed concern at the power imbalance between its clients and opposing parties in litigation. It contended that the difference between the risks borne by parties to litigation can make the negotiation of a fair outcome difficult. It explained that cost orders can have a significant impact on its clients (for example they can lead to the loss of property including cars and homes). By contrast, it suggested that opposing parties are almost always companies (and often large companies).

The Consumer Action Law Centre believes that tax deductibility that is available to companies further compounds the inequality between litigation participants and may be a disincentive for a company to settle major litigation at an early opportunity. On the other hand the Bar indicated that it is not aware of any problems in relation to tax deductibility and does not believe that there is any need for reform. It believes that there is no good reason in principle why legal expenses incurred in deriving assessable income should not be tax deductible like any other business expense. The Law Institute suggested that removing the tax deductibility of legal fees would effectively increase the cost to the parties of settling a claim, and consequently, reduce the likelihood of settlement.
Facilitating Ongoing Civil Justice Review and Reform

5.8 INTEREST UP TO JUDGMENT

Background

The position in Victoria in relation to the calculation of interest up to judgment is different to rules in all other Australian jurisdictions (except Tasmania). Elsewhere a model is adopted under which the court has a general discretion (sometimes subject to a presumption in favour of interest, and in all jurisdictions subject to specified limitations) to award interest in respect of all or part of the period between the arising of the claimant’s cause of action, and judgment. The discretion generally operates in all proceedings in which a monetary amount is at issue.

By contrast, the Victorian Supreme Court Act deals separately with ‘debts or sums certain’ and other ‘debts or damages’, and allows interest to be recovered on the former from the time the relevant amount was payable under a written instrument or demanded (as applicable) and the latter from the time of the commencement of legal proceedings. The Act also makes separate provision for interest in proceedings for trover or trespass to goods and proceedings based on policies of insurance.

Concerns raised by the Law Institute of Victoria

The Law Institute made the following arguments for reform of the Victorian provisions:

- Victoria is out of line with all other jurisdictions apart from Tasmania in allowing interest to be payable only from the date of issue rather than the date of accrual of action.
- Clients may take years to locate a debtor and may automatically lose any interest that would have accrued in that time.
- The award of interest is intended to compensate for the loss or detriment suffered by being kept away from money during the relevant period. Therefore, in order for compensation to be fairly distributed, it should be available from the date the cause of action accrued.
- The penalty interest rate is supposed to underline the seriousness of failing to pay a debt when it falls due and the current Supreme Court position undermines this objective.
- The current situation encourages forum shopping or, alternatively, the premature initiation of proceedings to ensure that interest starts to run. It further suggested that ‘one of the few alternatives open to plaintiffs—complicating the action by suing for damages for loss of use of the money—is clearly unsatisfactory.’

The Law Institute recognised that it will not always be appropriate to award interest from the date of accrual of a cause of action and recommended the introduction of a provision similar to section 51A of the Federal Court of Australia Act 1976 (Cth) to allow interest to be awarded as is considered appropriate in each case. It also suggested that the rate should be fixed, for instance, at the penalty interest rate, subject to an overriding discretion to depart from this in appropriate cases (for example, where there is delay by one of the parties).

The Law Institute further argued that there was no valid reason for drawing a legislative distinction between debts, damages, trover, trespass and policies of insurance in Victoria. It observed that this does not occur anywhere else in Australia.

5.9 PRESUMPTION THAT NO COSTS ARE RECOVERABLE FOR VERY SMALL CLAIMS

The Consumer Action Law Centre noted that costs are not awarded in the Magistrates’ Court for claims of less than $500, unless there are special circumstances. This limit has remained unchanged despite several increases in the upper limit of the court’s jurisdiction. In the centre’s experience costs for claims of less than $500 are awarded as a matter of course where a claim is undefended. It argued that undefended claims give rise to the least actual cost on the part of the plaintiff and cannot constitute any reasonable interpretation of ‘special circumstances’. It suggested that this anomaly needs to be addressed as a matter of urgency.

