



Chapter 8
**Improving Remedies in
Class Actions**



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The importance of access to justice, as a fundamental human right which ought to be available to all, is clearly a new consideration that stimulates fresh thinking about representative or 'grouped' proceedings.¹

As a procedural device, class actions excite an inordinately passionate public debate, and correspondingly, evoke quite disparate views as to their efficacy, utility and desirability. At one end of the spectrum, the class action has been variously described as a 'Frankenstein monster' and a 'rather loony proposal'; at the other end, it has been endorsed on the basis that it is 'one of the most significant procedural developments of the century'.²

[Australian class action legislation] was intended to provide a mechanism that promotes efficiency through aggregation of claims, enabling the pursuit of legitimate claims by people who might not otherwise be able to do so. Notwithstanding this general agreement, some decisions are in effect inconsistent with the intent of the legislation. These decisions have had negative consequences for class action applicants and have hampered the development of a healthy class action regime'.³

1. INTRODUCTION AND SUMMARY

In its initial Consultation Paper in October 2006 the commission sought views on whether the law relating to representative or class actions needs reform. The submissions received are summarised at the end of this chapter. Views were also sought on whether there is a need for reform in the funding of representative or class actions. The submissions received are summarised in Chapter 10.

On 28 June 2007, the commission published an exposure draft inviting submissions on class action reform proposals. Exposure Draft 1 set out four draft recommendations in relation to statutory class actions.

Two of the draft proposals are technical and are intended to solve practical problems arising out of judicial interpretations of the class action provisions in Part 4A of the *Supreme Court Act 1986* and Part IVA of the *Federal Court of Australia Act 1976* (Cth). The issues involve: (a) whether the class action procedure can be used for a group comprising only those who consent to the pursuit of claims on their behalf; and (b) whether it is necessary in cases involving multiple defendants for all class members to have individual claims against each of the defendants. The commission's recommendations are that limited classes should be permissible and that all class members should not be required to have claims against all defendants, provided that all class members have a claim against at least one defendant. Several recent judgments in the Federal Court, referred to below, have concluded that the statutory provisions should be interpreted in a way consistent with the commission's proposals.

The third proposal involves giving the court power to grant *cy-près* type remedies in certain circumstances, including where damages have not been claimed by class members following class action settlements or judgments. This may involve a significant change in the law, depending on the interpretation of one of the existing statutory class action provisions and the presently available remedies in the case of 'unjust enrichment'.

The fourth proposal involves the establishment of a new funding mechanism, with benefits for both plaintiffs and defendants in statutory class actions. The operation of the fund would not be limited to class actions. It could provide assistance in actions brought under the representative action rule or in any other civil proceeding. However, the proposed fund is likely to be in demand in class actions and likely to derive substantial revenue from these proceedings. The issue of funding is examined in Chapter 10.

After reviewing the submissions received the commission has recommended that certain reforms should be implemented. This chapter deals with the recommendations about statutory class action procedures and remedies. Chapter 10 deals with the funding of class actions and includes the commission's recommendations for the establishment of a new funding body.

1 *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386: [2006] HCA 41 [145] (Kirby J).

2 Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 3–4 (footnotes omitted).

3 Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399.



2. TECHNICAL AMENDMENTS TO THE LAW

Since the enactment of the Commonwealth and Victorian class action laws there has been considerable legal dispute and interlocutory appeals (at both federal and state levels) about the interpretation of key provisions.

This legal controversy involves, in part: (a) whether all class members are required to have individual claims against *all* defendants in cases where there are multiple defendants; and (b) whether a class action can be brought where the class is limited to identified individuals who have consented to the pursuit of claims on their behalf.

Judicial interpretations in these two areas have led to controversy between judges, academic criticism and ongoing interlocutory battles and appeals. These interpretations have added substantially to costs and delays in many class action proceedings. In other instances, cases have not been able to proceed because of non-compliance with procedural 'requirements'.⁴

Evidence suggests that the class action provisions are no longer being used by some plaintiffs and litigation funders. Instead they have sought to use the representative action rule, to circumvent some of the problems arising out of conflicting interpretations of the class action provisions. In some cases judicial rulings have resulted in a substantial increase in the size of the class on whose behalf the proceedings are maintained.⁵

The commission's recommendations are intended to solve perceived problems by clarifying the law. The most recent judicial interpretations of these key statutory provisions indicate that the proposals would not change the law. There is a clear need for certainty to avoid ongoing costly and protracted disputation that will otherwise continue until there is either reform of the law or determination by the High Court.

2.1 CLASS ACTIONS LIMITED TO PERSONS WHO CONSENT TO PROCEEDINGS

In Exposure Draft 1 the commission proposed there should be no legal impediment to the use of the class action procedure by identified persons or entities who are aggregated together or who consent to the pursuit of claims on their behalf.

There is at present a 'problem', arising out of the decision of the Federal Court in *Dorajay Pty Ltd v Aristocrat Leisure Ltd*⁶ and the corresponding decision of the Victorian Supreme Court in *Rod Investments (Vic) Pty Ltd v Adam Clark*.⁷

There are several dimensions to this problem. These are discussed in detail in a number of articles.⁸ Recently, Justice Finkelstein of the Federal Court took a different view from that of Justice Stone of the Federal Court and Justice Hansen of the Supreme Court in the decisions mentioned above.⁹ Justice Finkelstein's decision has been affirmed by the Full Federal Court.¹⁰

In *P Dawson Nominees Pty Ltd v Multiplex Limited*¹¹ the Federal Court dealt with an application, under section 33N of the *Federal Court of Australia Act 1976* (Cth), for an order that the action no longer proceed as a class action. In part, the application arose because the group members were limited to persons who had agreed to enter into litigation funding agreements with a commercial litigation funder and who had retained the one firm of solicitors. As Justice Finkelstein noted, the statutory class action provisions provide that where the threshold criteria are satisfied a class action may be commenced by one or more class members 'as representing some or all of them'.¹² He then observed that the Federal Court statutory class action regime 'allows a subset of all possible plaintiffs to constitute a group and there is no express restriction on how this subset is defined'.¹³ The matter was permitted to proceed, with Justice Finkelstein concluding that the law allowed the limitation of the group to those who had individually consented to the conduct of proceedings on their behalf.¹⁴

Justice Finkelstein noted that there were 'economically rational' reasons to limit the group on whose behalf the proceedings are brought.¹⁵ Such a limitation provides each group member with an 'incentive to contribute'; keeps the costs and the number of group members down; and makes it easier to settle the proceedings. Moreover, there is a 'greater prospect of [each individual group member] obtaining a higher percentage' of any settlement and the defendant benefits as a result of a smaller number of claimants and a 'smaller pay out'.¹⁶ Justice Finkelstein concluded that although the statutory class action regime facilitates the conduct of actions on behalf of persons without their

consent, the provisions do not preclude actions on behalf of those who do consent.¹⁷ He found nothing 'inappropriate', within the meaning of section 33N(1)(d) of the Federal Court of Australia Act, in the claims being pursued as a class action.¹⁸

This decision was recently upheld by the Full Federal Court, although Justices French, Lindgren and Jacobson did not agree with all aspects of Justice Finkelstein's reasoning.¹⁹

Justice French agreed with the reasons given by Justice Jacobson, and noted that the court's discretion under section 33N(1)(d) to order that proceedings no longer continue as a class action where it was satisfied that it was 'otherwise inappropriate' for the matter to proceed was not a 'charter to introduce a quasi legislative rule effectively excluding from representative proceedings groups defined by reference to accession to an agreement with a litigation funder'.²⁰

Justice Lindgren also generally agreed with Justice Jacobson but made a number of additional observations. As he noted:

*The concluding words of s 33C(1) 'as representing some or all of them' [show] positively an intention that there was to be no right of complaint merely because some of the persons falling within para (a), (b) and (c) of s 33C(1) had been omitted from the group as defined.*²¹

Contrary to the position of Justice Stone in *Dorajay*, Justice Lindgren held that a criterion that in order to be a group member a person must have entered into a funding agreement with a particular funder and retained a particular firm of solicitors was permitted under Part IVA.²² However, as Justices Lindgren and Jacobson noted, the facts of the present case were different, and thus distinguishable, from those in *Dorajay* in that in the latter case persons could become group members after the commencement of the proceedings (in effect, opt in) by becoming clients and agreeing to the litigation funding arrangements.

The principal issues in the appeals were the proper construction and operation of sections 33C(1) and 33N(1) of the *Federal Court of Australia Act 1976* and the relationship between those sections. The appeals also raised for consideration the definition and composition of the group and in particular whether a group defined by and limited to those who had agreed to enter into a litigation funding arrangement was contrary to the provisions of Part IVA.

Justice Jacobson held that in considering whether it is 'otherwise inappropriate' to allow the matter to proceed as a class action, the court may look to the purpose served by continuation of the proceedings, and may consider the way in which the group is defined.²³

The fact that the legislation expressly permits a class action to be brought on behalf of 'some or all' of the potential class members was said to permit a representative party to commence a proceeding on behalf of less than all of the

4 Several such cases are referred to in Peter Cashman, *Class Action Law and Practice* (2007) ch 4.

5 See *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 ('Dorajay') and *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449.

6 (2005) 147 FCR 394 (Stone J).

7 [2005] VSC 449 (Hansen J).

8 See, eg, Vince Morabito, 'Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29(1) *Sydney Law Review* 5; Peter Cashman, 'Class actions on behalf of clients: Is this permissible?' (2006) 80 *Australian Law Journal* 738; Bernard Murphy and Camille Cameron 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399; Peter Cashman, *Class Action Law and Practice* (2007) 197–223.

9 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061 ('Dawson Nominees').

10 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007) (French, Lindgren and Jacobson JJ).

11 [2007] FCA 1061.

12 *Federal Court of Australia Act 1976* (Cth) s 33C(1). Section 33C(1) of the *Supreme Court Act 1986* is in identical terms.

13 *Dawson Nominees* [2007] FCA 1061 [17].

14 *Dawson Nominees* [2007] FCA 1061 [48]–[51].

15 *Dawson Nominees* [2007] FCA 1061 [48].

16 *Dawson Nominees* [2007] FCA 1061 [48].

17 *Dawson Nominees* [2007] FCA 1061 [49].

18 *Dawson Nominees Pty Ltd* [2007] FCA 1061 [53].

19 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007) (French, Lindgren and Jacobson JJ) ('Multiplex').

20 *Multiplex* [2007] FCAFC 200 (21 December 2007) [1].

21 *Multiplex* [2007] FCAFC 200 (21 December 2007) [10].

22 *Multiplex* [2007] FCAFC 200 (21 December 2007) [28].

23 *Multiplex* [2007] FCAFC 200 (21 December 2007) [107].



potential group members.²⁴ According to Justice Jacobson it was not for the court to determine questions of appropriateness or inefficiency by reference to considerations other than those expressed or apparent in Part IVA.²⁵

Justice Jacobson accepted that the definition of the group is one of the matters the court can consider in determining whether to allow the matter to proceed in representative form, but held that this issue could not be determined by the mere fact that the group did not include the entire class of persons on whose behalf the proceedings could have been brought.²⁶ He could see nothing in the relevant provisions of Part IVA which precluded a group being defined in the manner adopted in that case.²⁷

Justice Jacobson did not consider that the funding criterion imposed an opt-in requirement; he held that, apart from the threshold requirements of section 33C(1), nothing in Part IVA precludes persons from reaching agreement, prior to the commencement of a proceeding, as to the definition of the group.²⁸

He accepted that the narrowness of the group and its self interest may provide legitimate concerns for the administration of justice, but held that Part IVA permits the commencement of such limited proceedings.²⁹

Prior to the decision of the Full Federal Court, a decision in *Jameson v Professional Investment Services Pty Ltd*³⁰ by Justice Young of the NSW Supreme Court expressed a preference for the views of Justice Stone³¹ and Justice Hansen³² over the views of Justice Finkelstein.³³ However, the decision in *Jameson* was based primarily on the judge's view that the various representations to group members lacked sufficient commonality and would require proof of reliance on the part of each group member.³⁴ Thus Justice Young's observations on the limited class issue in *Jameson* do not form part of the primary reasons in the judgment.³⁵

Class action provisions were introduced to facilitate the commencement of proceedings on behalf of a defined group, with a right of individual members to opt out of the proceedings if they do not want to be bound by the result or wish to conduct their own separate actions. However, judicial views remain divided on whether it is legally permissible or appropriate to bring a class action on behalf of a limited group of identified individuals, including where each of the class members has consented to proceedings on their behalf.

On one view of the existing law and the recommendations of the Australian Law Reform Commission (ALRC) in its report on group actions,³⁶ this is permissible (and has in fact occurred in numerous instances). However, the ongoing controversy is likely to lead to further disputes and appeals, adding to the costs and delays in class action litigation. It has resulted in a number of instances in the abandonment of the class action procedure and resort to the representative action rule in order to avoid the 'problem'. However, the attempt to use the representative action rule rather than the statutory class action provisions suffered a setback with the decision of Justice White of the NSW Supreme Court in *O'Sullivan v Challenger Managed Investments Ltd*.³⁷ Applications for leave to appeal from this decision were discontinued following amendment of the NSW representative action rule in late 2007.

