

**Sixth Judicial Seminar on Commercial Litigation
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Case Management: Innovations and Obstacles

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Introduction

Case management techniques are likely adopted by each of the courts represented at this seminar, particularly, in more complex cases. There are no doubt differences in the case management techniques that are used, and such differences exist even between Australian courts. Those techniques are under continuing pressure by issues such as the length, the cost of trials and lack of access to the legal system which are, of course, not entirely new.

Case management is, in the Australian courts, now underpinned by statutory recognitions of the overriding objective of the just, quick and cheap resolution of the real issues in dispute in proceedings, in ss 56-58 of the *Civil Procedure Act 2005* (NSW) and the broadly similar provisions in s 37M of the *Federal Court of Australia Act 1976* (Cth). These provisions reflect those introduced in the United Kingdom following the Woolf Report.¹ These sections are important both to give the courts a clear statutory basis for the exercise of case management powers, and because those obligations are also applied to the parties to litigation and their legal representatives.² Their genesis was summarised by the Court of Appeal of the Supreme Court of New South Wales in *Richards v Cornford (No 3)* [2010] NSWCA 134 at [42]-[44] as follows:

“The litigious process is inherently stressful for any party, in particular an individual. ... That stress includes the uncertainty and concern as to the effects of legal costs that can lead to bankruptcy and financial ruin. The reality of the personal strain of litigation is now clearly recognised by the Courts.

This being the nature of the process of litigation, the courts in this country in modern times, have sought to exercise control and supervision over litigation in order to see cases resolved in a relatively timely fashion. It cannot always be done. Parties, practitioners, courts and judges sometimes fall behind by reference to appropriate standards of efficiency and timeliness. Nevertheless, the need for the due despatch of the cases of litigants is ever-present and is a fundamental aim of the administration of justice.

To put the matter simply and bluntly, parties are entitled to expect that the costly and stressful, though necessary evil that is litigation be resolved with reasonable despatch so as to minimise, where reasonably possible, the time during which people are subjected to its rigours and strains” [citation omitted].

¹ See B Tronson, “Chapter 9 Towards Proportionality – The ‘Quick, Cheap and Just’ Balance in Civil Litigation” (2016) 48 *Ius Gentium* 183.

² See, for example, *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* (2012) 208 FCR 78 at [57]ff; *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 3022 at [20].

Australian courts often refer to the observations of the High Court of Australia in *Aon Risk Services v Australian National University* (2009) 239 CLR 175, in case management decisions and particularly in dealing with amendment applications.³ That case was an appeal against a decision of a trial judge to allow an amendment to pleadings at a late stage, in a case which had already suffered substantial delays. A joint judgment of five members of the High Court observed (at [98]), in relation to rules of court that were similar to s 56 of the *Civil Procedure Act*, that:

“Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and costs are taken into account. The Rule’s reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.”

The joint judgment also observed (at [103]) that an explanation will generally be required for delay in raising a matter and that:

“Not only will [the applicants] need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the Court’s attention, so that they may be weighed against the effects of any delay and the objectives of the Rules.”

The majority also observed (at [112] – [113]) that:

“A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

In the past it has been left largely to the parties to prepare for trial and to seek the court’s assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.”

Similar views were expressed by the Chief Justice (at [35]) and by Heydon J (at [154] – [156]).

A unanimous High Court in turn summarised the holding in *Aon* in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303, in a case where there

³ As to amendment applications, see also *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2011] NSWSC 1423; *Kelly v Mina* [2014] NSWCA 9; *Tamaya Resources Ltd v Deloitte Touche Tohmatsu* [2016] FCAFC 2; (2016) 332 ALR 199; *Re ACN 092 745 330 Pty Ltd* [2018] NSWSC 1185.

had been inadvertent disclosure of privileged documents. The High Court there observed (at [51]) that:

“In *Aon Risk Services Australia Ltd v Australian National University*, it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants. ... the [*Aon*] decision confirmed as correct an approach to interlocutory proceedings which has regard to the wider objects of the administration of justice.”