It argued that the legal costs of small claims are unjustified in comparison with the amounts of the claims. In many instances, costs exceed the amount of the claim and result in consumers having to pay substantial legal bills.
The Consumer Action Law Centre recommended:

- For small claims of $1000 or less in the Magistrates’ Court, the rules should be changed so that there is a presumption that each party bears its own costs whether the claim is defended or not.
- The no-cost cap should be increased from $500 to $1000.237

5.10 THE NEED TO CONSIDER ECONOMIC ASPECTS OF THE CIVIL JUSTICE SYSTEM

The Victorian Bar highlighted that it is also important to consider the economic aspects of the civil justice system when looking at reform.238 It proposed the following issues for consideration:

- The civil justice system is an important service industry in Victoria, contributing nearly $1 billion to the state’s economy each year.
- It was suggested that inefficiency in the civil justice system is contributing to the loss of significant civil litigation, especially commercial work, to other jurisdictions, in particular the Federal Court and the Supreme Court in NSW, and is also limiting Victoria’s ability to attract work from the growing Asian litigation market. In the Bar’s view ‘the loss of commercial litigation risks impairing the quality of justice in Victoria and retarding the growth of an important part of the services sector’.239
- Providing the most predictable and rapid resolution of cases would assist Victoria to achieve national leadership as a centre for litigation excellence and to capture economic growth.
- Becoming an Asia-Pacific centre for litigation excellence would enable Victoria to position itself as a credible choice of jurisdiction for non-domestic civil litigation.
- Major reforms of the civil justice system are not achievable without significant government participation. The Bar envisaged two roles for government. Firstly, the creation of an ‘industry policy’ for the civil litigation industry and second, support to the Supreme Court in packaging and presenting a reform agenda to the legal profession and the public.
- There is a need for rules to increase transparency in decision making for clients, and the enforcement of appropriate corporate standards of behaviour in Victoria (including seeking common national standards).240
- The Bar pointed to less burdensome contracts legislation in NSW and called for national uniformity in areas such as fair trading and proportionate liability to prevent loss of work.241
- The program of 360 degree feedback by the Judicial College of Victoria should be expanded and the program supported by clear performance measures and a regular external peer review system allowing barristers and, where appropriate, solicitors to provide feedback.242

5.11 COURT GOVERNANCE

In a letter to the commission dated 15 November 2007, Chief Justice Marilyn Warren suggested that some of the important issues the commission might explore in the second phase of its civil justice review were

the extent to which a more independent court governance structure would:

- free up judge time currently spent in dealings with the Department [of Justice] and preparing specific funding submissions;
- reduce duplication of effort between the Department and Courts in relation to administrative matters; and
- provide courts with greater capacity to respond and adapt to changing circumstances in a timely fashion.

The Chief Justice noted that court governance was put forward as an issue requiring attention in the Attorney-General’s Justice Statement and the Courts Strategic Directions Statement, which noted:

A modern governance system needs to be introduced to enable the Courts and VCAT to respond adequately to the changing needs of the community.243
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The Chief Justice’s suggestion was supported by the Chief Magistrate, Ian Gray, and the Chief Judge of the County Court also supported further consideration of these issues. Models of court governance were also considered in some detail in Going to Court.

5.12 Other Issues Raised in Submissions

A number of additional issues were raised and reform suggestions made in submissions and consultations during our review, including:

- the early assessment of medical negligence claims by a medical panel of approved independent medical experts appointed by the Specialist Colleges.
- the use of joint medical examinations to save costs and increase objectivity.
- the suggestion that the lack of pleadings in serious injury cases leaves the court and the parties in the dark in relation to the possible ‘defence’ until trial. In addition, it was suggested that in order to prevent trial by ambush any surveillance evidence should be required to be disclosed before trial. It was recommended that a defendant file an affidavit setting out why a serious injury claim is rejected.
- the need for the review of the recently enacted proportionate liability legislation. It was argued that the regime should operate in a manner that involves minimal cost and complexity and maximum expedition. The Supreme Court said consideration should be given to reforming the procedure dealing with non-party concurrent wrongdoers, pleadings, default or summary judgment, offers of compromise, settlement and costs. In addition the Supreme Court flagged that the following issues should also be considered by a law reform body: the desirability of eliminating differences between the Commonwealth and Victorian regimes and between state regimes in relation to the role of a contractual allocation of responsibility; the differential impact of limitation periods; issue estoppel and res judicata issues.
- the need to amend section 134AB(28) of the Accident Compensation Act 1985 to make it fairer for workers who remain on weekly payments pending trial. It was suggested that consideration be given to the interpretation of section 134AB(28) in light of the Court of Appeal decision of Raeburn v Tenix Defence Systems Pty Ltd [2007] VSCA 90.
- increasing in the civil jurisdictional limit of the Magistrates’ Court to $250,000.
- review of the Magistrates’ Court’s limited jurisdiction to deal with WorkCover matters under section 43 of the Accident Compensation Act 1985. The Magistrates’ Court argued that the restricted jurisdiction under this Act should be removed and, in relation to other claims, be increased to the civil jurisdictional limit of $100,000.
- the regulation of commercially funded litigation. Risks to plaintiffs and defendants were canvassed in submissions. Several submissions called for greater regulation of commercially funded litigation. Some of the reform suggestions canvassed included legislation detailing:
  - the factors that must be addressed in a funding agreement
  - the filing of a funding agreement in court at the commencement of proceedings
  - a direct contractual relationship between the plaintiff and the solicitor running the case rather than a contract between the funder and solicitor
  - proper regulation and disclosure requirements for litigation funders
  - the capping of damages able to be retained by the funder
  - enforcement of costs orders against the plaintiff or the funder
  - requirement to notify the court and the other parties if a funder withdraws
  - entitlement to security for costs if the solvency of the litigation funder is in issue
  - all funding agreements to be subject to court supervision.
• providing a right to a jury in a damages trial.\textsuperscript{254}
• exploring options for making the determination of motor vehicle disputes simpler and cheaper. It was suggested that compulsory third party property coverage and no-fault accident compensation schemes should be investigated.\textsuperscript{255} Another suggestion was compulsory mediation or conciliation as a precondition to issuing proceedings in motor vehicle accident matters. Alternatively, it was proposed that the Insurance Ombudsman’s terms of reference could be widened to allow it to deal with individuals who believe they are being wrongly pursued by an insurance company.\textsuperscript{256}
• increased and improved regulation of the taxi industry to address concerns arising in relation to insurance.\textsuperscript{257}
• review of the processes applying to claims filed outside Victoria and served on Victorian defendants. It was suggested that often defendants do not act on or seek advice in respect of such proceedings. Subsequent action to stay a matter is complex, and default judgment is often obtained. Consideration should be given to amending the Service and Execution of Process Act 1992 (Cth) to prevent the issuing of matters outside the appropriate jurisdiction or alternatively to provide for an automatic transfer (unless both parties agree otherwise) to the appropriate jurisdiction when a defence is lodged.\textsuperscript{258}
• extinguishing a debt at the expiration of the limitations period.\textsuperscript{259}
• further analysis and review of the 1998 Victorian Parliamentary Law Reform Committee’s Review of the Fences Act 1968.\textsuperscript{260}
• specialised legal assistance for people with disabilities.\textsuperscript{261}
• increased attention on the impact of court processes on homeless persons. The PILCH Homeless Persons Legal Clinic recommended: increased flexibility and facilities for homeless persons who are required to attend court; judicial training; specialist court lists; the expansion of the homelessness court liaison officer role beyond the Melbourne Magistrates’ Court; increased funding.\textsuperscript{262}
• consideration of the impact of reform on disadvantaged groups. The Victorian Aboriginal Legal Service recommended the establishment of principles which would improve equity and accessibility. It called for a Koori impact statement to be considered in the early stages of policy development.\textsuperscript{263}
• the enactment of legislation or changes to civil procedure rules to protect individuals and groups from defamation actions aimed at silencing debate about matters of public interest, political debate and dissent. Support was also expressed for reform to allow defendants in defamation cases to apply for the opportunity to prove on the balance of probabilities that the proceeding was brought for an improper purpose.\textsuperscript{264}
• allowing parties to adjourn matters by consent in the County Court without having to apply to the Practice Court
• the use of docket judges in large construction matters in the Building Case List in the Supreme Court.\textsuperscript{265} The commission notes the case management principles embodied in the recent Supreme Court Practice Note for Building Cases.\textsuperscript{266}