The commission recommends that the position should be resolved by making it clear that the statutory class action procedure can be used by a group or groups of individuals who are aggregated together, including where such individuals consent to the pursuit of proceedings on their behalf. This is now the position for class actions in the Federal Court, given that the decision of Justice Finkelstein in *P Dawson Nominees Pty Ltd v Multiplex Limited* was recently upheld by the Full Federal Court.³⁸

The other statutory requirements for the commencement of a class action would still need to be satisfied and the court would retain its existing discretion to order, in appropriate circumstances, that the proceeding not continue in representative form.³⁹

However, as Justice Finkelstein and the Full Court of the Federal Court have held, such discretion should not be able to be exercised to prevent a class action from proceeding merely because the defined group of identified individuals is smaller than the total of the group of affected persons on whose behalf a class action could have been brought.⁴⁰

In the United States the decision of the Federal District Court to allow an opt-in class under Rule 23 of the Federal Rules of Civil Procedure was overturned on appeal.⁴¹ However, the American Law Institute has recognised the desirability, in appropriate cases, of permitting limited or opt-in classes and has proposed a model law to facilitate this.⁴²

If a defendant or potential group member is concerned about the limited extent of the group involved in the proceedings, a question arises as to whether there should be provision for the defendant or potential group member to apply for an order expanding the definition of the group. In this event, the court might order the expansion of the group, particularly where there is a prospect of multiple class actions and/or individual proceedings.

At present the court may, at any stage of a class action proceeding, give leave to amend the writ commencing the class action so as to 'alter the description of the group'.⁴³ However, this can only be done (under this provision at least) 'on application made by the plaintiff'.⁴⁴ However, as Justice Finkelstein noted in *P Dawson Nominees Pty Ltd v Multiplex Limited*, a respondent may make an application under section 33ZF to enlarge the group membership.⁴⁵

On one view, in the interests of judicial economy and given the cost consequences for the defendant(s), the entitlement of groups of individuals to group together to pursue a class action should not allow a multiplicity of individual and/or class action proceedings by persons with common, similar or related claims against the same defendant(s). However, in appropriate cases, the court might use existing powers to order any such separate proceedings be consolidated or heard together.⁴⁶

On the other hand, any provision for application by parties other than the representative party, or non-parties, to expand the group may lead to further disputation, delay and cost escalation. Under the present regime, people or entities who are already included in the class as defined at the start of litigation have a right to opt out, including for the purpose of pursuing separate proceedings.⁴⁷ This occurred in the Esso class action proceedings, for example.⁴⁸ In the current Amcor price-fixing litigation, one of the large commercial entities (Cadbury Schweppes) has opted out and initiated a separate proceeding.⁴⁹ There are no doubt many situations where different persons or entities may have good reasons to run their case separately to other similar proceedings.

Where the simultaneous conduct of a multiplicity of 'similar' proceedings is considered undesirable, the existing powers of the court and procedural rules facilitate orders staying new proceedings until existing proceedings are determined, or ordering that different proceedings be consolidated or heard together.⁵⁰

Even if express power is conferred to permit applications by defendants or prospective group members to expand the class, judges may be reluctant to require the representative party to take on the responsibility (and the associated costs) of conducting an action on behalf of a larger class than the representative party has agreed to. The representative party may not be prepared to continue to conduct the matter on this basis, particularly given the potential personal liability for the defendant's costs if the case fails. A litigation funder providing financial support for the class action proceeding may also have concerns about expansion of the group (although such concerns may abate if the funder is able to secure an entitlement to a share of the amount recovered by the larger group where the litigation is successful).

- 24 *Multiplex* [2007] FCAFC 200 (21 December 2007) [111].
- 25 *Multiplex* [2007] FCAFC 200 (21 December 2007) [118]. Reference was also made to the ordinary rules of the Australian common law of statutory interpretation as set out by the Full Federal Court in *Braverus Maritime Inc v Port Kembla Coal Terminal* (2005) 148 FCR 68 at [36].
- 26 *Multiplex* [2007] FCAFC 200 (21 December 2007) [123].
- 27 *Multiplex* [2007] FCAFC 200 (21 December 2007) [141].
- 28 *Multiplex* [2007] FCAFC 200 (21 December 2007) [194].
- 29 *Multiplex* [2007] FCAFC 200 (21 December 2007) [198].
- 30 *Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437 (12 December 2007).
- 31 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* 2005) 147 FCR 394.
- 32 *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449.
- 33 *Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061.
- 34 [2007] NSWSC 1437 (12 December 2007) [87], [123].
- 35 *Multiplex* [2007] FCAFC 200 (21 December 2007) [33].
- 36 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988). However, as noted by the Full Federal Court in *Multiplex*, references to the ALRC report may be misleading as several of the ALRC's recommendations were not implemented. This included the proposed power to stay proceedings or make other orders where a class action had been commenced on behalf of less than all of those who had similar or related claims.
- 37 [2007] NSWSC 383, [54]–[57].
- 38 *Multiplex* [2007] FCAFC 200 (21 December 2007) (French, Lindgren and Jacobson JJ).
- 39 *Federal Court of Australia Act 1976* (Cth) s 33N.
- 40 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, [48]–[49]; *Multiplex* [2007] FCAFC 200 (21 December 2007) [10], [111], [123], [141].
- 41 *In re Ski Train Fire in Kaprun, Austria on Nov 11, 2000*, 220 FRD 195 (SDNY 2003); *Kern v Siemens Corp* 393 F 3d 120 (2d Cir 2004).
- 42 The American Law Institute, *Principles of the Law of Aggregate Litigation*, Discussion Draft 2 (2007) 176–177.
- 43 *Supreme Court Act 1986* s 33K(1).
- 44 *Supreme Court Act 1986* s 33K(1).
- 45 [2007] FCA 1061 [55], referring to the order made by Sackville J in *Darcy v Medtel Pty Ltd* [2002] FCA 925.
- 46 *Supreme Court (General Civil Procedure) Rules 2005* r 9.12.
- 47 *Supreme Court Act 1986* s 33J.

48 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731.

49 *Cadbury Schweppes Pty Ltd v Amcor Ltd*. See for example the recent interlocutory decision of Gordon J (2008) [FCA 88].

50 *Supreme Court (General Civil Procedure) Rules 2005* r 9.12.



Allowing the class to be expanded without the consent of the representative party may also make settlement more difficult, particularly where there is uncertainty as to the number of people within the expanded class definition and difficulty in determining how many will ultimately come forward and be able to establish their individual entitlements.

On balance, the commission is of the view that arguments in favour of permitting expansion of the class other than with the consent of the representative plaintiff are outweighed by the arguments against.

Of course, a person who is concerned by his or her own exclusion from the ambit of the group may, under existing provisions, apply to be joined as a party to the proceedings.⁵¹ This would enable the person to participate and to obtain any benefit from the outcome. However, as a party he or she would have potential liability for any adverse costs order.

2.1.1 Support for the draft proposal

Numerous submissions⁵² supported the commission's draft proposal to clarify that the statutory class action procedure is able to be used by a group or groups of individuals who are aggregated together, including where such individuals or entities consent to the pursuit of proceedings on their behalf.

The Law Institute of Victoria supported the draft proposal on the basis that this would clarify an issue that has currently given rise to 'much confusion and differing judicial interpretations'.⁵³

Professor Peta Spender supported the draft proposal, subject to the right of a 'defendant or potential group member to make application for an order expanding the definition of the group' and the court having power to order the expansion of the class.⁵⁴

2.1.2 Opposition to the draft proposal

There was no opposition to the commission's draft proposal, although various concerns were raised.

Clayton Utz noted that, in light of the decision in *P Dawson Nominees Pty Ltd v Multiplex Limited*,⁵⁵ at least one Federal Court judge is of the view that limited opt-in classes are not repugnant to the 'construction, intention and spirit of Part IVA' of the Federal Court Act and the corresponding provision in the Supreme Court Act. However, the submission noted that the Full Court of the Federal Court and possibly the High Court may be asked to resolve this issue.⁵⁶ As noted above, the Full Federal Court's decision in the *Multiplex* case has affirmed the validity of limited classes under Part IVA of the Federal Court Act.⁵⁷

The submission noted two issues that require further consideration. On the first question, whether the interests of justice will be served where the proceeding is brought on behalf of some rather than all potential claimants, it suggested that the prospect of further proceedings by claimants excluded from the first class action seems at odds with the underlying rationale of an opt-out regime.

Second, the Clayton Utz submission raised the issue that those who have claims brought on their behalf because they agree to the terms proposed (by the law firm or litigation funder) may have 'little, if any, bargaining power' and the court supervisory role only comes into play after they are 'inside the clubhouse'.

2.2 REQUIRING ALL GROUP MEMBERS TO HAVE CLAIMS AGAINST ALL DEFENDANTS

In its first exposure draft the commission proposed that there should be no 'requirement' that all class members should be required to have individual claims against *all* defendants in class action proceedings involving multiple defendants.

The requirement that all class members have individual claims against all defendants derives from the Federal Court case of *Philip Morris (Australia) Ltd v Nixon*, in which counsel conceded that this was a requirement of Part IVA of the *Federal Court Act 1976* (Cth), and in particular section 33C(1)(a).⁵⁸ This provides, in part, that a class action may be commenced where '7 or more persons have claims against the same person'. Justice Sackville concluded:

*[T]he expression 'the same person' in s 33C(1)(a) is to be read as including more than one person (see Acts Interpretation Act 1901 (Cth) s 23(b)), provided that all applicants and members of the represented class make claims against all respondents to the proceedings.*⁵⁹

On this construction, every plaintiff and group member must, in cases involving multiple defendants, have an individual claim against *each* of the defendants.

The alleged failure to satisfy this requirement has given rise to continuing judicial and academic controversy, interlocutory disputation, strike-out applications and appeals. This has added substantially to costs and delays in class action litigation.⁶⁰

A number of judges have raised doubts about whether there is in fact any such requirement, but have felt constrained to follow the Full Court decision in *Philip Morris*. A differently constituted Full Court of the Federal Court upheld the validity of a proceeding despite objections by the respondents that each group member did not have a claim against each respondent.⁶¹

The problems with this requirement may be illustrated by several factual situations.

In a product liability case, there may often be a single manufacturer of an allegedly defective product but different distributors (eg, in different states or regions). Persons claiming loss or damage as a result of use of the defective product may have a claim against both the manufacturer and the distributor. Where the manufacturer had manufactured all the products in question then a class comprised of all users of the product could join the manufacturer in any class action proceedings. However, where different distributors were involved, none of them could be joined as a defendant, at least for the purpose of compensation, as all class members would not have an individual claim for damages against each individual distributor.

This problem also arises in investor class action litigation. There may be defendants against whom all class members have a claim and other potential defendants against whom only some individuals in the class have individual claims. For example, in shareholder litigation it is not uncommon to join directors as defendants to the class action. In some instances there may be fluctuating membership of the board of directors, with some directors only appointed after the date on which certain class members either acquired or sold shares, or before or after certain documents were published or representations were made. Depending on when the various causes of action of shareholders arose and/or when certain losses were suffered, some shareholders may not have claims for compensation or damages against some directors. The problem is further complicated where the proceedings are commenced against one or more defendants but additional parties are brought in by the original defendants for the purpose of claims for indemnity, contribution or proportionate liability.

One solution to these problems would be to bring separate class action proceedings on behalf of each relevant subgroup. However, a preferable solution would be to clarify the position (or, where necessary, change the law) to make it clear that in cases where there is at least one defendant against whom *all* class members have individual claims (thus satisfying what, on one construction, appears to be the requirement of section 33C(1)(a) of both the Federal Court Act and the Supreme Court Act), additional defendants may be joined even if only some members of the class have individual claims against such additional defendants.

The Federal Court has further considered the present state of the law in light of the decisions in *Philip Morris (Australia) Ltd v Nixon*⁶² and *Bray v F Hoffman-La Roche Ltd*.⁶³ In *McBride v Monzie Pty Ltd*⁶⁴ Justice Finkelstein concluded that *Philip Morris* had been overruled by *Bray*, despite two other first instance judgments⁶⁵ which had held that the relevant comments in *Bray* were not part of the primary reasons in the judgment. Thus, according to Justice Finkelstein, there is no legal requirement that all group members must have a claim against all respondents and therefore the only issue which required resolution (on this aspect of that case) in relation to the requirements of section 33C(1)(a) was whether the applicant had a claim against each of the respondents.⁶⁶

It seems clear from section 33D(1) of both the federal and state class action provisions that the representative applicant must have an individual claim against each of the defendants. Thus, in some cases involving multiple defendants there may need to be more than one representative applicant. The commission's proposal for where there are defendants against whom all class members do not have claims against does not address the existing standing requirements for representative plaintiffs. Whether or not a representative plaintiff has a sufficient interest to bring a claim against a defendant on their own behalf (and also on behalf of the class members) will depend on the nature of the cause(s) of action, the nature of the relief claimed and the ordinary statutory or other standing requirements for such causes of action or relief. Some statutory provisions enable 'any person' to seek certain remedies, including injunctions and declarations.

51 *Supreme Court (General Civil Procedure) Rules 2005* rr 9.02, 9.03, 9.06.

52 Including those by a commercial litigation funder: submissions ED1 8 (IMF (Australia) Ltd); ED1 31 (Law Institute of Victoria); ED1 11 (Mental Health Legal Centre); ED1 25 (Victoria Legal Aid).

53 Submission ED1 31 (Law Institute of Victoria).

54 Submission ED2 13 (Professor Peta Spender).

55 [2007] FCA 1061.