The Court also noted (at [56]-[57]) that:

“The evident intention and the expectation of the C[ivil] P[rocedure] A[ct] is that the court use these broad powers to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose.

That purpose may require a more robust and proactive approach on the part of the courts. Unduly technical and costly disputes about non-essential issues are clearly to be avoided. However, the powers of the court are not at large and are not to be exercised according to a judge’s individualistic idea of what is fair in a given circumstance. Rather, the dictates of justice referred to in s 58 require that in determining what directions or orders to make in the conduct of the proceedings, regard is to be had in the first place to how the overriding purpose of the C[ivil] P[rocedure] A[ct] can be furthered, together with other relevant matters, including those referred to in s 58(2). The focus is upon facilitating a just, quick and cheap resolution of the real issues in the proceedings, although not at all costs. The terms of the CPA assume that its purpose, to a large extent, will coincide with the dictates of justice.”

In *UBS AG v Tyne (as trustee of the Argot Trust)* [2018] HCA 45; (2018) 360 ALR 184, in dealing with a question of overlapping successive proceedings, a plurality of the High Court again referred to *Aon* and noted (at [38]) that its effect was that:

“The timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute. These wider interests are reflected in s 37M(2) of the F[ederal] C[ourt] A[ct] [corresponding to s 56 of the Civil Procedure Act]. As the joint reasons in *Aon* explain, the “just resolution” of a dispute is to be understood in light of the purposes and objectives of provisions such as s 37M of the F[ederal] C[ourt] A[ct]. Integral to a “just resolution” is the minimisation of delay and expense. These considerations inform the rejection in *Aon* of the claimed “right” of a party to amend its pleading at a late stage in the litigation in order to raise an arguable claim. The point is made that a party has a right to bring proceedings but that choices are made respecting what claims are made and how they are framed. Their Honours speak of the just resolution of the dispute

in terms of the parties having a sufficient opportunity to identify the issues that they seek to agitate.”

There are, of course, advantages and disadvantages of active case management. Regular directions hearings or alternative forms of active case management, likely reduce the time a matter takes to reach trial but also increases costs. Efforts to identify the real issues in dispute may lead costs to be incurred at an earlier point.⁴ It is sometimes suggested that these costs will be wasted, particularly if the matter settles, although a counter-view is that a reduction in the time taken to reach trial is also likely to accelerate any settlement.⁵ Judges need to be conscious of the risk that too close an involvement in a case, or too decisive an approach at the case management stage, may give rise to issues as to the appearance of bias or pre-judgment, although Australian appellate courts have tended to recognise the legitimacy of judges forming and expressing views, at least in the course of a trial, and that principle should extend to steps taken in case management.⁶

The structure of court lists

Some Australian courts, including the Federal Court of Australia, adopt a docket system, albeit modified in the Federal Court by maintaining panels of Judges with specialist expertise to whom matters within that expertise are typically allocated. Other courts, including the Supreme Court of New South Wales, will adopt centralised case management for general lists, and manage cases in particular fields (for example, technology, construction and commercial matters, corporations matters and real property matters) within specialist lists. Each of the specialist lists in the Supreme Court of New South Wales centralises case management within one judge, although hearings will then be allocated between several judges sitting in the list. Ideally, this will tend to promote consistency and predictability in case management, while maximising the efficient use of judges’ time, because it is then possible to reallocate matters if there is a settlement, avoiding loss of sitting time which settlements may create within a docket system.