In addition to the miscellaneous law reform proposals referred to and summarised above there were other suggestions made with respect to matters which are dealt with in other chapters of this report. Some of the reform suggestions referred to above may be appropriate for consideration by the commission during the second stage of the present inquiry, or by the proposed Civil Justice Council. Alternatively, a number of reform proposals could be implemented without the need for further investigation (for example, the proposal that courts should have a discretion to award interest from the date of accrual of a cause of action rather than from the date of commencement of legal proceedings).

\textsuperscript{244} Letter from Ian L Gray, Chief Magistrate, to Dr Peter Cashman dated 30 January 2008; Telephone conversation between Chief Judge Michael Rozenes and Dr Peter Cashman, 30 November 2007.
\textsuperscript{245} Sallmann and Wright (2000) above n 33, 44–53. See also Justice Tim Smith, ‘Court Governance and the Executive Model’ (Paper presented at the Judicial Conference of Australia, Canberra, 6–8 October 2006).
\textsuperscript{246} Submissions CP 60 and ED 1 1 (Royal Australasian College of Surgeons).
\textsuperscript{247} Submission CP 52 (Hollows Lawyers).
\textsuperscript{248} Submission CP 5 (Confidential). permission to quote granted 4 February 2008.
\textsuperscript{249} Submission CP 58 (Supreme Court of Victoria).
\textsuperscript{251} Submission CP 55 (Magistrates’ Court of Victoria).
\textsuperscript{252} Submission CP 47 (Group Submission).
\textsuperscript{253} See Submissions CP 47 (Group Submission), CP 38 (Allens Arthur Robinson), CP 18 (Law Institute of Victoria), CP 11 (Dibbs Abott Stillman). A contrasting view was expressed by the Police Association (Submission CP 61).
\textsuperscript{254} Submissions CP 48 (Victorian WorkCover Authority), CP 37 (Transport Accident Commission).
\textsuperscript{255} Submissions CP 59 (Springvale Monash Legal Service), CP 44 (Fitzroy Legal Service), CP 3 (SRC Legal Service).
\textsuperscript{256} Submission CP 32 (Federation of Community Legal Centres).
\textsuperscript{257} Submission CP 32 (Federation of Community Legal Centres).
\textsuperscript{258} Submission CP 43 (Consumer Action Law Centre).
\textsuperscript{259} Submission CP 43 (Consumer Action Law Centre).
\textsuperscript{260} Submission CP 32 (Federation of Community Legal Centres).
\textsuperscript{261} Submission CP 59 (Springvale Monash Legal Service).
\textsuperscript{262} Submission CP 29 (PILCH Homeless Persons Legal Service).
\textsuperscript{263} Submission CP 27 (Victorian Aboriginal Legal Service).
\textsuperscript{264} Submission CP 32 (Federation of Community Legal Centres).
\textsuperscript{265} Submission CP 12 (Construction and Infrastructure Law Committee (Vic Group) Law Council of Australia).
Chapter 12