56 Submission ED1 18 (Clayton Utz).

57 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007) [194].

58 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, [108].

59 *Ibid.*

60 Submission CP 7 (Maurice Blackburn).

61 *Bray v Hoffmann La-Roche* (2003) 130 FCR 317.

62 (2000) 170 ALR 487, at [514] Sackville J, [489] Spender J and [492] Hill J.

63 (2003) 130 FCR 317.

64 [2007] FCA 1947 (7 December 2007).

65 *Johnstone v HIH Ltd* [2004] FCA 190 at [38] and *Guglielmin v Trescowthick (No 2)* (2005) 220 ALR 515, 522.

66 Interestingly, as noted in the judgment, the parties gave undertakings that they would not seek to appeal any order arising out of the judgment until the final disposition of the case.



2.2.1 Submissions supporting proposed change

Various submissions supported the need to remove the requirement that all class members must have a claim against all defendants. However, opinions differed as to how this should be achieved.

In its submission the commercial litigation funder IMF supported the commission's draft recommendations.⁶⁷

Associate Professor Morabito supported liberalisation of standing requirements generally. This would permit 'ideological' plaintiffs such as environmental, consumer and public interest organisations to bring class action proceedings without any requirement to have a personal claim against any defendant. On this model, the representative plaintiff would not be legally required to have a personal claim against anyone.⁶⁸

Law firm Maurice Blackburn proposed that the representative plaintiff should be required to have a claim against all defendants but that where this requirement is satisfied, the claimants with claims against one or more defendants could be included as group members.⁶⁹ This proposal was based on proposed amendments to the class action statutory provisions drafted by counsel with significant class action experience.⁷⁰ However, this 'one claim against all' requirement is quite different from the draft reform proposed by the commission.

Under the commission's draft proposal, all class members would be required to have a claim against one defendant. This 'all with claims against one' model is consistent with the views of a number of judges that this is the correct interpretation of the present legislative requirement. According to Justice Finkelstein, neither the language nor the context of section 33(1)(a) of the Federal Court Act⁷¹ required the conclusion reached by the Full Court in *Philip Morris*.⁷² In the opinion of Justice Finkelstein, the section simply does not address the situation where some members of the group have claims against some other person provided that the legislative requirement that there be common claims of all class members against 'the same person' is satisfied.⁷³ However, other single judges of the Federal Court have felt constrained to follow the decision of the Full Federal Court in *Philip Morris*.⁷⁴

The fact that there is ongoing uncertainty, forensic disputation at first instance and on appeal and a divergence of views among appellate judges on the meaning of the existing legislative provision supports the commission's view that the position needs to be clarified. Of course this could be done by way of legislative amendment to make explicit the *Philip Morris* requirement that all class members are required to have claims against all defendants.

At present, this requirement has not prevented defendants in class action proceedings from joining additional defendants, for the purpose of indemnity or contribution claims, despite the fact that all class members do not have claims against such additional defendants.⁷⁵

The Law Institute of Victoria supported the draft proposal on the basis that this would clarify an issue that has currently given rise to 'much confusion and differing judicial interpretations'.⁷⁶

2.2.2 Submissions opposing proposed change

One submission expressed concern about the prospect of disparate claims being heard together and the risk that 'the advantages of grouping may easily be outweighed by diversity and unmanageability of the issues'.⁷⁷ It contended that the objective of judicial economy would not be achieved if all individual class members did not have a personal claim against all defendants in a single class action.

In fact, liberalisation of the existing restrictive requirement is conducive to judicial economy as it will avoid the necessity for separate proceedings against defendants against whom all class members do not have a claim.

Another submission raised concerns about manageability, additional interlocutory applications and an increase in complexity and duration of trials where subgroups have claims against one or more defendants which are not common to all class members.

In considering these issues it is useful to differentiate the question of whether there should be a threshold *legal requirement* that all class members have a claim against all defendants from the *discretionary questions* of whether a class action should be permitted to proceed where this is not the case and how the litigation is to be judicially managed. Removing the threshold legal requirement does not mean that the court cannot, in appropriate circumstances, exercise its discretion to make orders for the separate determination of the claims against certain defendants where not all class members

have claims against such defendants. Where such claims are truly ‘disparate’, the court may determine that such claims should not be permitted to proceed as part of the class action proceeding or, alternatively, should be determined separately in such proceeding.

3. EXPRESS POWERS TO GRANT CY-PRÈS RELIEF

*The legal doctrine of cy-près is neither new nor radical, yet it has rarely been used by the Australian courts. Its power to do good—to help right wrongs—is immense and virtually untapped in the Australian marketplace.*⁷⁸

In its earlier exposure draft the commission proposed the introduction of a new judicial power (or clarification of existing powers) to order cy-près type remedies in class action proceedings.

Proposal 6.3 of the commission’s exposure draft advocated that the court should have power to order cy-près type remedies where:

- (a) there has been a proven contravention of the law
- (b) a financial or other pecuniary advantage (‘unjust enrichment’) has accrued to the person or entity contravening the law as a result of such contravention
- (c) a loss suffered by others is able to be quantified
- (d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.

The proposed ‘new’ power (or, on one view, clarification of existing powers) would, at least initially, be limited to class actions. In the light of practical experience, consideration could later be given to whether this power should be available in other contexts.

3.1 ORIGINS OF CY-PRÈS REMEDIES

Cy-près principles evolved in the context of charitable trusts.⁷⁹ Sometimes it is impossible or impracticable to give effect to the declared intention of a donor. In some circumstances, the general law (and in most jurisdictions, statute)⁸⁰ enables the court to give effect as near as is possible to that intention.⁸¹ The rationale is that this is preferable to allowing the donation to fail altogether. For example, where a disposition is directed to a charitable purpose which cannot be fulfilled in the precise manner stated (eg, because its object is unclear or does not exist, or insufficient funds are made available), but the trust instrument manifests a ‘general charitable intention’,⁸² the court can order its application to a purpose that is closely aligned with the donor’s declared intention. Similar principles apply where the donor applies funds for a specific charitable purpose which later fails, or where the original charitable purpose of a donor is fulfilled but funds are left over. In some jurisdictions, legislation vests the Attorney-General with the power to make orders as to the establishment of cy-près schemes in limited circumstances.⁸³

3.2. CY-PRÈS IN THE CONTEXT OF LITIGATION

3.2.1 General

The ‘next best’ approach to the application of funds embodied in the doctrine of cy-près can be (and has been) transposed onto the litigation context. Higgins summarises the possible purposes of cy-près remedies in a litigious setting (with particular reference to consumer litigation):

Cy-pres solutions may serve many ends. Compensation of wronged parties may be effected by a class action where private actions will be prohibited by the disproportionate legal and administrative costs of action. A subsidiary concern as regards compensation is the preservation of intra-class equity. Demographic and socioeconomic factors may militate against recovery by certain sectors of affected consumer classes. Barriers of information, education and access may prevent direct recovery by parties who would nonetheless be able to enjoy indirect compensation through the administration of a cy-pres mechanism.

Goals of disgorgement/punishment can be achieved through cy-pres—the defendant is not allowed to retain illegally obtained profits merely through the subtlety and dispersion of the illegal means. Associated deterrent ends can similarly be achieved through

- 67 Submission ED1 8 (IMF (Australia) Ltd).
- 68 Submission CP 28 (Associate Professor Vince Morabito).
- 69 Submission CP 7 (Maurice Blackburn).
- 70 Dr Kris Hanscombe SC and Lachlan Armstrong of the Victorian Bar (see Attachment D of Submission CP 7 (Maurice Blackburn)).
- 71 The corresponding provision in the *Supreme Court Act 1986* is identical.
- 72 *Bray v Hoffman La-Roche Ltd* (2003) 130 FCR 317, [248].
- 73 Carr J agreed with Finkelstein J but Branson J took a different view.
- 74 See *Johnstone v HIH Insurance Ltd* [2004] FCA 190, [41] (Tamberlin J) and *Guglielmin v Trescowthick (No 2)* [2005] FCA 138, [29] (Mansfield J).
- 75 *King v GIO Australia Holdings Ltd* [2000] FCA 1543, [6]–[7]. See also Cashman (2007) above n 4, 248.
- 76 Submission ED1 31 (Law Institute of Victoria).
- 77 Submission ED1 12 (Allens Arthur Robinson and Philip Morris), quoting from the report of the Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988). The submission was also adopted in ED1 17 (Telstra) and ED1 16 (Australian Corporate Lawyers Association). Submission ED1 18 (Clayton Utz) also opposed modification of the principle that all class members should have claims against all defendants but acknowledged that there is a ‘diversity of [judicial] opinion within the Federal Court which is yet to be resolved’.
- 78 Louise Sylvan, *Cy-près: The Next Best Thing?* (2003) Choice <www.choice.com.au/goArticle.aspx?id=103708> at 10 December 2007.
- 79 See generally Rachael Mulheron, *The Modern Cy-près Doctrine: Applications & Implications* (2006) ch 3.
- 80 See, eg, *Charities Act 1978* s 2.
- 81 On the relationship between the general law and statute, see *Aston v Mount Gambier Presbyterian Charge* [2002] SASC 332.
- 82 See Butterworths, *Halsbury’s Laws of Australia*, vol 4 (at 10 December 2007) 75 Charities ‘2 General Charitable Intention’ [75-605]–[75-610].
- 83 See, eg, *Charities Act 1978* s 4(3).



demonstrating that wrongdoers will be prevented from retaining illegal profits. The purposes to which residual funds are then put can further achieve these ends through educational and litigation uses.⁸⁴

In litigation involving a single plaintiff or a small number of claimants, direct compensation is in general achievable and there is no obvious role for *cy-près* distribution. However, as Higgins points out, there is considerable scope for the application of *cy-près* principles in class action proceedings given the difficulties that can attend the distribution of damages in those cases:

[Many] consumer class actions are characterised by large class size and small per capita damages, a heterogenous affected class that presents difficulties of identification, education, communication and proof, and [hence] poor recovery rates.⁸⁵

She provides an example of a situation in which direct compensation would be problematic:

Certain trade practices violations, though flagrant, may have dispersed and de minimis effects that present barriers to consumer action. A horizontal price fix that results in an incremental \$2 rise in the price of a consumer good over a 12 month period is unlikely to warrant any individual cause. However, across a wide class, nugatory individual effects may aggregate to a significant total abuse.⁸⁶

Endeavouring to achieve disgorgement/punishment and deterrence has not been one of the traditional preoccupations of class action law in Australia. To date, the focus has been primarily if not exclusively on compensation for group members who can individually prove and quantify their loss. However, there is an important policy question as to whether a defendant should be permitted to retain the proceeds of unlawful conduct just because it is impossible or impracticable to make direct reparation to individuals who have suffered loss as a result.

In class actions, there are two distinct situations in which a plaintiff might wish to invoke *cy-près* principles:

- to deal with the undistributed remainder of an award, where it is considered inappropriate that such remainder revert to the defendant
- to deal with a situation in which it is impossible, impracticable or otherwise inappropriate to distribute direct compensation to individuals who have suffered loss or damage from unlawful conduct, but where it is possible to calculate aggregate damages for the group.

In some overseas jurisdictions, the use of *cy-près* schemes in both situations is well entrenched:

The notion underpinning class actions cy-près is that where a judgment or settlement has been achieved against a defendant, and where distribution to the class of plaintiffs who should strictly receive the sum is 'impracticable' or 'inappropriate', then (subject always to court approval) the damages should be distributed in the 'next best' fashion in order, as nearly as possible, to approximate the purpose for which they were awarded.⁸⁷

There are two principal forms that *cy-près* relief can take. First, 'price rollback' relief involves damages recovered in respect of unlawful conduct being used to reduce the cost to purchasers of the defendant's goods or services.⁸⁸ However, such relief may be considered objectionable because, for example:

- (a) the damages are in effect used to subsidise the defendant's operation and could in fact provide it with a competitive price advantage in non-monopolistic markets
- (b) class members are obliged to continue to patronise the defendant in order to be compensated
- (c) there is no automatic correlation between persons who suffered damage and persons benefiting from the award, in particular where the defendant's products/services are not often the subject of regular repeat purchasing
- (d) a defendant is able to 'internalise' the 'loss' involved by, for example, producing its products at a cheaper price during the relevant time period.⁸⁹

The second, less controversial form of *cy-près* relief involves distributing all or part of an award among nominated organisations where it cannot be directed to compensation of persons who have suffered damage. This is considered to be justified because the interests of those organisations are thought to

be aligned with those of class members.⁹⁰ However, there have been cases in which the link between class members and the ultimate recipients of class action damages has been somewhat tenuous, as discussed below.