Courts may undertake continued management of matters by regular directions lists at which numerous matters are listed (as is the practice both in general lists and in the specialist lists in the Supreme Court of New South Wales) or by fixing directions hearings before a Judge hearing a particular case (as is the practice in the Federal Court of Australia, for directions hearings before a docket judge, and also occurs in the Supreme Court of New South Wales where a particular Judge is case managing a matter). Longer directions lists, which are certainly seen in the commercial and corporations lists in this court, can lead parties to incur the costs of “waiting time” of legal representatives, who are waiting in court for some time before their matter is called. This is mitigated, to some extent, by the fact that legal representatives may often appear in several matters within a list and by the practice of allocating matters

⁴ *Law Council of Australia/Federal Court of Australia Case Management Handbook*, [3.12]

⁵ *Law Council of Australia/Federal Court of Australia Case Management Handbook*, [3.2]

⁶ *Kimber v The Owners Strata Plan No 482 16 (No 2)* [2018] FCAFC 181 at [14]; *Palmer v Parbery* [2018] QCA 302.

to specified time periods in longer lists. There is a real question why so many matters are dealt with by practitioners attending in the longer directions lists and handing up consent orders, where judges would generally make consent orders submitted to chambers if asked to do so, typically up to the business day before the list. This may reflect the fact that these lists provide a scheduled time and place for practitioners to focus on the directions to be made, with a sense of urgency arising from the impending mention of the matter before the judge, and without other distractions.

The Federal Court of Australia, or at least some of its Judges, also undertake case management conferences, which will cover matters that would be undertaken in a directions hearing, but takes place in a conference room rather than a courtroom, although still adopting a relatively formal structure.

The Supreme Court of New South Wales has now also adopted an “on-line court” for directions by Registrars, at least in some matters, generally where orders can be made by consent or involve straightforward timetabling orders or for referral of a matter to a list judge for a more substantive dispute. The use of the “on-line court” in this way has the obvious advantage of avoiding the need for physical attendance of legal practitioners at court, or waiting in court. This is a real saving where some practitioners will practice interstate or in areas that are considerable distances from the court, and where the time spent in travelling to and from court would be substantial.

Disclosure

The process of disclosure is described in the *Law Council of Australia/Federal Court of Australia Case Management Handbook* [7.2] as:

“An invasive process which requires the compulsory identification and, subject to claims of privilege, disclosure of documents (including, in appropriate cases, information concerning certain documents no longer in the possession of a party and a description of documents in respect of which privilege is claimed) relevant to matters in dispute.”

The authors there note the objective of discovery is to facilitate proof of facts in issue, avoid ambush or surprise and associated delay and wasted costs, and has a secondary purpose of permitting the parties to assess the strengths and weaknesses of their respective cases prior to a trial, and thereby assists the settlement of claims. The authors also recognise the concern that discovery has led to excessive burdens on the parties and excessive costs, and point particularly to difficulties with discovery of emails and electronic documents held on recovery backup tapes. Mr Kenneth Hayne, writing after his retirement as a judge of the High Court, identifies the same concern in stronger terms:

“Not all increases in delay and cost were occasioned by new procedures. Some considerable increases in delay and cost were brought about by the way in which long-standing procedures were applied. In particular, discovery of documents took on a new and frighteningly large importance as the volume of documents to be considered in relation to a proceeding grew ... a procedure designed when the most assiduous record keeper might have one

or two files of paper relating to a matter in dispute with another, was being applied in a world of record and information keeping that had fundamentally changed.”⁷

Although acknowledging that steps to restrict discovery have already been taken, Mr Hayne suggests that “[i]t is time to finish the work started in some jurisdictions and completely abandon general discovery of documents.”⁸

Various steps have been taken in United States, English and Australian courts to address the costs of discovery. These have included steps to address the basis on which documents are treated as discoverable, including a retreat from the test that the documents “relate” to a matter in issue, in the sense described in *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63. Both the Supreme Court of New South Wales and the Federal Court of Australia have now taken more radical steps by moving away from any expectation of discovery as of right in commercial, corporate and equity matters, and generally deferring any discovery until after evidence is filed.

This approach is set out in Practice Note SC Eq 11, “Disclosure in the Equity Division” which applies to proceedings in the Equity Division generally, including the specialist commercial and corporations lists. Under this Practice Note, the court will not make an order for the disclosure of documents until after the parties have served evidence, unless there are exceptional circumstances necessitating disclosure and it is necessary for the resolution of the real issues in dispute in the proceedings. An application for an order for disclosure, even if consented to by the parties, must be supported by an affidavit setting out the reason why disclosure is necessary for the resolution of the real issues in dispute, classes of documents as to which disclosure is sought, and the likely cost of such disclosure. The court may also make an order limiting the recoverable costs in respect of disclosure.