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Appendices
## Appendix 1

### Consultations

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</table>
| 1            | David Poulton—Minter Ellison  
Annabel Evans—CGU Professional Risks Insurance | 13 September 2006  |
| 2            | Bernard Murphy, Greg Tucker—Maurice Blackburn                                 | 14 September 2006  |
| 3            | Bob Musgrove, Michael Naper—Civil Justice Council; Colin Stutt, Head of Funding Policy—Legal Services Commission, UK | 15 September 2006  |
| 4            | Vicki Waye, Associate Dean of Teaching, Law School—University of Adelaide      | 16 September 2006  |
| 5            | Vince Morabito, Department of Business Law and Taxation—Monash University     | 18 September 2006  |
| 6            | Prof Zuckermann, Prof Camille Cameron, Oxford University and University of Melbourne | 19 September 2006  |
| 7            | Michael W Shand QC, Christine Harvey—Victorian Bar                            | 28 September 2006  |
| 8            | Judge Wodak, Judge Anderson—County Court                                      | 03 October 2006    |
| 9            | Chief Justice Warren, President Justice Maxwell, Justice Neave AO, Justice Hargrave, Justice Bell, Master Lansdowne, Master Wood, Master Kings—Supreme Court of Victoria | 04 October 2006    |
| 10           | Lou Schetzer, Manager, Research, Civil Law Policy—Department of Justice        | 04 October 2006    |
| 11           | Deputy Chief Magistrate Peter Lauritsen—Magistrates’ Court of Victoria        | 11 October 2006    |
| 12           | Camille Cameron, Gary Cazalet, Jacqui Horan, Ann Genovese, Michelle Taylor-Sands—Melbourne Law School | 11 October 2006    |
| 13           | Judge Wodak—County Court of Victoria                                          | 16 October 2006    |
| 14           | Andrew Tenni, Siobhan Haverkamp—Supreme Court of Victoria                     | 27 October 2006    |
| 15           | Anna Rowland, Janet Tilley—Civil Justice Council, UK                          | 27 October 2006    |
| 16           | David Gladwell, Head of Civil Appeals Office, Master in the Court of Appeal—Civil Division, UK | 25 October 2006    |
| 17           | Lord Justice Dyson, Lord Justice of Appeal—High Court, Her Majesty’s Courts Service, UK | 25 October 2006    |
| 18           | Peter Hurst, Senior Costs Judge, Judiciary of England and Wales, Supreme Court Costs Office—Royal Courts Of Justice, UK | 23 October 2006    |
| 19           | Master John Ungley, Queen’s Bench—High Court, Her Majesty’s Courts Service, UK | 23 October 2006    |
| 20           | Janet Tilley, Partner—Colemans-ctts Solicitors, UK                           | 26 October 2006    |
| 21           | Robert Musgrove, Chief Executive—Civil Justice Council, UK                    | 23 October 2006    |
| 22           | John Pickering—Irwin Mitchell Solicitors, UK                                  | 26 October 2006    |
| 23           | Colin Stutt, Head of Funding Policy—Legal Services Commission, UK            | 24 October 2006    |
| 24           | Laura Wilkin, Partner—Weightmans, UK                                          | 24 October 2006    |
| 25           | Professor Martin Partington CBE, Special Consultant University of Bristol Law School—Law Commission of England and Wales | 23 October 2006    |
| 26           | Dr Rachael Mulheron, Reader in Law, School of Law—Queen Mary University of London | 27 October 2006    |
| 27           | Sue Bence, Partner—Leigh Day & Co, UK                                         | 27 October 2006    |
| 28           | Chief Justice Warren, Justice Hargrave, Justice Bell, Master Lansdowne, Master Wood, Master Kings, Claire Downey—Supreme Court of Victoria | 31 October 2006    |
| 29           | Bettina Miller, Business Analyst and Kate Spillane, Civil Listings Manager—County Court of Victoria | 01 November 2006    |
| 30           | Chief Magistrate Ian Gray, Deputy Chief Magistrate Peter Lauritsen—Magistrates’ Court of Victoria | 03 November 2006    |