3.2.2 United States

The basis of the class actions regime at federal level in the United States is rule 23 of the Federal Rules of Civil Procedure. However, the provision makes no reference to *cy-près* distribution. Accordingly,

*it is by virtue of judicial innovation that the United States possesses the most developed cy-près jurisprudence relevant to class actions—although it is fair to say that the application of cy-près in this context has received quite a mixed reception among American courts.*⁹¹

Mulheron notes a number of instances in which courts have endorsed the use of *cy-près* distribution, but also points out that some judges have been more ambivalent—stating, for instance, that it ‘should be reserved for unusual circumstances’.⁹² However, it does appear to be settled that *cy-près* distribution is appropriate and permissible where it occurs pursuant to a settlement agreement concluded by the parties.⁹³ Indeed, courts have been known to advertise for applications from potential recipients where a settlement agreement leaves an undistributed balance.⁹⁴ Whether a court order can mandate such distribution is less clear.⁹⁵ Mulheron further points out that courts are, in general, more disposed to be liberal when it is the application of the unclaimed part of an award that is at issue, although a ‘distribution of the entire settlement or judgment sum is not precluded in practice’.⁹⁶

The American Law Institute has recently published a Draft of the Principles of Aggregate Litigation in which it suggests that *cy-près* relief ought only to be considered in ‘circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim’.⁹⁷ These sentiments were referred to with approval in a recent case in the Court of Appeals for the Second Circuit.⁹⁸

No uniform position has emerged on the required relationship between the purpose of a class proceeding and the object(s) to which funds are to be applied *cy-près*.⁹⁹ Some courts have maintained a conservative position on this point, insisting on the establishment of some form of nexus or proximate relation between the interests of class members and the *cy-près* recipient(s).¹⁰⁰ Others have been more liberal and permitted the distribution of funds to unrelated organisations or causes.¹⁰¹ In *Superior Beverage Co v Owens-Illinois*, the court stated:

*[W]hile use of funds for purposes closely related to their origin is still the best cy pres application, the doctrine of cy pres and courts’ broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations, both for current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs to be used in conjunction with other funds raised contemporaneously.*¹⁰²

For instance, in *In re Motorsports Merchandise Antitrust Litigation*,¹⁰³ which dealt with price-fixing of NASCAR race souvenirs, the court approved (over the objections of the defendants) a distribution scheme under which funds were provided to the Make-A-Wish Foundation, the American Red Cross, Race Against Drugs (a nationwide drug prevention education program), Children’s Healthcare of Atlanta, the Atlanta Legal Aid Society, the Georgia Legal Services Program, Kids’ Chance (an organisation providing scholarships for children whose parents have been killed or incapacitated in workplace accidents), the Duke Children’s Hospital and Health Center, the Lawyers Foundation of Georgia and the Susan G Komen Breast Cancer Foundation. The court opined that ‘[t]he absence of an obvious cause to support with [undistributed or unclaimed] funds does not bar a charitable donation’.¹⁰⁴ As Mulheron observes:

*The disadvantage of this [more liberal] approach ... is that the framework for determining between competing plaintiffs for the fund disappears—hunting for the ‘next best’ application of the monies becomes a highly subjective and discretionary exercise, akin, perhaps, to a lottery or prize for the most inventiveness.*¹⁰⁵

84 Ruth Higgins, ‘The Equitable Doctrine of Cy-près and Consumer Protection’ (2002) *The Trade Practices Act Review*, <www.tpareview.treasury.gov.au/content/subs/105_Attachment1_ACA.rtf> at 10 December 2007.

85 *Ibid* 2.

86 *Ibid* 1.

87 Mulheron (2006) above n 79, 215.

88 *Ibid* 218. See also the examples at 219–20.

89 *Ibid* 220–1.

90 *Ibid* 222.

91 *Ibid* 236.

92 *Ibid* 238, quoting *Mace v Van Ru Credit Corp*, 109 F 3d 338, 345 (1997).

93 See, eg, *In re ‘Agent Orange’ Product Liability Litigation*, 818 F 2d 179, 185 (1987) (noting the wider latitude available to courts where cases settle).

94 See, eg, *Superior Beverage Co v Owens-Illinois*, 827 F Supp 477, 478 (ND Ill, 1993).

95 Mulheron (2006) above n 79, 242–3.

96 *Ibid* 243–4.

97 American Law Institute, *Draft of the Principles of the Law of Aggregate Litigation* § 3.08 (Cy Pres Settlements), quoted in *Masters v Wilhelmina Model Agency Inc*, 473 F 3d 423, 435–6 (2d Cir, 2007).

98 *Masters v Wilhelmina Model Agency Inc*, 473 F 3d 423, 436 (2d Cir, 2007).

99 Mulheron (2006) above n 79, 270.

100 *Ibid* 270–1.

101 See, eg, *Superior Beverage Co v Owens-Illinois*, 827 F Supp 477, 478–80 (ND Ill, 1993); *In re Motorsports Merchandise Antitrust Litigation*, 160 F Supp.2d 1392, 1394 (ND Ga, 2001). See also Mulheron (2006) above n 79, 271–3.

102 *Superior Beverage Co v Owens-Illinois*, 827 F Supp 477, 479 (ND Ill, 1993).

103 160 F Supp 2d 1392, 1396–9 (ND Ga, 2001).

104 At 1394, citing *Jones v National Distillers*, 56 F Supp 2d 355, 359 (SDNY 1999).

105 Mulheron (2006) above n 79, 273. This arbitrariness has led to the argument (rejected by the court) that defendants should themselves be able to select the charities to receive the proceeds of *cy-près* distribution: *In re Motorsports Merchandise Antitrust Litigation*, 160 F Supp 2d 1392, 1395 (ND Ga, 2001).



Nevertheless, she argues:

[W]hilst the triggers and the further objective criteria for the application of cy-près should be stringently adhered to in order to ensure that the doctrine is not abused or fractured, once those 'narrow gates' have been safely negotiated, the court should arguably be permitted to apply the damages to the 'next best' use that it perceives. Sometimes this will entail a distribution for a purpose 'as near as possible' to the purpose for which the action was brought; and sometimes, the 'next best' use will benefit the class members in other ways, somewhat distinct from the class suit itself. A 'wide gate' at the stage at which the damages are applied for cy-près purposes ensures the optimal use of scarce resources, and allows for a greater degree of pragmatism and flexibility.¹⁰⁶

In *Jones v National Distillers*, the court allowed the undistributed remainder of a settlement fund to pass to the Legal Aid Society Civil Division, which had but a tenuous connection to the intent behind the litigation concerned. However, Justice Motley emphasised that as the cause of action in the matter had arisen more than 20 years prior, it was futile to attempt to select a charitable application that carried a meaningful potential benefit for actual class members.¹⁰⁷

United States courts have exhibited a degree of wariness on the related issue of how specific a proposed application of cy-près funds must be to attract court endorsement. In the *Agent Orange* litigation, the District Court had mandated the establishment of an independent 'class assistance foundation ... to fund projects and services that will benefit the entire class'.¹⁰⁸ The Court of Appeals for the Second Circuit considered that while the creation of such a fund could be, in principle, an appropriate response to the needs of a large and variegated class,

the district court must in such circumstances designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds. The district court failed to do so in the instant case. Instead, it provided that the board of directors of a class assistance foundation would control, inter alia, 'investment and budget decisions, specific funding priorities ... [and] the actual grant awards ... and that the court would retain only "[a] comparatively modest supervisory role" in such decision-making' ... [W]hile a district court is permitted broad supervisory authority over the distribution of a class settlement ... there is no principle of law authorizing such a broad delegation of judicial authority to private parties.¹⁰⁹

The court expressed particular concern that the board as constituted would be under no obligation to consider the interests of the class as a whole or limit itself to activities consistent with the judicial function. It noted that it was open to the district court, on remand, to 'designate in detail [appropriate] programs and provide for their supervision'.¹¹⁰

In the recent matter of *Fears v Wilhelmina Model Agency Inc*, Justice Baer formulated orders designed for compliance with the *Agent Orange* requirements, distributing funds to various named charities on the basis that such funds would be distributed in stages, with future distributions contingent on 'achievement' as detailed in an annual report provided to the court.¹¹¹

3.2.3 Canada

Most Canadian jurisdictions have, over the past two decades, introduced class action statutes that allow for aggregate relief to be awarded in appropriate circumstances.¹¹² All of these statutes make provision for the cy-près application of undistributed amounts, and most follow a similar model.¹¹³ In Manitoba, for instance, section 34 of the *Class Proceedings Act*¹¹⁴ provides as follows:

Undistributed award

(1) *The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even if the order does not provide for monetary relief to individual class or subclass members.*

Considerations re undistributed award

(2) *In deciding whether to make an award under subsection (1), the court must consider:*

- (a) *whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass; and*
- (b) *any other matter the court considers relevant.*

Undistributed award if class members unknown

(3) *The court may make an order under subsection (1) whether or not the class or subclass members can be identified or all their shares can be exactly determined.*

Award may benefit non-class members

(4) *The court may make an order under subsection (1) even if the order would benefit:*

- (a) *persons who are not class or subclass members; or*
- (b) *persons who may otherwise receive monetary relief as a result of the class proceeding.*

Unclaimed award

(5) *If any part of an [aggregate] award... remains unclaimed or is otherwise undistributed after a time set by the court, the court may order that the unclaimed or undistributed part of the award:*

- (a) *be applied against the cost of the class proceeding;*
- (b) *be forfeited to the Government;*
- (c) *be returned to the party against whom the award was made.*

Near identical provisions (with minor variations of expression) are applicable in Saskatchewan,¹¹⁵ Newfoundland and Labrador,¹¹⁶ Alberta,¹¹⁷ British Columbia¹¹⁸ and New Brunswick.¹¹⁹ These statutes place significant limits on the inventiveness of the courts in dealing with unclaimed funds: (a) there must be a reasonable expectation that the application of such funds will benefit class members in some sense; and (b) the court must consider whether ‘unreasonable benefits’ will be conferred on non-class members (although this is stated not to be itself determinative). Thus, while *cy-près* schemes ‘inherently involve some subjective choice of a “deserving” recipient’,¹²⁰ the discretion of the court in most Canadian jurisdictions is not left at large.

The corresponding provision in Ontario is similar,¹²¹ but there are also some notable differences, the effect of which is to render it less expansive overall. First, before making orders in respect of the undistributed remainder, the court must be satisfied that ‘a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order’.¹²² Secondly, any unclaimed or undistributed balance that remains after the time set by the court for application of funds then reverts to the defendant ‘without further order of the court’.¹²³ Thirdly, the Ontario provision does not contain a stipulation to the effect that the court must consider whether ‘unreasonable benefits’ might flow to non-class members in deciding whether or not to make an order in the nature of *cy-près*.

The Federal Court’s rules relating to class actions also countenance the *cy-près* application of the remainder of damages awarded on an aggregate basis, stating that ‘a judge may make any order in respect of the distribution of monetary relief, including regarding an undistributed portion of an award due to a class or subclass or its members’.¹²⁴

In Quebec, the Code of Civil Procedure also permits the award of aggregate damages (or ‘collective recovery’), in which case the court can order that the defendant either ‘deposit the established amount in the office of the court or with a financial institution operating in Quebec, or to carry out a reparatory measure that it determines or to deposit a part of the established amount and to carry out a reparatory measure that it deems appropriate’.¹²⁵ In the event that the court considers that distributing the award to individual claimants would be ‘impossible or too expensive’, it can, after making provision for the ‘law costs’ of the proceeding, ‘the fees of the representative’s attorney’ and ‘the claims of the members, if any’, deal with ‘the balance in the manner it determines, taking particular account of the interest of the members, after giving the parties and any other person it designates an opportunity to be heard’.¹²⁶

- 106 Mulheron (2006) above n 79, 274.
- 107 *Jones v National Distillers*, 56 F Supp 2d 355, 358–9 (SDNY 1999).
- 108 *In re ‘Agent Orange’ Product Liability Litigation*, 818 F 2d 179, 184 (2d Cir, 1987) (‘Agent Orange’).
- 109 ‘Agent Orange’, 818 F 2d 185 (2d Cir, 1987).
- 110 ‘Agent Orange’, 818 F 2d 186 (2d Cir, 1987).
- 111 2005 US Dist LEXIS 7961, 37–8 (SDNY, 2005). On appeal, the matter was remanded back to the District Court on the basis that Baer J had failed to advert to an option available to him in relation to the distribution of remaining funds (treble damages). The Court of Appeals made a number of observations as to *cy-près* schemes but did not comment on the supervision mechanisms that Baer J had proposed: see *Masters v Wilhelmina Model Agency Inc*, 473 F 3d 423 (2d Cir, 2007).
- 112 See Mulheron (2006) above n 79, 232–4. Quebec is an exception as its class action regime came into force in 1979.
- 113 Mulheron (2006) above n 79, 234.
- 114 CCSM 2002, c C130.
- 115 *Class Actions Act*, SS 2001, c C-12.01, s 37.
- 116 *Class Actions Act*, SNL 2001, c C-18.1, s 34. Note that in Newfoundland and Labrador the court is not obliged to consider whether a proposed mode of distribution would deliver unreasonable benefits to non-class members, although it is mentioned as a relevant consideration: s 34(2).
- 117 *Class Proceedings Act*, SA 2003, c C-16.5, s 34. The Alberta provision allows the court to make ‘any order [it] considers appropriate’ to deal with unclaimed or undistributed amounts, rather than setting out the three options available in Manitoba and other jurisdictions: s 34(5).
- 118 *Class Proceedings Act*, RSBC 1996, c 50, s 34.
- 119 *Class Proceedings Act*, SNB 2006, c C-5.15, s 36.
- 120 Mulheron (2006) above n 79, 270.
- 121 *Class Proceedings Act*, SO 1992, c 6, s 26.
- 122 *Class Proceedings Act*, SO 1992, c 6, s 26(4).
- 123 *Class Proceedings Act*, SO 1992, c 6, s 26(10).
- 124 *Federal Courts Rules*, SOR/98-106, r 299.3(2).
- 125 *Code of Civil Procedure*, RSQ 1965, c C-25, s 1032.
- 126 *Code of Civil Procedure*, RSQ 1965, c C-25, ss 1034–6. See Mulheron (2006) above n 79, 233.