In *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [66], Bergin CJ in Eq observed that the Practice Note contemplated that:

“The ambit of that disclosure is confined to the real issues between the parties as defined by not only the pleadings, but also the evidence. This process will require the proofing of witnesses at a very early stage of the litigation with the need for forensic judgments to be made as to the existence of admissible evidence in support of the respective claims. This will of course require the client and/or witnesses to provide the relevant documents to the lawyers in support of the particular claims in their evidence. However it is envisaged that the process will engender a far more disciplined analysis of the need for disclosure by reference to those real issues, compared to the carte blanche gathering in of every document the respective clients have generated in their lengthy relationship for “review” by teams of lawyers and students in the absence of any knowledge of the proposed evidence.”

⁷ K Hayne, “The Australian Judicial System: Causes for Dissatisfaction” (2018) 92 *ALJ* 32, 35.

⁸ Hayne, note 7, 45.

In *Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd* [2014] NSWSC 1326 at [13]-[14], Brereton J (as his Honour then was) similarly noted that the intent of the Practice Note was to avoid unnecessary and burdensome discovery and also to avoid parties constructing their affidavit evidence around the discovered documents, by requiring them to first commit their case to affidavits. His Honour also observed that:

“[T]he Practice Note provides guidance as to the practice of the Court in respect of disclosure. It is not a statute, nor is it a rule of the Court. It guides, but does not govern, the disclosure process. It must yield to the requirements of the individual case, although the importance of its purpose means that it will be in a rare case that the Court will depart from its guidance.”

Exceptional circumstances warranting early disclosure may be made out if the relevant facts are solely in the knowledge of the party from which disclosure is sought, and the court will seek to ensure that it does not deprive a party of early access to documents that are essential to the presentation of its case, if the interests of justice require it.⁹ The Practice Note has also been applied by analogy to extensive notices to produce, which are functionally equivalent to applications for discovery.¹⁰

This regime is largely regarded by parties and by Judges as successful. It leaves open a possibility that some cases may then be determined on an incomplete factual basis, and potentially decided differently from the position if wider disclosure has been given. The cases where that will ultimately occur may be very rare, and this may be the necessary price for a reduction in the costs of litigation and a consequential improvement in the community's access to justice.

Mediation

There is a longstanding and strong commitment to the use of alternative dispute resolution techniques, particularly mediation,¹¹ in the Australian courts. Many matters, particularly those of significant length, will be referred to mediation before going to trial. Either a registrar or a private mediator retained by the parties may be appointed as mediator. The parties are under a statutory duty to participate in the mediation in good faith.

⁹ *Bauen Constructions Pty Limited v New South Wales Land and Housing Corporation* [2014] NSWSC 684; *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue (No 2)* [2013] NSWSC 89 at [19]; *RSA (Moorvale Station) Pty Ltd v VDM CCE Pty Ltd* [2013] NSWSC 534

¹⁰ *Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502; see also *Re Mempoll Pty Ltd, Anakin Pty Ltd & Gold Kings (Australia) Pty Ltd* [2012] NSWSC 1057; *Re North Coast Transit Pty Ltd* [2013] NSWSC 1912; *Noun v Pavey* [2014] NSWSC 429; *Rhinehart v Rhinehart* [2015] NSWSC 205; *Skyscanner Ltd v Hotels Combined Pty Ltd* [2016] NSWSC 183 at [64]ff.

¹¹ Part 4 of the *Civil Procedure Act 2005* (NSW) provides for mediation. That term is defined in *Civil Procedure Act* s 25 as a “structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute”.