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<th>PARTICIPANTS</th>
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<tr>
<td>32</td>
<td>Tony Parsons, Managing Director—Victoria Legal Aid</td>
<td>08 November 2006</td>
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<td>33</td>
<td>Claire Downey—Supreme Court of Victoria</td>
<td>09 November 2006</td>
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<td>34</td>
<td>Justice Morris—Victorian Civil and Administrative Tribunal</td>
<td>9 November 2006</td>
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<td>35</td>
<td>Andrew Cannon, Acting Chief Magistrate—Magistrates Court [South Australia]</td>
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<td>Nerida Wallace, Director—Transformation Management Services</td>
<td>04 December 2006</td>
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<td>Bernard Murphy—Maurice Blackburn</td>
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<td>38</td>
<td>Alternative Dispute Resolution Strategy team—Department of Justice</td>
<td>12 December 2006</td>
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<td>39</td>
<td>Professor Carl Baar—York University, Canada</td>
<td>19 January 2007</td>
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<td>40</td>
<td>Professor Peter Sallmann—Monash University</td>
<td>24 January 2007</td>
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<td>42</td>
<td>Richard O'Keefe, Principal Registrar and Samantha Ludolf, CEO—Victorian Civil</td>
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<td>43</td>
<td>Heather Cook—Government Legal Services</td>
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<td>Louis Baziots—Appeal Costs Board</td>
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<td>Bronwyn Hammond, Self-represented Litigants’ Co-ordinator—Supreme Court of</td>
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<td>47</td>
<td>Dr John Lynch—Crown Counsel</td>
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<td>Eve Stagoll, Tabitha Lovett—Public Interest Law Clearing House</td>
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<td>Ian Kennedy, Cathy Gale—Kennedy Wisewoulds</td>
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<td>Vicki Evans, Natasha Sugden, Anna Worrall, Magistrates’ Court 2015 Project—</td>
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<td>Paul O’Connor, Jane Bloomfield, John Bolitho—Transport Accident Commission</td>
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<td>Gil Brooks—ICMS team</td>
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<td>Brian Tee, MLC—Victorian Parliament Law Reform Committee</td>
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<td>Andrew Grech, Cath Evans, Mark Walter—Slater &amp; Gordon</td>
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<td>Greg Reinhardt—Australasian Institute of Judicial Administration</td>
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<td>Denis Nelthorpe, consumer consultant</td>
<td>30 May 2007</td>
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<td>58</td>
<td>Jane Dunn—District Court of New South Wales</td>
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<td>Judge Bowman, Mark Dwyer, Helen Gibson, Richard O’Keefe, Samantha Ludolf—</td>
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<td>Professor Garry Watson, Osgoode Hall Law School—York University, Canada</td>
<td>13 August 2007</td>
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<td>Professor Deborah Hensler, Judge John W Ford Professor of Dispute Resolution Law School—Stanford University, US</td>
<td>13 August 2007 &amp; 23 August 2007</td>
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<td>73</td>
<td>Adam Cockayne, Janet Cohen, Caroline Morgan—Legal Services Board &amp; Legal Services Commissioner</td>
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<td>Peter Riordan SC, Mark Moshinsky SC—Victorian Bar</td>
<td>20 February 2008</td>
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## Appendix 2: Submissions

### Consultation Paper

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### Appendix 2: Submissions

#### Consultation Paper

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## Appendix 2: Submissions

### Draft Exposure 1 Proposals

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## Appendix 3: Events Attended

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<td>Launch of IAMA Arbitration Rules</td>
<td>Institute of Arbitrators and Mediators Australia</td>
<td>29 October 2007</td>
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<td>44</td>
<td>Annual Dinner presentation by Dr Peter Cashman</td>
<td>Chartered Institute of Arbitrators (Australia) Limited</td>
<td>10 November 2007</td>
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## Court Observations

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<td>13 October 2006</td>
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<td>2</td>
<td>Supreme Court Masters Court</td>
<td>13 October 2006</td>
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<td>3</td>
<td>County Court Medical List</td>
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<td>4</td>
<td>Supreme Court Masters Court</td>
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<td>17 November 2006</td>
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<td>7</td>
<td>Supreme Court Court of Appeal</td>
<td>24 November 2006</td>
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<tr>
<td>8</td>
<td>Supreme Court</td>
<td>3 April 2007</td>
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**Terminology**

**amicus curiae** – friend of the court. A person granted permission by a court to make submissions on a point of law or matter of practice. An amicus curiae has no personal interest in the case and does not advocate for either party.