As Mulheron has noted:

It has been judicially acknowledged in Canadian courts that cy-près provisions in class action regimes serve the important policy objectives of general and specific deterrence of wrongful conduct, and that ‘the private class action litigation bar functions as a regulator in the public interest for public policy objectives’. This statutory incorporation of the cy-près doctrine is further evidence that class suits in this jurisdiction do not serve a solely compensatory function (a view entirely at odds with Australian law reform, legislative and judicial opinion).¹²⁷

She further states:

Although Ontario’s provisions appear to be worded on the basis that any undistributed residue of an aggregate award can be distributed cy-près ... the provision has clearly been applied to entire judgments or settlements, apparently on the basis that it would be impracticable to provide a more direct benefit by distributing any part of the monetary award to individual class members.¹²⁸

Mulheron cites as an example *Tesluk v Boots Pharmaceutical plc*.¹²⁹ In that case Justice Winkler was asked to approve a settlement in a class action concerning misrepresentation in connection with the sale of a pharmaceutical product for treating hypothyroidism. The settlement to which the parties had agreed provided for \$2.25 million to be directed to five specified organisations, ‘to be used for specific research projects, education and outreach having to do with thyroid disease’.¹³⁰ This was seen to be appropriate because there were some 520 000 class members each with a low-value claim against the defendant.

Justice Winkler took a number of factors into account in concluding that the settlement was fair and appropriate in the circumstances:

- the matter would be expensive and its outcome uncertain in the event that it proceeded to trial (limited costs had been incurred thus far)
- the terms were comparable to those of a similar settlement agreed in Quebec
- ‘individual distribution of this settlement would be impracticable and not in the interests of the class as a whole’ as ‘[c]osts would simply dissipate the settlement fund in large measure’
- the fact that ‘the negotiation with the defendants was short and to the point’ and that there had not been ‘an overabundance of communication with class members’ was not, in the circumstances, problematic.¹³¹

He commented that:

Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a cy-près distribution to recognized organizations or institutions which will benefit class members.¹³²

The whole of the amount due to a particular class was also the subject of cy-près distribution in *Alfresh Beverages Canada Corp v Hoechst AG*.¹³³ The proceeding concerned price fixing of preservatives that had effects on their distributors, manufacturers who used them as a component of other products, intermediaries in their sale and consumers who purchased products containing them over a long period of time. While provision was able to be made for the direct compensation of the distributors and manufacturers, Justice Cumming recognised there were ‘significant problems in identifying possible claimants below the manufacturer level’. He thus approved a settlement that involved funds being distributed to the Canadian Council of Grocery Distributors and Canadian Federation of Independent Grocers (for intermediaries), as well as the Food Institute at the University of Guelph, the Consumers Association of Canada and the Canadian Association of Food Banks (for consumers) as ‘surrogate’ recipients.¹³⁴

The reference to recognised organisations in *Tesluk* is telling; the courts have exhibited considerable caution in permitting funds to be distributed to particular recipients. In approving a settlement with a cy-près component in *Ford v F Hoffman–La Roche Ltd* Justice Cumming commented:

It is necessary and appropriate that only well-recognized entities be the recipients of the cy-près distributions. Such entities have an established record of providing nonprofit services, with transparency in respect of their activities and accounting. They provide

*the greatest level of confidence and assurance to the general consuming public that the monies distributed will be responsibly used.*¹³⁵

The *Ford* proceedings had to do with large-scale price fixing of vitamin products and, as in *Alfresh*, direct compensation of intermediate purchasers and consumers of affected products was not feasible. Class counsel had evaluated possible *cy-près* recipients of funds with reference to certain specified factors. Potential recipients on behalf of intermediate purchasers (all of them industry organisations) were judged according to:

- (a) *the organization's membership base;*
- (b) *whether the organization was national in scope;*
- (c) *the organization's ability to deliver benefits to a particular group of Intermediate Purchasers; and*
- (d) *the organization's financial stability.*¹³⁶

Potential recipients on behalf of consumers were scrutinised on the basis of:

- (a) *the organization's ability to deliver benefits in each province and territory;*
- (b) *the organization's ability to reach one or more of the target age groups, being children, youth, adults, or the elderly;*
- (c) *whether the organization was non-denominational;*
- (d) *whether the organization had a charitable or non-profit designation;*
- (e) *the organization's financial stability and budget;*
- (f) *the organization's history of advocacy, service delivery, research or education relevant to Vitamin Products.*¹³⁷

In addition, each proposed recipient had 'prepared a detailed proposal for the expenditure of its share of the settlement monies' and was to be 'held accountable for the monies it receives through compliance with strict governing Rules'.¹³⁸

According to Berryman, discussion of the doctrine relating to *cy-près* distribution of damages awards in Canada is limited to five reported cases.¹³⁹

3.3 AUSTRALIA: BACKGROUND

In its 1979 discussion paper *Access to the Courts—II: Class Actions*,¹⁴⁰ the ALRC observed that *cy-près* schemes could be used to deal with situations where, for example, it is impossible or impracticable to track down class members or isolate their personal losses, or where the circumstances are such that it is improbable that individual class members will make claims, or 'where the cost of distributing damages could absorb the damages fund'.¹⁴¹ The ALRC considered that *cy-près* schemes could assist to overcome practical and legal difficulties involved in maintaining class actions which would otherwise blunt their effectiveness against a wrongdoer. It recognised that the use of *cy-près* remedies could render the class action something more than a mere procedural device; it could 'assume the character of a consumer protection mechanism to deter unlawful conduct, force the wrongdoer to surrender unlawful profits and distribute those profits in a way to benefit class members'.¹⁴² It noted that there were both advantages and disadvantages to taking such a step,¹⁴³ and suggested that some people considered it

more appropriate for [procedures such as cy-près] to be restricted to government so that the primary objective of private class actions remains one of compensation and compensation alone. The issue is whether it is preferable for the enforcement of legislation to be left:

- *to private individuals who come forward—in the knowledge that they will usually be few, or*
- *to governmental agencies.*¹⁴⁴

In 1995, the Victorian Attorney-General's Law Reform Advisory Council¹⁴⁵ engaged Vince Morabito and Judd Epstein to review Victorian law with respect to civil proceedings involving more than one claimant. Morabito and Epstein recommended that a class actions model similar to that existing under the Federal Court Act be introduced at state level,¹⁴⁶ but also recommended that provision be made to allow *cy-près* distributions 'in appropriate circumstances'.¹⁴⁷

127 Mulheron (2006) above n 79, 234, quoting *Alfresh Beverages Canada Corp. v Hoescht AG* (2002), 16 CPC (5th) 301(SCJ) [16].

128 *Ibid* 235–6.

129 (2002), 21 CPC (5th) 196 (SCJ).

130 (2002) 21 CPC (5th) 196 (SCJ) [9].

131 (2002) 21 CPC (5th) 196 (SCJ) [11]–[15].

132 (2002) 21 CPC (5th) 196 (SCJ) [16].

133 (2002) 16 CPC (5th) 301.

134 *Alfresh Beverages Canada Corp v Hoescht AG* (2002) 16 CPC (5th) 301 [15], [17].

135 *Ford v F Hoffman–La Roche Ltd* (2005) 74 OR (3d) 758 (SCJ) [158] ('Ford').

136 *Ford* (2005) 74 OR (3d) 758 (SCJ) [84].

137 *Ford* (2005) 74 OR (3d) 758 (SCJ) [96].

138 *Ford* (2005) 74 OR (3d) 758 (SCJ) [49], see also [86], [98].

139 These cases are: *Sutherland v Boots Pharmaceutical PLC* [2002] OJ No 1361; *Currie v McDonald's Restaurants of Canada* [2006] OJ No 813; *Garland v Embridge Gas Distribution Inc*, [2006] OJ No 4273; *Gilbert v CIBC* [2004] OJ No 4260 and *Ford v F Hoffman–La Roche* (2005) 74 OR (3d) 758 (SCJ). See Jeff Berryman, 'Class Actions (Representative Proceedings) and the Exercise of the Cy Pres Doctrine: Time for Improved Scrutiny' (Paper presented at the Second International Symposium on the Law of Remedies, Auckland, 16 November 2007) 18.

140 Australian Law Reform Commission, *Access to the Courts—II: Class Actions*, Discussion Paper No 11 (1979).

141 *Ibid* [48].

142 *Ibid* [50].

143 *Ibid* [50]–[51].

144 *Ibid* [52].

145 A predecessor of the VLRC.

146 Vince Morabito and Judd Epstein, *Class Actions in Victoria—Time for a New Approach*, Victorian Attorney-General's Law Reform Advisory Council, Expert Report 2, (1997) 44 (Recommendation 2).

147 *Ibid* 57 (Recommendation 12).



Despite widespread recognition of their potential, and in contrast to the position elsewhere, the two Australian class action statutes do not on their face countenance the application of *cy-près* principles in dealing with damages awards to a plaintiff class. In observations apposite to the Victorian scheme, Mulheron has noted:

*Of the leading class actions jurisdictions, Australia is the odd one out—the Australian federal class action regime ... does not statutorily reference a cy-près distribution of all or any part of the judgment that a class may obtain against a defendant ... Reversion to the defendant of any unclaimed amount is preferred to a cy-près distribution.*¹⁴⁸

Cy-près remedies could be given explicit recognition in Australian law through amendments to: (1) class action statutes themselves; and/or (2) consumer law statutes.

3.3.1 Class action statutes in Australia

Sections 33Z and 33ZA of the Supreme Court Act 1986

Section 33Z(1)(f) of the *Supreme Court Act 1986* permits the court, in a group proceeding, to ‘award damages in an aggregate amount without specifying amounts awarded in respect of individual group members’. The court must, however, be satisfied that ‘a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment’.¹⁴⁹ Section 33Z(2) provides that where damages are awarded, the court ‘must make provision for the payment or distribution of the money to the group members entitled’.¹⁵⁰

Under section 33ZA(1), the court is able to constitute a fund into which aggregate damages will be paid to facilitate their distribution to group members.¹⁵¹ If it does so, it must set a date before which such persons must make a claim upon the fund.¹⁵² After that date, the defendant is able to make an application for an order that the undistributed remainder of the fund revert to it.¹⁵³ The court would appear to have a discretion on this point; it is entitled to make ‘such orders as it thinks fit’ as to the return of the money.¹⁵⁴

Section 33Z(1)(g) of the *Supreme Court Act 1986* also permits the court to ‘make such other order as is just, including, but not restricted to, an order for monetary relief other than for damages and an order for non-pecuniary damages’. The implications of this provision are somewhat obscure, in particular given that it differs from section 33Z(1)(g) of the *Federal Court of Australia Act 1976*, which uses the simple formulation ‘make such other order as the court thinks just’.

Whether or not the provision would permit orders in the nature of *cy-près* relief, either in respect of the undistributed remainder of a damages award or otherwise, is unclear. It is perhaps instructive that monetary relief cannot be granted under the provision unless (as where aggregate damages are awarded) the court can make a ‘reasonably accurate assessment ... of the total amount to which group members will be entitled under the judgment’.¹⁵⁵

Doubt as to the meaning of section 33Z(1)(g) aside, sections 33Z and 33ZA of the *Supreme Court Act 1986* and the *Federal Court of Australia Act 1976* would not seem to countenance the application of *cy-près* principles to generate a primary remedy in a class action.

Section 33ZA(5), dealing with the undistributed remainder of a class action settlement fund, reflects the recommendation of the ALRC in its 1988 report, *Grouped Proceedings in the Federal Court*.¹⁵⁶ The ALRC there recognised that ‘[o]ne alternative is that [the remainder] be used to benefit uncompensated group members indirectly’, although it cautioned that the attempt to do so could result in a ‘windfall gain to non group members and give the respondent an unfair price advantage over its competitors’.¹⁵⁷ It concluded:

*The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extent than that provided for under the existing law. Any money ordered to be paid by the respondent should be matched, so far as is possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into Consolidated Revenue, simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform.*¹⁵⁸

However, the ALRC also considered that where a respondent made no application or funds were not returned for some other reason, the remainder should 'go into a special fund which could be made available for the financing of grouped proceedings'.¹⁵⁹ The recommendation to establish such a fund has not been implemented, and both class actions statutes are silent as to the application of the undistributed remainder where the court exercises its apparent discretion *not* to return that remainder to the defendant.