The court will typically be conscious of the question when a mediation is most likely to be effective, for example, whether there would be a cost advantage in ordering mediation before the costs of the proceedings have escalated, or whether it is preferable that any mediation take place after affidavits have been filed so that the parties have a better understanding of the evidence on which they respectively rely. The court has power to order mediation, even over the opposition of a party to the proceedings.¹²

Form of evidence

The Australian courts, and judges within Australian courts, may adopt somewhat different approaches to the form in which evidence is led. In commercial proceedings in the Supreme Court of New South Wales, evidence will ordinarily be given by witness statement, which will be adopted by the witness on oath or affirmation at the point of giving evidence or by affidavit. The approach of legal representatives to that process is also criticised, likely too harshly, by Mr Hayne:

“The preparation of witness statements was turned into a prolonged and expensive exercise in legal drafting of pleading and argument, rather than producing a simple and accurate record of what a witness would say in answer to non-leading questions about matters and events of which that witness could speak from personal knowledge.”¹³

At least historically, the Federal Court of Australia has been more inclined to require oral evidence as to disputed conversations. That approach may mitigate the risk that witness statements or affidavits, prepared with legal advisers’ assistance, can overstate a witness’s recollection of events; on the other hand oral evidence can equally so, at least if a witness has done substantial work in preparing to give evidence. Evidence led orally is likely to be more time consuming than evidence led by affidavit or witness statements.

Expert evidence

There have also been concerns as to the use and costs of expert evidence, described by Mr Hayne as follows, possibly also in too strong terms:

“Because the calling of expert evidence has not often been tightly controlled by the courts, parties have spent much time and money seeking the most favourable expert evidence they can find. Or, putting the matter more bluntly, they have sought the best opinion that money can buy. Experts called by opposite parties would agree on many matters. But the points of agreement and difference between them were often lost in the detailed answers each gave to the particular questions framed by the retaining party in whatever way that party thought forensically advantageous. And many parties felt a need to adduce expert evidence in support of their case, regardless of whether the matters about which the expert would speak were founded on any study of an

¹² *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 427; *Higgins v Higgins* [2002] NSWSC 455.

¹³ Hayne, note 7, 35.

organised body of knowledge or were relevant to the issues between the parties. Too often, expert evidence was used as a tool of argument.”¹⁴

Mr Hayne identifies a solution, which overlaps with steps already taken, that:

“The courts must take control of whether and when expert evidence may be adduced. The courts must decide who may be retained as an expert, what questions will be asked of the expert and what material is to be supplied to the expert. If the court appoints the expert, why is more than one expert witness needed? Of course the parties must have their opportunity to make submissions about all of those questions. But the courts can no longer permit the parties to control expert evidence.”¹⁵

Australian courts have moved to impose limits on the use of expert evidence, typically requiring leave before expert evidence is led. There is some use of single experts, appointed jointly by the parties, although less use of expert witnesses appointed by the courts. Rule 31.37 of the Uniform Civil Procedure Rules (NSW) provides for an order for a single expert to be engaged jointly by the parties, and contemplates that the parties will agree on written instructions to be provided to the expert concerning the issues to be addressed by the expert and the facts, and assumptions of fact, on which the report is to be based. There may be less practical advantage in an order for a single expert where parties are generally uncooperative in the conduct of the proceedings, or where they have radically different views as to the relevant facts or the issues arising from them. In those situations, an order for a single expert is likely to be the precursor to further disputes as to the scope of a single expert’s report and as to the factual assumptions which he or she is to be asked to make. Where a single expert is used, the courts may still permit the parties to lead further expert evidence, depending on the scope of the matters in issue and questions of proportionality, and would likely permit further evidence if “otherwise the party affected would have a legitimate sense of grievance that it had not been permitted to advance its case at trial”.¹⁶

Rule 31.46 allows the court (as distinct from the parties) to direct an expert to inquire into and produce a report on any particular issues arising in the proceedings, and r 31.47 allows the court to give directions to the expert as to the issues to be dealt with and the facts and assumptions to be relied on in forming an opinion. Obviously, it will be difficult for the court to give such directions if those matters depend on findings which could only be reached at a fully contested hearing. Rule 31.52 provides that, without the court’s leave, the parties may not adduce further expert evidence as to an issue addressed by the court-appointed expert. The evidence of a court-appointed expert is not treated as having greater weight than that of any expert evidence led by the parties, if such evidence is permitted.¹⁷

¹⁴ Hayne, note 7, 35.