**certiorari** – to be informed. A type of prerogative remedy issued by a court to bring before it the decision or determination of a tribunal or inferior court to quash it on the grounds of non-jurisdictional error of law on the face of the record, or for jurisdictional error or denial of procedural fairness. *

**common law** – ‘The unwritten law derived from traditional law of England as developed by judicial [precedent], interpretation, expansion and modification.’ *

**contribution** – ‘an equitable right existing between two co-sureties, under which each co-surety is only obliged to contribute proportionately to the satisfaction of the principal debt. A co-surety who has paid more than his or her fair portion of that debt may claim re-imbursement from his or her co-sureties’. * There may be other legal grounds upon which a defendant in a proceeding may claim a contribution (to any amount required to be paid to the plaintiff) from another defendant or person.

**conversion** – the tort of intentionally and unlawfully interfering with another person’s property. Formerly known as trover, conversion is one form of trespass to goods.

**cy-près** – as nearly. An equitable doctrine that allows a court to vary the original terms of a charitable gift, where the intention of the gift cannot be fulfilled. The variation must be as close as practical to the original intention.

**declarations** – a civil law remedy. ‘Decision of a court or judge on a question of law or rights’. 

**de novo** – A matter that is heard de-novo is heard again from the beginning. The body conducting the hearing is not confined to the evidence or materials which were presented in the original hearing. It ‘stands in the shoes’ of the original decision maker, and makes the decision again’. *

**discovery** – ‘A pre-trial procedure where a party to proceedings makes available for inspection all relevant documents to the other parties’. *

**equitable remedy** – ‘Equitable remedies are sought where common law remedies such as damages are inadequate to right the wrong done to the plaintiff. *

**equity** – ‘The separate body of law, developed by the English Court of Chancery, which supplements, corrects and controls the rules of common law’. *

**estoppel** – ‘a bar or impediment preventing a party from asserting a fact or a claim inconsistent with a position he or she previously took, either by conduct or words, especially where a representation has been relied or acted upon by others.’ *

**ex parte** – ‘In the absence of the other side. Ex-parte applications are heard in the absence of the party against whom the order is sought’. *

**ex tempore** – ‘by lapse of time. An ex tempore judgement is given without preparation, for example where a matter is urgent ... A transcript of ex tempore reasons for judgment produced by a court reporting service may be considered a document of the court.’ *

**habeas corpus** – ‘have the body. Originally a type of writ issued by a superior court allowing a prisoner to have himself or herself removed from prison and be brought before the court to have the matter for which he or she was being detained determined’. *

**hot tubbing** - permitting experts to give evidence concurrently in a panel format (sometimes also referred to as ‘concurrent evidence’).

**in camera** – ‘A hearing where the court considers it desirable in the interests of justice or in order to prevent undue hardship to any person to order specified persons or all persons except those specified to remove themselves from the court room during the whole or any part of the proceeding. Courts have an inherent common law power to order that a hearing proceed in camera’. *

**indemnity** – ‘security or protection against loss or injury’. *

**Indictable offence** – ‘An offence which can be prosecuted before a judge and jury’. *

**injunction** – ‘A court order of an equitable nature requiring a person to do, or refrain from doing, a particular action’. ‘Injunctions may require a particular act (mandatory injunctions) or forbid a particular act (prohibitory injunctions), they may be interlocutory (interim) or final’. ‘They may be granted ex parte or inter partes and they may be granted to prevent wrongs currently existing or to prevent wrongs that may not have been committed’. *
interlocutory application – ‘An application to a court to make an order before the court makes a final order in the proceeding’. *

inter partes – between parties.