Other reports of law reform agencies evinced less readiness to permit undistributed balances to revert to a defendant. In 1977, the Law Reform Committee of South Australia, in considering the potential for the introduction of a class actions regime, noted that '[t]here is a strong body of opinion ... that a defendant should not be able to take advantage of the inertia and dispersion of class members when the wrongful conduct and total amount involved has been proved to the Court's satisfaction'.¹⁶⁰ As the committee noted, where such an amount is exacted from a defendant:

*The question arises—where should [the undistributed] balance be paid? Should it be kept by the defendant, paid into Consolidated Revenue or applied to some appropriate fund related to class actions? There are precedents in the United States for applying such moneys to funds designed to confer some benefit on persons who have been or will be affected by the type of conduct in question.*¹⁶¹

The committee ultimately suggested that undistributed damages could be paid into a litigation fund and that '[o]nce such a fund ha[s] accumulated a reasonable amount sufficient to meet anticipated demands thereon, later undistributed balances could be paid to Consolidated Revenue. The amount invested in the fund could be reviewed from time to time'.¹⁶²

In the Discussion Paper *Access to the Courts—II*, the ALRC had noted that '[w]here a surplus remains unclaimed [following the distribution of a damages fund], [a] *cy-près* scheme will also permit an application of the fund to a charitable or otherwise beneficial public use, which is seen to be preferable to permitting a defendant to retain his unjust enrichment'.¹⁶³ It ultimately put forward a scheme for discussion under which surplus monies remaining once individual claims had been met pursuant to a successful class action would be paid into a 'Class Actions Fund', which would be used to assist plaintiffs to bring class action claims in appropriate cases.¹⁶⁴

Morabito and Epstein also expressed support for the *cy-près* application of undistributed funds in their 1995 report for the Victorian Attorney-General's Law Reform Advisory Council.¹⁶⁵

Section 33M of the Supreme Court Act 1986

One further impediment to *cy-près* relief under the present Victorian class action regime is section 33M of the *Supreme Court Act 1986*, which allows the court to discontinue (or partially stay) a proceeding as a class action where the plaintiff seeks an award of money to group members, and it appears probable that if the plaintiff is successful, the costs involved in the identification of, and distribution of money to group members 'would be excessive having regard to the likely total of these amounts'. In essence, what is involved is a 'cost-benefit equation'.¹⁶⁶ Section 33M of the *Federal Court of Australia Act 1976* (Cth), to which the Victorian provision is identical in effect, embodies a recommendation of the ALRC, which was concerned that the aggregation of large numbers of limited claims had the potential to become uneconomical.¹⁶⁷

Morabito and Epstein did not make explicit comment as to whether section 33M ought to be adopted in Victoria, although they noted that it and like provisions tend to encourage interlocutory dispute,¹⁶⁸ and recommended that 'the power of the court to order the termination of class suits which satisfied the prerequisites for such suits [should] be limited as much as possible'.¹⁶⁹ However, as Morabito has elsewhere noted in connection with the federal provision:

*Section 33M has been criticized because it leaves class members without remedy just because they are disparate and their individual claims are relatively small. This is inconsistent with the access to justice aim of [the class actions regime] and hinders the ability of [class action] proceedings to enforce the law and discourage unlawful behaviour.*¹⁷⁰

Morabito notes that at the time of introduction of the Commonwealth scheme, the Australian Democrats had advocated an amendment to section 33M, which would have replaced the court's power to terminate a class action proceeding in such circumstances with a power to order that class members not be paid. The proposed provision would have left the plaintiff with the option of

148 Mulheron (2006) above n 79, 230.

149 *Supreme Court Act 1986* s 33Z(3).

150 *Supreme Court Act 1986* (Vic) s 33Z(2).

151 *Supreme Court Act 1986* s 33ZA(1).

152 *Supreme Court Act 1986* s 33ZA(3)(c).

153 *Supreme Court Act 1986* s 33ZA(5).

154 *Supreme Court Act 1986* s 33ZA(5).
Note that the Federal Court Act uses the formulation 'such orders as are just': s 33ZA(5).

155 *Supreme Court Act 1986* s 33Z(3).

156 ALRC (1988) above n 36 [240].

157 *Ibid* [237].

158 *Ibid* [239].

159 *Ibid* [240].

160 Law Reform Committee of South Australia, *Relating to Class Actions*, Report No 36 (1977) 9.

161 *Ibid*.

162 *Ibid* 10.

163 ALRC (1979) above n 140, [49].

164 *Ibid* [98]. It was envisaged that the proposed fund would also benefit defendants by meeting any liability for costs awarded against the assisted representative applicant.

165 Morabito and Epstein (1997) above n 146, 57.

166 Cashman (2007) above n 4, 309.

167 ALRC (1988) above n 36, [151].

168 Morabito and Epstein (1997) above n 146, [6.16].

169 *Ibid* 48 (Recommendation 4).

170 Vince Morabito, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42(3) *Osgoode Hall Law Journal* 473, 490 (footnote omitted).



continuing and seeking an order that all undistributed compensation be referred to a prescribed legal aid fund.¹⁷¹ Senator Sid Spindler, proposing the amendment, noted that its purpose was to 'ensure that funds which have become available as a result of a successful action are not reclaimed by bodies of persons who have caused the damage but are put to a beneficial use'.¹⁷² However, the Democrats' amendment was defeated, Senator Michael Tate (then Minister for Justice and Consumer Affairs) commenting:

*[A]lthough I can see the motive behind Senator Spindler's concerns and do not say that they are completely without merit, I believe that the task of the court is to adjudicate between parties and to award compensation to an injured party in those cases where it is appropriate ... if for one reason or another that compensation cannot be easily paid or persons cannot be paid to whom payment ought to be made, the defendant should not be disadvantaged. We do not believe it is right in a sense that the defendant be punished by having assets diminished simply because a payment cannot be made to those who otherwise would be entitled to receive a payment.*¹⁷³

The courts have tended to resist arguments that difficulties of proof of the precise losses of individual class members ought to preclude class actions from proceeding. In *ACCC v Golden Sphere International Inc*,¹⁷⁴ the respondents submitted that the circumstances would render the court unable to make a 'reasonably accurate assessment' of aggregate damages as required under section 33Z(3) of the Federal Court Act.¹⁷⁵ Justice O'Loughlin considered it probable that there was variation between the circumstances of individual class members, but dismissed the respondents' submission, commenting:

*Pt IVA of the [Federal Court of Australia] Act is not to be read down through any evidentiary inability to identify every member of the group and the relevant amount of damage that each member has or may have suffered ... These are aspects of the case that can be determined at a later stage by the trustee ... The respondents have proffered no evidence or assistance; they are content to sit back and despite their conduct, claim that they should not be the object of an award of damages because of the applicant's alleged inability to prove those damages. To allow such an attitude to prevail would be tantamount to allowing the respondents to profit from their wrong doings. The ACCC has proposed that damages be based only on the minimal sum of \$A50 per member. If the respondents properly considered that this figure was excessive, the remedy was in their hands to submit the contradictory evidence.*¹⁷⁶

Maurice Blackburn's submission suggests that in the context of class actions, and particularly in the area of anti-competitive conduct, *cy-près* remedies would reduce the cost and complexity of proceedings, result in the modernisation and simplification of the law and promote fairness and access to justice. The present legislative approval of assessment of aggregate damages would facilitate the application of *cy-près* style principles.¹⁷⁷

3.4 CONSUMER LAW STATUTES

3.4.1 Introduction

The bodies established under statute to monitor and enforce trade practices legislation at both state and federal levels are well placed to seek compensation (of a *cy-près* nature or otherwise) on behalf of affected consumers in situations where it is unlikely that an individual would undertake to conduct representative proceedings when the personal stakes are small and the risk of adverse costs considerable.

Recent decisions at a federal level have affirmed that the Australian Competition and Consumer Commission (ACCC) is unable to seek an award of compensation (let alone *cy-près* compensation) on behalf of consumers who have suffered loss due to contraventions of the *Trade Practices Act 1974* (Cth) except in narrowly defined circumstances. However, the position appears to be quite different for Consumer Affairs Victoria.

3.4.2 The ACCC

The scope for the ACCC to seek compensation or related remedies on behalf of a significant number of consumers is limited.¹⁷⁸ The *Trade Practices Act 1974* (Cth) enables the court, on application, to make orders as it considers 'appropriate' to compensate persons who have suffered loss or damage

from unlawful conduct under the Act.¹⁷⁹ Either an affected person or the ACCC (on behalf of affected persons) can make an application. However, the ACCC is limited to bringing action on behalf of named persons who have given their express consent to involvement in the action.¹⁸⁰ In effect, an opt-in regime is in place and the ACCC is ill-equipped to seek compensation, direct or indirect, in situations where a large class of consumers have suffered small-scale losses which are difficult to separate.

Two recent cases have explored the potential for the ACCC to seek orders that non-parties (that is, consumers) be compensated pursuant to non-representative proceedings that it has commenced and conducted.

In *Medibank Private Ltd v Cassidy*,¹⁸¹ the Federal Court was required to consider (in relation to analogous provisions of the *Australian Securities and Investments Commission Act 1989* (Cth)) whether its power to grant injunctive relief under section 80 of the *Trade Practices Act 1974* extended to awarding such compensation. The court held that it did not.¹⁸² Central to its reasoning was the manner in which the scheme of remedies available under the Act had developed.¹⁸³ It noted:

- At first, section 80 had permitted the ACCC to seek an injunction restraining contravening conduct, but where the court granted such an injunction, section 87(1) allowed it to also make ‘such other orders as it [thought] fit’ to compensate persons that the conduct had injured. Such orders could be made irrespective of whether or not those persons were parties to the proceedings.¹⁸⁴
- In 1977, the Act was amended such that section 87 orders were restricted to parties to the proceeding. The amendment was made for ‘constitutional reasons’.¹⁸⁵
- In 1983, section 80 was amended so as to allow the making not just of restraining orders but also mandatory orders ‘in such terms as the Court determines to be appropriate’.¹⁸⁶ However, ‘there was no suggestion that the effect of the amendment was to confer on the Court the very power that Parliament had taken away, by the [earlier] amendment to s 87’.¹⁸⁷
- Section 87(1B) was later amended to permit the ACCC to seek compensation under section 87 on behalf of specified persons who had consented to the application (as discussed above).¹⁸⁸

Having regard to this sequence of amendments to the Act, the court held that it was not open to order compensation in favour of non-parties on application of the ACCC, stating:

*Such an interpretation would give rise to a capricious and irrational scheme. The effect of such a construction would be that certain of the provisions of s 87 would be quite otiose and have no work to do.*¹⁸⁹

Special leave to appeal the *Medibank* decision to the High Court was refused.¹⁹⁰

In *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd*,¹⁹¹ the respondent was found to have engaged in misleading conduct under the Act. The ACCC sought orders under section 80 requiring the respondent to provide a refund to consumers who had purchased its product in reliance on that conduct. Justice Dowsett noted that although sections 80 and 87 had been amended after the decision in *Medibank*, the changes were not such as to disturb the court’s reasoning in that case.¹⁹²

It is notable that the ALRC in 1979 suggested that the original section 87(1), affording the court broad powers to make orders for compensation in proceedings for an offence, ought to be revived, assuming that the constitutional problems associated with it could be circumvented.¹⁹³ In 1994, the ALRC recommended, along similar lines, that the Trade Practices Act be amended to permit the court to make appropriate orders ‘to compensate a person who has suffered loss or damage’ as a result of a contravention of the Act and/or ‘to undo the effects of the contravention’.¹⁹⁴ These recommendations have not been implemented, and the issue does not appear to have been the subject of consideration in the Treasury’s recent review of the Trade Practices Act.¹⁹⁵

Catriona Lowe, Co-CEO of the Victorian-based Consumer Action Law Centre, observed in May 2007:

*There have been 15 acts of parliament amending the TPA (16 if small business reforms are passed by June) since the Medibank and Danoz decisions. Yet not once has the government taken the opportunity to fix fundamental limitations on the ACCC’s ability to help consumers.*¹⁹⁶

- 171 Ibid 490–1. For the text of the Democrats’ proposed amendment, see Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3034 (Sid Spindler).
- 172 Commonwealth, 13 November 1991, above n 171.
- 173 Ibid 3034 (Michael Tate). See also ibid 3035 (Peter Durack).
- 174 (1998) 83 FCR 424.
- 175 Section 33Z of the *Federal Court of Australia Act 1976* (Cth) is for present purposes identical to s 33Z of the *Supreme Court Act 1986*.
- 176 (1998) 83 FCR 424, 449.
- 177 Submission CP 7 (Maurice Blackburn).
- 178 See Cashman (2007) above n 4, 576–7.
- 179 *Trade Practices Act 1974* (Cth) s 87(1A).
- 180 *Trade Practices Act 1974* (Cth) s 87(1B).
- 181 [2002] FCAFC 290.
- 182 *Medibank Private Ltd v Cassidy* [2002] FCAFC 290, [35], [45] (Sundberg, Emmett and Conti JJ) (‘Medibank’).
- 183 *Medibank* [2002] FCAFC 290 [19].
- 184 *Medibank* [2002] FCAFC 290 [22].
- 185 *Medibank* [2002] FCAFC 290 [24], citing the Explanatory Memorandum of the amending Act.
- 186 *Medibank* [2002] FCAFC 290 [26].
- 187 *Medibank* [2002] FCAFC 290 [27].
- 188 *Medibank* [2002] FCAFC 290 [28]–[29].
- 189 *Medibank* [2002] FCAFC 290 [32].
- 190 See Transcript of Proceedings, *Cassidy v Medibank Private Ltd* (High Court of Australia, McHugh and Hayne JJ, 20 June 2003).
- 191 [2003] FCA 881.
- 192 *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881, [271].
- 193 ALRC (1979) above n 140, [96].
- 194 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) [4.8].
- 195 Trade Practices Act Review Committee, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003).
- 196 Catriona Lowe, ‘Give ACCC Consumer Reforms It Needs’ (Letter to the Editor), *The Australian Financial Review* (Sydney) 28 May 2007, 59.