¹⁵ Hayne, note 7, 46.

¹⁶ *Tomko v Tomko* [2007] NSWSC 1486 at [9]; *Wu v Statewide Developments Pty Ltd* [2009] NSWSC 587 at [17]; *Coyne v Calabro* [2009] NSWSC 1023; *Conias Hotels Pty Ltd v Murphy* [2012] QSC 297.

¹⁷ *Huntsman v Qenos* [2005] NSWSC 494 at [68].

Orders are invariably made for expert witnesses to confer and to identify those issues as to which they agree, those issues as to which they disagree, and the areas of their disagreement. Rule 31.26 of the Uniform Civil Procedure Rules provides for a joint report prepared after a meeting of the experts, identifying the issues as to which they agree or differ and the reasons for any disagreement. It is now common practice for expert evidence to be called after both parties have given lay evidence, which may assist in refining the assumptions to be made by experts, and that practice is generally appropriate for concurrent evidence.

There is a common, but not universal, practice of leading concurrent evidence of expert witnesses, so that several expert witnesses will give evidence together, typically issue by issue, with the process moderated by the trial judge. The process for concurrent expert evidence has been described as:

“[E]ssentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavour to identify the issues and arrive where possible at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.”¹⁸

The concurrent evidence process reduces, but does not exclude, the opportunity for cross-examination by Counsel. There is a reasonably widely held view that concurrent evidence assists in promoting a constructive engagement by experts with the evidence of other experts, and reduces the time spent on expert evidence at the hearing.

Non-compliance with timetables and late evidence

Australian courts regularly make timetabling orders, for example for filing and service of defences, witness statements and affidavit evidence, which are equally regularly breached. At least in some of the specialist lists, the Supreme Court of New South Wales will make qualified guillotine orders, which exclude reliance on evidence filed after a particular date without leave. Late evidence is also addressed by provisions in the *Civil Procedure Act* and the Uniform Civil Procedure Rules (NSW) (“UCPR”). First, s 61(3) of the *Civil Procedure Act* provides that, if a party to whom a direction has been given fails to comply with it, the court may disallow or reject any evidence that party has adduced or sought to adduce. Second, UCPR r 10.2 provides that a party intending to use an affidavit that has not been filed must serve it a reasonable time before the occasion for using it arises, and a party who fails to serve an affidavit as required by that rule must not use it except by the court's leave. The court's power to disallow or reject an affidavit under Civil Procedure Act s 61(3) and to grant or withhold leave to read it under UCPR r 10.2 must be

¹⁸ P McClellan, “New Method with Experts – Concurrent Evidence” (2010) 3 *J of Court Innovation* 259, and, as to the adoption of that approach in the United Kingdom, Lord Dyson, “The Jackson reforms and civil justice” (2015) 39 *Australian Bar Review* 215 at 217.

exercised in accordance with the obligations imposed by ss 56–60 of the *Civil Procedure Act* and specifically the overriding purpose and the objectives of case management.

Whether the court should permit late evidence involves weighing, on the one hand, of the claims of individualised justice in a particular matter, having regard to the detriment to the party in breach if evidence is excluded, and the detriment to the innocent party if it is admitted. There may be a question as to the weight which ought to be given to the demands of integrity in case management orders generally, less the utility of qualified guillotine orders is lost, if parties believe leave for late evidence is always available. The court may well decline leave to read a later affidavit where doing so would cause prejudice to the other party, particularly if that prejudice cannot readily be accommodated by an order for costs or an adjournment; for example where allowing that affidavit to be read would require an adjournment of the final hearing where a matter involves any degree of urgency.¹⁹

More rarely, absolute guillotine orders may be made, which provide for dismissal of proceedings if orders are not complied with. The necessity to exercise a discretion in dealing with issues of delay may make it more difficult for parties to predict the outcome of those applications. Where that is the case, matters are less likely to be resolved by consent and more likely to result in contested applications.