interrogatories – ‘A form of discovery that involves one party asking the other party specific questions relating to the matters in issue in the proceedings in a written form in accordance with the rules of the Court.’ *

jurisdictional error – ‘The purported exercise by a tribunal or court of jurisdiction in excess of that which has been conferred upon it, or the failure to exercise its proper jurisdiction. Jurisdictional error is a ground for judicial review.’ *

legal professional privilege – ‘A common law privilege which provides that confidential communications between legal practitioner and client for the sole purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated litigation need not be given in evidence nor disclosed by the client or by the legal practitioner without the consent of the client: (Grant v Downs (1976) 135 CLR 674). The precise scope of the common law legal professional privilege is unclear (Cadbury Schweppes Pty Ltd v Amcor Limited [2008] FCA 88 [6] (Gordon J). Privilege relating to legal ‘advice’ and privilege relating to ‘litigation’ is also governed by evidence legislation in many Australian jurisdictions.

letter of demand – is usually sent by a solicitor on behalf of a client prior to the institution of proceedings. The letter usually sets out the general nature of a claim and what is required to be done and by when in order to resolve the claim before the author takes further action to enforce his or her rights.

liability – ‘a person’s present or prospective legal responsibility, duty or obligation’. *

mandamus – ‘we command. An order issued by a court to compel a public official to perform a public duty or to exercise a statutory discretionary power’. *

nolle prosequi – ‘unwilling to proceed. An entry made in a court record when the prosecutor or plaintiff is unwilling to continue the proceedings against the defendant. In criminal proceedings, a decision by the Attorney-General or the Director of Public Prosecutions not to continue with a prosecution or indictment after a bill has been found. A nolle prosequi does not establish the innocence of an accused, against whom another indictment may later be presented for the same or similar offence.’ *

party–party costs – ‘Fair and reasonable costs, including fees, charges, disbursements, expenses and remuneration, incurred by a party in enforcing or defending their legal rights.’ *

prerogative powers – ‘The common law powers of the Crown derived from the Queen… Such prerogatives are subject to the Commonwealth Constitution and may be circumscribed or extinguished by legislation… Some prerogative powers are vested in the Attorney-General as first law officer of the Crown’. *

prerogative writ – a ‘writ traditionally within the power of a superior court to issue in its exercise of supervision of the administration of justice’. * ‘There are six writs in all – mandamus, prohibition, procedendo, certiorari, quo warranto, and habeas corpus’.

pro bono – ‘Legal work performed free or at a reduced rate’. *

procedural fairness – ‘Common law principles applied to statutory and prerogative powers to ensure the fairness of a decision-making procedure of courts and administrators. The term is used interchangeably with natural justice.’ *

prohibition – ‘A type of prerogative remedy issued by a court to prevent a tribunal or inferior court which is acting in excess of its jurisdiction, from proceeding any further’. *

proportionate liability – The sharing of liability between parties proportionate to their relative blameworthiness or degree of fault with regard to the same incident.

quantum – amount claimed or due to a particular party.

quo warranto – ‘by what authority. A writ requiring a person to show by what warrant he or she holds official office or exercises a function’. *

res judicata – a judicially determined matter. The rule that if a dispute is judged by a court, then the judgment of the court is finally between the parties to that dispute.

restitution – ‘restoration of property or rights previously taken away, conveyed or surrendered’. *

tort – ‘wrong. A civil injury, actionable by a private individual, as opposed to a criminal wrong, actionable by the state.’

ultra vires – ‘beyond the power. An ultra vires act is beyond the legal power or authority of a person, institution, or legislation, and therefore invalid’. *

unjust enrichment – ‘a benefit for which the recipient is required to make restitution to the person at whose expense it was obtained. An enrichment is unjust if, for example, the enrichment was provided by mistake, under duress or influence…’ *

viva voce – an examination where questions are asked and answered orally rather than in writing.’

Glossary


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