Thus, the ACCC is not at present entitled to seek compensation on behalf of a substantial class of victims of unlawful conduct, although consumer advocates continue to back amendments to the Trade Practices Act to enable the ACCC to seek compensation (eg, refunds) on behalf of consumers and civil penalties designed to preclude wrongdoers from profiting from their unlawful conduct.¹⁹⁷ Even if the ACCC was empowered to seek compensation on behalf of a large aggregation of consumers, it is doubtful that *cy-près* relief would be among the available remedies. In *Cauvin v Philip Morris Ltd*,¹⁹⁸ determined in 2002, an individual plaintiff sought remedies in the nature of *cy-près* orders via the court's powers under the Trade Practices Act. However, the court held that it lacked the power to make such orders.¹⁹⁹

The *Cauvin* proceedings were instituted following the decisions in *Ha v New South Wales*²⁰⁰ and *Roxborough v Rothmans of Pall Mall Australia Ltd*,²⁰¹ in which it was determined, respectively, that legislation imposing a 'tax' on tobacco products was invalid, and that all identifiable amounts paid to tobacco wholesalers by tobacco retailers under this legislation were to be returned to the retailers.²⁰² However, as was recognised in *Roxborough*, the retention of those amounts would have comprised a windfall gain to either the wholesalers or the retailers.²⁰³ In real terms, it was consumers who had absorbed the impact of the invalid tax through increased prices for the affected products. The plaintiff, *Cauvin*, brought a representative action on behalf of such consumers, seeking, on a number of bases, that the funds collected be paid to them or otherwise used for their benefit.²⁰⁴ Most of the claims were struck out, but the court's consideration of the claims made under the Trade Practices Act is, for present purposes, illuminating.

In essence, the plaintiff's claim was that the wholesalers and retailers had engaged in unconscionable conduct in contravention of section 51AA and/or section 51AB of the Act, and that as she had standing to seek an injunction under section 80, the court could make 'other orders' under section 87(1).²⁰⁵ The plaintiff sought orders that would compensate consumers for, prevent or mitigate past or future loss or damage, 'including, if the court thinks fit, an order that the moneys be paid into an appropriate fund for [their] benefit'.²⁰⁶ 'Whether this was to reduce the cost of cigarettes over a period or for purposes such as "Quit for Life" [was to be] left to the court to decide'.²⁰⁷ It was accepted that it would be difficult, if not impossible, for the plaintiff to establish that she had purchased cigarettes on which tax was not forwarded to the government, or to identify all the individuals comprising the class she sought to represent.²⁰⁸ Justice Windeyer held that the claim must fail, noting that he did not accept that the plaintiff or those she purported to represent had suffered a recognisable 'loss':

*The plaintiff's real case is not for an amount but for a fund, not to compensate purchasers, because it is accepted that they cannot be identified, but for some other good purpose for community welfare or consumer benefit.*²⁰⁹

Justice Windeyer found that there was no scope under the Act for the making of an order to establish such a fund:

*It has not been explained on what basis the court has any such power ... Whatever may be the position in the United States of America [with respect to class actions] there is no power in this court to make orders for disposition of a fund other than to persons who establish an entitlement to compensation out of such fund. Notions based on *cy-près* analogies, escheat, fluid recovery and deterrent distribution are just that. On no basis are they within the remedies available under s 87 of the Trade Practices Act.*²¹⁰

Similar issues in the context of the *Fair Trading Act 1987* (NSW) were considered in *Commissioner for Fair Trading v Thomas*.²¹¹ Section 72 of that Act provided that the court had the power, where certain contraventions of the provision led to a person suffering loss or damage, to 'make such order or orders as it thinks appropriate' against those involved in the contravention, provided that the order or orders would 'compensate the first-mentioned person wholly or in part for the loss or damage or [would] prevent or reduce the loss or damage'.²¹²

In *Thomas*, the various defendants (who were in business as credit consultants) were found to have engaged in unlawful conduct under the Act, with the result that a substantial number of consumers had suffered loss. The Commissioner of Fair Trading sought orders under section 72 establishing a trust comprising monies recovered from the defendants. The commissioner would administer the trust, with a view to compensating consumers for their losses.²¹³ The trust would operate for a certain

period, at the end of which all undistributed monies would be paid into the Financial Counselling Trust Fund.²¹⁴ The purpose of the latter fund is to assist nonprofit organisations engaged in financial counselling, the training of financial counsellors or other educational programs on the management of personal finances.²¹⁵

Justice Shaw found there was a ‘jurisdictional question’ as to whether the court was empowered to order the establishment of such a trust.²¹⁶ The defendants contended that the court had no such power, relying on *Cauvin*.²¹⁷ However, Justice Shaw considered *Cauvin* to be distinguishable on the basis of differences between section 72 of the Fair Trading Act (NSW) and section 87(1) of the Trade Practices Act, in particular that the court has broader powers under the former:

*any appropriate orders are empowered [under s 72] if they are compensatory in character, and the making of such orders does not require the person who suffers loss or damage ... to be the applicant or plaintiff invoking the court’s jurisdiction [as with s 87(1)]. The adjective ‘appropriate’ [in s 72] is of wide import and confers a broad discretion in the court to do justice.*²¹⁸

Justice Shaw further observed:

*It appears that in Cauvin, the orders sought were not directed to compensate consumers for identifiable loss or damage but [wholly] for other, more general, community purposes.*²¹⁹

Justice Shaw thus appears to have held that it was (at least in theory) within the power of the court ‘to make the orders as sought constituting the trust’.²²⁰ However, he declined to order that the remainder of the compensation fund revert to the Financial Counselling Trust Fund:

I have no doubt that [the Trust Fund’s] are worthy objectives and in an era when debt and financial difficulty appears quite widespread that the educative function of such a trust performs a significant public purpose. Nevertheless, the question is whether if there is a surplus in the trust fund which I propose to order it is the defendants in the present litigation who ought to be contributing to the financial counselling fund by a coercive order of this court.

*In my opinion, such a requirement could be characterised as punitive rather than reflecting the leitmotiv of the statutory provisions which are the foundation of the plaintiff’s case. Whilst valiantly seeking to pursue this aspect of the orders [counsel for the plaintiff] fairly indicated that this was ‘the weakest’ part of his argument. I therefore propose that an order be made that if there is a surplus in the fund once the trustee has completed all inquiries and made all payments to consumers which he considers proper and justifiable that any remaining funds shall be repaid to the defendants proportionately to their contribution to the fund.*²²¹

In 2003, the Commonwealth Treasury released a report following a review of the Trade Practices Act.²²² A number of submissions had advocated the inclusion in the Act of an explicit provision empowering the court to make *cy-près* orders.²²³ However, the Review Committee rejected this idea, stating that the application of funds in this manner would raise issues outside the courts’ competence:

*Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance.*²²⁴

However, the committee’s subsequent observation that ‘[a]t present, pecuniary penalties [under the Act] are paid into [Consolidated Revenue], the expenditure of which is a matter ... for the Government’ tends to indicate that its conclusion may have been the artefact of a confusion between damages and penalties, as available under the Act.²²⁵ The thrust of the submissions made to the review was that *cy-près* orders ought to be available to enable the court to use funds obtained through unlawful conduct to effect a form of indirect compensation of affected persons when an action is brought on their behalf—not to divert the proceeds of ACCC enforcement actions to particular ‘purposes’.

197 Ibid.

198 [2002] NSWSC 736.

199 *Cauvin v Philip Morris Ltd* [2002] NSWSC 736 (‘Cauvin’), [33].

200 (1997) 189 CLR 465.

201 (2001) 208 CLR 516 (‘Roxborough’).

202 *Cauvin* [2002] NSWSC 736, [2].

203 (2001) 208 CLR 516, [5] (Gleeson CJ, Gaudron and Hayne JJ), [114]–[115] (Kirby J).

204 *Cauvin* [2002] NSWSC 736, [14] (Windeyer J).

205 *Cauvin* [2002] NSWSC 736, [25], [28].

206 *Cauvin* [2002] NSWSC 736, [14] (Windeyer J, quoting the plaintiff’s statement of claim).

207 *Cauvin* [2002] NSWSC 736, [30].

208 *Cauvin* [2002] NSWSC 736, [16].

209 *Cauvin* [2002] NSWSC 736 [31].

210 *Cauvin* [2002] NSWSC 736 [31], [33].

211 [2004] NSWSC 479 (‘Thomas’).

212 *Fair Trading Act 1987* (NSW) s 72.

213 *Commissioner for Fair Trading v Thomas* [2004] NSWSC 479 (‘Thomas’), [1].

214 *Thomas* [2004] NSWSC 479, [1].

215 *Credit (Savings and Transitional) Regulation 1984* (NSW), reg 29(3).

216 *Thomas* [2004] NSWSC 479, [24].

217 *Thomas* [2004] NSWSC 479 [25].

218 *Thomas* [2004] NSWSC 479 [27].

219 *Thomas* [2004] NSWSC 479 [27].

220 *Thomas* [2004] NSWSC 479 [29].

221 *Thomas* [2004] NSWSC 479 [54]–[55].

222 Trade Practices Act Review Committee, above n 195.

223 Ibid. Submissions are available on the website of the Department of the Treasury <www.tpareview.treasury.gov.au/content/home.asp> at 12 December 2007. See, eg, submissions of the Communications Law Centre <http://tpareview.treasury.gov.au/content/subs/177_Submission_CLC.rtf>; the Consumer Law Centre Victoria <http://tpareview.treasury.gov.au/content/subs/031_Submission_CLC.rtf>; the Australian Consumers’ Association <http://tpareview.treasury.gov.au/content/subs/105_Summary_ACA.rtf>; Canberra Consumers <<http://tpareview.treasury.gov.au/content/subs/184.rtf>>; David Roche <http://tpareview.treasury.gov.au/content/subs/012_Submission_Roche.rtf> (all at 12 December 2007).

224 Trade Practices Act Review Committee (2003) above n 195, 163.

225 Ibid.



3.4.3 Consumer Affairs Victoria

Consumer Affairs Victoria is in a much better position to seek compensation on behalf of large groups of consumers who have suffered loss or damage in respect of the same unlawful conduct. Under section 105(1) of the *Fair Trading Act 1999*, the Director of Consumer Affairs Victoria is able to 'institute or continue proceedings on behalf of ... a person or persons in respect of a consumer dispute'.²²⁶ The term 'proceeding' encompasses both group and representative proceedings for the purposes of the section.²²⁷ The director must be satisfied that the person or persons have a good cause of action and that it is in the public interest to act on their behalf.²²⁸ The director must also obtain the consent of the person on whose behalf the proceedings are brought, but in the case of representative or group proceedings only the consent of the representative party is required.²²⁹ Revocation of consent does not preclude the director from continuing the action.²³⁰

The powers of the director to institute and intervene in group or representative proceedings arise from recent amendments. Section 105 in the Act as passed made no mention of such proceedings (and, in addition, required the director to obtain permission from the minister before becoming involved in an action and retain the consent of the person represented throughout).²³¹ The amending Act, the *Fair Trading (Enhanced Compliance) Act 2004*, was directed to 'establish[ing] better enforcement mechanisms to protect consumers' and involved a shift in the 'enforcement of consumer protection legislation from reliance on criminal prosecutions to a greater reliance on civil and administrative interventions'.²³²

The orders that can be sought for breaches of the Act are also broader than at federal level, and could be broad enough that representative action proceedings may not be required to obtain redress on behalf of consumers for unlawful conduct under the *Fair Trading Act 1999*.

Under section 149A(1), the minister, the director or 'any other person' is able apply in the Supreme Court or the County Court for a mandatory injunction requiring a person who has engaged in (or been involved in) unlawful conduct 'to do any act or thing'.²³³ Section 149A(3) sets out a non-exhaustive list of possible orders that the court can make, including orders that the person 'refund money to purchasers' (c.f. the position under the Trade Practices Act, as described above).²³⁴ Prior to the introduction of section 149A in 2004,²³⁵ applicants were restricted to seeking injunctions to restrain conduct under section 149. In the Second Reading Speech to the relevant amending Act, Attorney-General Rob Hulls made specific reference to enabling 'remedial injunctions'.²³⁶

There is also provision for the court to make such orders as it considers 'fair' where it is found that the defendant has contravened the Act and another person has suffered loss or damage as a result.²³⁷ Section 158(2) provides a non-exhaustive list of possible orders, which can include a requirement that the defendant refund money paid by the injured person or provide other compensation for the breach but does not explicitly mention *cy-près* orders.²³⁸ Provision is also made for a limited amount of compensation to be awarded in recognition of humiliation or distress caused by conduct constituting an offence under the Act.²³⁹

Reasoning similar to that of Justice Shaw in *Thomas* may therefore not preclude the court making *cy-près* orders under either section 149A or section 158.

Section 149A is a provision of open standing; 'any ... person' is able to apply for an injunction under it.²⁴⁰ Thus, if the section was found to license the making of *cy-près* orders, an individual consumer (or indeed an organisation of consumer advocates) would be able to seek such orders in an appropriate case.

3.5 CY-PRÈS AND SETTLEMENTS

There have been a number of instances in Australia in which *cy-près* type remedies have been incorporated into settlement agreements.