Time limits in trials

Australian judges might well now consider that it can be appropriate for the court to seek to confine a case that the parties wished to run widely, in the interests of the efficient and timely conduct of the proceedings or the community.²⁰ In such a case, the interests of the parties and the interests of the community may have much in common, in any event, because it will not be in the parties' interests, nor the community's interests, for a matter to expand to excessive size or length, although it may be difficult to determine what is "excessive" in any particular case. There will be some or many cases where a fair trial is more likely to be promoted by confining the issues, the time taken, or the costs incurred, or all three, even if the parties do not themselves take that view.

A judge in the Supreme Court of New South Wales has power under s 62 of the *Civil Procedure Act* to set time limits, although that power is not commonly used unless issues have arisen as to the way in which legal representatives are conducting the hearing. There is limited use, at least in the Supreme Court of New South Wales, of a "stop watch" approach to trials, although this may be more common in appeals in intermediate Courts of Appeal and is used in applications for leave to appeal to the High Court of Australia.

Self-representation

¹⁹ *Khan v Khan; Islamic Association Western Suburbs Sydney Inc* [2015] NSWSC 1993 at [20].

²⁰ Contrast *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1329 at [67] – [68].

All Australian courts, like courts in the United Kingdom, are dealing with increasing number of cases involving self-represented litigants and, occasionally, self-represented litigants who also require the assistance of an interpreter. Some litigants are self-represented because of reductions in the availability of legal aid, and financial constraints upon parties' ability to retain legal representatives, although a minority may choose to be self-represented, because they wish to raise issues or run a case in a way that a legal representative would not consider that he or she could reasonably or properly do.

The Australian case law indicates that trial judges must provide assistance to self-represented litigants, within the limits of a judicial role. In *Neil v Nott* [1994] HCA 23; (1994) 68 ALJR 509, the High Court noted at [5] that:

“A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy.”

In *Uszok v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31 at [149], Beazley JA (as her Honour then was) noted that a trial judge will frequently have to take affirmative steps to ensure that it understands the issues presented to it and that the applicant understands the nature of and limitations on its powers. Those observations were cited with approval in *Cicek v Estate of the late Mark Solomon* [2014] NSWCA 278 at [127], although Ward JA also there observed (at [130]) that a trial judge's

“duty to provide information in order to attempt to overcome the procedural disadvantages faced by a self-represented litigant is not a duty to run the case for him or her.”

The case law also recognises that, while courts cannot prefer the interests of self-represented litigants over those who are legally represented, they may take into account, in case management, the disparity which can exist between the resources available to a well-funded litigant and a self-represented litigant.²¹

There are limits on the extent to which a corporation may be represented by a director in proceedings in the Supreme Court of New South Wales, although the court has power to dispense with those limits.²² There is some flexibility of approach as to whether the court will dispense with that limitation to permit a director, officer or employee of the Corporation to conduct such proceedings. There is little appetite to dispense with that rule to permit third parties who are

²¹ *Reisner v Bratt* [2004] NSWCA 22 at [4]; *Malouf v Malouf* [2006] NSWCA 83 at [94]; *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181 at [42]; *Kelly v Westpac Banking Corp* [2014] NSWCA 348 at [42].

²² See, for example, *JSBG Developments Pty Ltd v Kozlowski* [2009] NSWSC 1128; (2009) 75 NSWLR 745; *DB Mahaffy & Associates Pty Ltd v Mahaffy* [2011] NSWSC 673; *Re DB Mahaffy & Associates Pty Ltd* [2012] NSWSC 776; *Tanamerah Estates Pty Ltd (as trustee for Alexander Superannuation Fund) v Tibra Capital Pty Ltd* [2013] NSWCA 266; *Marlinspike Debt Acquisitions Pty Ltd v Undone Pty Ltd (No 2)* [2018] NSWSC 72; *Business Innovation Pty Ltd v Maddison Morgan and Bailey Pty Ltd* [2018] NSWSC 1523.

not qualified as legal representatives to conduct proceedings on a corporation's behalf.

Electronic court rooms and on-line courts

Mechanisms for electronic filing of court documents are now common in Australian courts. As I noted above, the Supreme Court of New South Wales has now also adopted an "on-line court" for directions by Registrars, at least in some matters. Australian courts often use videolinks in criminal matters, as an alternative to physical attendance of those in custody, at least in bail and interlocutory hearings.

Most Australian courts will use electronic court books and real time transcript in at least larger cases, although this tends to be somewhat costly for the parties. Commentators have suggested the use of real time transcript and document display technologies significantly reduces the length of hearings.²³ Where the parties largely fund the costs of electronic court books and real time transcript, these cannot readily be used in proceedings where one or more parties is less sophisticated or less well-resourced, unless the other parties are prepared to (or could properly be ordered to) bear the costs of such system. It is probably fair to observe that electronic court books can tend to encourage the inclusion of too much material in court books. Where they are adopted, it is particularly important for the parties and the trial judge to be rigorous in keeping track of the documents tendered from the electronic court book.

The most ambitious developments in this area are on-line adjudication in Canada and in the United Kingdom, in the latter case reflecting Lord Justice Briggs' *Civil Courts Structure Reports*. Lord Justice Briggs there recommended a three-tiered on-line court, initially to deal with claims up to £25,000, which would have an initial automated stage to assist claimants in articulating their claims. A second alternative dispute resolution stage would involve telephone, on-line or face-to-face mediation or early neutral evaluation, which would be an essential stage in the process. A third determination stage would involve a telephone, video or conventional hearing or possibly a determination of the matter without a hearing.²⁴

The United Kingdom reforms are largely directed to addressing issues of access to justice, which also exist in Australia, where a significant proportion of Australians have limited or no access to justice, and where there are also significant and increasing constraints on the availability of legal aid.²⁵ There is

²³ R Susskind, *Tomorrow's Lawyers: An Introduction to your Future*, 2nd ed, p 108.

²⁴ Lord Justice Briggs, *Civil Courts Structure Review*, Interim Report (2015), Final Report (2016); M Legg, "The future of dispute resolution: Online ADR and online courts" (2016) 27 *ADRJ* 227; M Ahmed, "A Critical View of Stage 1 of the On Line Court" (2017) 36 *CJQ* 12; S Rodrick, "Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings" (2017) 26 *JJA* 79 at 94-96; M Ahmed, "Expanding the Scope of Dispute Resolution and Access to Justice" (2019) 38 *CJQ* 1; R Assy, "Briggs' On Line Court and the need for a Paradigm Shift" (2017) 36 *CJQ* 70.

²⁵ Law Council of Australia, *Justice Project Final Report*, August 2018; TF Bathurst, "The Role of the Commercial Bar in the mid-21st Century", 16 November 2018, [10]

a question as to how the changes made by the on-line court, if fully implemented, will affect the manner in which parties approach the formation of claims and the giving of evidence in court, absent the formality of a courtroom, and whether litigants will believe they have had their “day in court” from the process. On the other hand, any concerns in these areas may be the price that has to be paid for improving access to justice, in circumstances that it would not otherwise be available to many. Professor Susskind, long a supporter of online dispute resolution takes an optimistic view, recognising the question whether the displacement of the courtroom will have an impact on public perceptions of justice, but suggesting that on-line courts may “become symbolic of a new, more inclusive era for dispute resolution” and that:

“Indeed, for tomorrow’s clients, virtual hearings, on-line courts and ODR [on-line dispute resolution] together may improve access to justice and offer routes to dispute resolution where none would otherwise be available.”

Susskind also observes, rightly, that on-line courts and on-line dispute resolution should not be compared with “some ideal and yet simply unaffordable convention court service”, where that conventional hearing is increasingly unavailable to most of the population.²⁶

These developments obviously raise significant implementation challenges. There is, as far as I am aware, no present movement towards such an ambitious approach in Australia.

²⁶ R Susskind, *Tomorrow’s Lawyers: An Introduction to your Future*, p 120.