The Consumer Law Centre Victoria (now merged into the Consumer Action Law Centre) was itself established with the proceeds of a legal settlement:

*The outcome is a consumer advocacy group which can represent the interests of consumers in a manner which ultimately assists in reducing consumer detriment and improves the protection of consumer interests broadly.*²⁴¹

In more recent times, a settlement agreement in a class action has made provision for the *cy-près* application of the undistributed remainder of the settlement fund:

*In King v AG Australia Holdings Limited and Ors*²⁴² the Settlement Agreement, which was approved by the Federal Court of Australia, provided that undistributed damages would be paid to the Australian Institute of Management for the purposes of training corporate officers and directors, or to the Australian Shareholders' Association.²⁴³

Information has also been provided to the commission that the ACCC has in the past reached arrangements under which settlement monies were placed in a fund for the purpose of assisting consumers, including through research.

3.6. EXISTING CY-PRÈS TYPE MECHANISMS

3.6.1 Consumer credit funds

New South Wales: Financial Counselling Trust Fund

In the *Thomas* case,²⁴⁴ as discussed above, the NSW Commissioner for Fair Trading sought to have the unclaimed residue of an award paid into the Financial Counselling Trust Fund.²⁴⁵ That fund, established in 1993, is itself maintained through an arrangement analogous to a *cy-près* scheme, set up under the *Credit Act 1984* (NSW).²⁴⁶ Where a credit provider's contract fails to comply with that Act, the amount the affected debtor has to pay is, in some circumstances, reduced (eg, through the provider forgoing 'credit charges').²⁴⁷ In this situation, the credit provider is able to apply to the Consumer, Trader and Tenancy Tribunal for an order increasing that amount.²⁴⁸ The tribunal must determine whether the provider's noncompliance ought to be excused. If it decides that the provider's conduct is excusable it can order that the debtor is liable for the original amount. Where it is not excusable the tribunal can order that the debtor is liable for such part of the amount financed/owing and the contracted credit charge as it sees fit.²⁴⁹

Section 86 allows the tribunal to deal with several contracts (or a class of contracts) at once where the provider's conduct has affected them all.²⁵⁰ In this situation, under section 86B the tribunal may determine that all credit charges must be repaid to the provider, but that the provider must remit a specified amount to the fund.²⁵¹ In setting the amount, the tribunal must have regard to the number of contracts in issue (and can make an estimate thereof if required).²⁵² Before making such an order, the tribunal must be satisfied:

- (a) the credit provider's noncompliance with the Act was 'sufficiently serious to warrant the ... provider being penalised'; and

226 Note that a 'consumer dispute' is a dispute between a purchaser or possible purchaser and a supplier of goods and services in trade or commerce: *Fair Trading Act 1999* s 105(5). This definition does not appear to limit the director's involvement in proceedings only to causes of action arising under the Act.

227 *Fair Trading Act 1999* s 105(5).

228 *Fair Trading Act 1999* s 105(2)(a), (c).

229 *Fair Trading Act 1999* s 105(3)(a), (b).

230 *Fair Trading Act 1999* s 105(4).

231 These latter requirements were removed by s 43 of the *Fair Trading (Amendment) Act 2003*.

232 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 November 2004, 1509 (Rob Hulls, Attorney-General).

233 *Fair Trading Act 1999* s 149A(1).

234 *Fair Trading Act 1999* s 149A(3).

235 See *Fair Trading (Enhanced Compliance) Act 2004* s 19.

236 Victoria, *Parliamentary Debates*, 11 November 2004, above n 232.

237 *Fair Trading Act 1999* s 158.

238 *Fair Trading Act 1999* s 158(2). The s 158(2) list was, in fact, exhaustive until amended by s 61(1) of the *Fair Trading (Amendment) Act 2003*. The stated purpose of the amendment was to 'remove unnecessary restrictions on access to the ancillary remedies under the [A]ct': Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 1495 (Rob Hulls, Attorney-General).

239 *Fair Trading Act 1999* s 160.

240 *Fair Trading Act 1999* s 149A(1).

241 Submission of the Australian Consumers' Association to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act (2002)* 9, available at <http://tpareview.treasury.gov.au/content/subs/105_Summary_ACA.rtf> at 12 December 2007.

242 [2003] FCA 980.

243 Submission CP 7 (Maurice Blackburn).

244 *Commissioner for Fair Trading v Thomas* [2004] NSWSC 479.

245 *Thomas* [2004] NSWSC 479 [1].

246 The *Credit (Savings and Transitional) Regulation 1984* (NSW), reg 29 states that the fund 'is established for the receipt of money the subject of a direction under section 86B' of the *Credit Act 1984* (NSW).

247 The 'credit charge' is, in general terms, the difference between the amount financed and the amount that must be repaid under a contract of credit: see *Credit Act 1984* (NSW) s 11(1)(a).

248 *Credit Act 1984* (NSW) s 85(1).

249 *Credit Act 1984* (NSW) s 85(2).

250 *Credit Act 1984* (NSW) s 86(1).

251 *Credit Act 1984* (NSW) s 86B(1).

252 *Credit Act 1984* (NSW) s 86B(1), (2).



(b) that it would be 'unreasonable' to require the provider to take the practical steps that would be involved in reducing the credit charges in respect of individual debtors, eg because of the administrative problems involved in making small adjustments in respect of the contracts of a large number of debtors.²⁵³

The Financial Counselling Trust Fund is able to be applied to assist nonprofit organisations engaged in financial counselling, the training of financial counsellors or other educational programs with regard to personal financial management.²⁵⁴ In other words, penalties exacted from credit providers for contraventions of the Credit Act are directed to assisting consumers in their dealings with such providers. The fund is now administered under the NSW Department of Fair Trading's Financial Counselling Services Program.²⁵⁵

In the Second Reading Speech to the Credit (Amendment) Bill 1992 (NSW) introducing the section 86B scheme, then NSW Attorney-General Peter Collins emphasised its principal purpose was to preclude a credit provider benefiting from noncompliance simply because it would be impracticable to adjust their arrangements with each individual debtor:

[I]t is clear that in cases involving thousands of contracts where the Tribunal does not find that a breach is a minor error which ought to be excused, a credit provider whose credit charges are partially restored faces very considerable costs in identifying and locating past and current borrowers, reconstructing contracts, calculating refunds, adjusting existing loan accounts, processing and posting refunds and dealing with those returned unclaimed. The benefit to individual borrowers, on the other hand, may be small. This bill gives the Tribunal an alternative: the discretion to direct that forfeited credit charges be paid into a fund used to benefit consumers of credit as a whole.²⁵⁶

However, Mr Collins mentioned that the main purpose of reducing the amount for which debtors are liable under the Act is to penalise the credit provider, not to 'compensate' the debtors, who indeed need not have suffered loss. The direction of confiscated monies to the fund could in some cases do no more than deprive the debtors of what would otherwise be a 'windfall'.²⁵⁷ In this sense, the principal object of the section 86B scheme is regulation rather than indirect compensation of a traditional *cy-près* character.

Victoria: Consumer Credit Fund

In Victoria, the Consumer Credit Fund operates on a similar basis. The fund derives finance from a number of sources,²⁵⁸ including forfeited credit charges (as in NSW),²⁵⁹ civil penalties under the Consumer Credit (Victoria) Code,²⁶⁰ and certain penalties imposed on credit providers by the Victorian Civil and Administrative Tribunal.²⁶¹ The Minister for Consumer Affairs is able to draw on the fund to provide grants to nonprofit persons or organisations (or, since 2003, to the Director of Consumer Affairs Victoria)²⁶² providing education services, information, advice or assistance to credit users, or conducting research into the use of credit. The possible applications of the fund are, therefore, broader than those of its NSW counterpart.

When the fund was established, grants could not be made to enable the provision of assistance to credit users 'by the conduct of legal proceedings'. This caveat was the subject of some debate in parliament, and the Labor opposition moved an amendment to have it deleted.²⁶³ Labor MP Bruce Mildenhall commented:

We do not suggest that trust funds be specifically used for [the purpose of legal proceedings] but just that the restriction that they not be used for that purpose be deleted and that the advisory committee have the option of using trust funds for that purpose.

Some spectacular test cases in Victoria and the rest of Australia have proven to be the best way of enforcing and highlighting consumer rights and creating greater awareness of the ability of consumers to pursue their rights by enabling and resourcing consumers in taking a matter to an appropriate forum and having it dealt with in an appropriate way.²⁶⁴

The Labor amendment failed, with then Attorney-General Jan Wade arguing:

Advocacy assistance is already available on consumer issues through the Consumer Credit Legal Service Co-op, which has played a very important role in protecting consumer interests over a number of years. It has done it very well and will continue to do that.

*The Consumer Law Centre has a very large endowment which I have no doubt will be put to use in the provision of advocacy services. I do not see the need to extend the purposes for which the fund can be used.*²⁶⁵

The restriction relating to legal proceedings was removed in 2004,²⁶⁶ as part of a package of amendments that also empowered the Director of Consumer Affairs Victoria to bring group or representative proceedings on behalf of consumers (see above). In the Second Reading Speech to the amending Act, Attorney-General Rob Hulls noted that one purpose of removing the restriction was to 'allow the government to run test cases'.²⁶⁷

In making grants, the minister must act on the recommendations of the majority of an advisory committee comprising various prescribed stakeholders (see below).²⁶⁸ The composition and mode of operation of the committee were also controversial at the time of its inception. The Labor opposition was critical of the level of involvement of the minister in the management of the fund, and moved amendments designed to give the committee exclusive control of it.²⁶⁹ Mr Mildenhall highlighted the fact that 'government moneys are not involved; [the Fund comprises] moneys derived from the settlement of consumer actions'.²⁷⁰ He commented:

It is more appropriate that an advisory committee rather than the minister responsible be the arbiter of how trust funds are to be used.

It may well be that, through pressures on the minister's office, contacts the minister has had and other political considerations, an action a consumer group might want to take might be seen as far from desirable in the minister's mind. An advisory committee could be well and truly dissuaded, prevented or prohibited given the present provisions of the bill from taking up such causes.

*To remove the possibility of conflict and of the minister's acting at cross-purposes as an ultimate authority on the use of these funds and as part of a government for which such consumer issues might assume a political significance, it is desirable from a policy perspective that there be an adequate separation of the role of the minister from the role of the advisory committee.*²⁷¹

However, the government rejected the Labor amendments, Ms Wade stating that '[w]here public funds are involved, whether they be taxpayer funds or funds obtained in some other way on behalf of the public, it is far better that the minister have a responsibility to ensure that those funds are expended appropriately'.²⁷²

The relevant provisions have not been subsequently amended. The minister retains ultimate control over the making of grants, and is also empowered to appoint the members of the committee, which must comprise not more than:

253 *Credit Act 1984* (NSW) s 86B(3)(a), (b).

254 *Credit (Savings and Transitional) Regulation 1984* (NSW) reg 29(3).

255 See NSW Office of Fair Trading, *Financial Counselling Services Program* (2007) <www.fairtrading.nsw.gov.au/corporate/aboutus/financialcounsellingservicesprogram.html> at 13 December 2007.

256 NSW, *Parliamentary Debates*, Legislative Assembly, 9 April 1992, 2473 (Peter Collins).

257 *Ibid* 2474 (Peter Collins).

258 See *Credit (Administration) Act 1984* s 86AA(2).

259 See *Credit Act 1984* s 86A.

260 See *Consumer Credit (Victoria) Act 1995* s 38.

261 See *Consumer Credit (Victoria) Act 1995* s 30(4)(b).

262 See *Fair Trading (Further Amendment) Act 2003* s 21(3).

263 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 1995, 1660 (Bruce Mildenhall).

264 *Ibid* 1652 (Bruce Mildenhall).

265 *Ibid* 1661 (Jan Wade).

266 See *Fair Trading (Enhanced Compliance) Act 2004* s 34(2).

267 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 November 2004, 1510.

268 *Credit (Administration) Act 1984* ss 86AB–86AC. For examples of the kinds of projects for which funds have been provided, see, eg, Minister for Consumer Affairs, 'Grants to Assist Disadvantaged with Credit Issues' (Media Release, 4 April 2005), available at <[269 Victoria, *Parliamentary Debates*, above note 162, 1660 \(Bruce Mildenhall\).](http://www.consumer.vic.gov.au/CA256F2B00231FE5/page/Listing-cavApril2005-04-04-2005+++GRANTS+TO+ASSIST+DISADVANTAGED+WITH+CREDIT+ISSUES?OpenDocument&1=74-2005~&2=18-April~&3=~&REFUNID=B24156D41CFCE554CA256FE40008692E~> at 13 December 2007.</p></div><div data-bbox=)

270 *Ibid* 1652.

271 *Ibid*.

272 *Ibid* 1661.



- two persons 'with an interest in the provision of education, advice, or assistance to consumers'²⁷³
- two persons selected from among 'names submitted by a prescribed body representing interests of credit providers'²⁷⁴
- two persons selected from among 'names submitted by a prescribed body representing the interests of consumers'.²⁷⁵

Other States

A Consumer Credit Fund also operates in Queensland.²⁷⁶

3.6.2 Community service orders under the Trade Practices Act

Section 86C of the Trade Practices Act establishes a suite of 'non-punitive orders' that the court can, on application by the ACCC, impose on a person who has contravened specified sections.²⁷⁷ One is a 'community service order', which requires the contravener to perform a service 'for the benefit of the community or a section of the community'.²⁷⁸ Such service must be related to the contravening conduct;²⁷⁹ two examples are provided in the Act:

Example: The following are examples of community service orders:

- (a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and*
- (b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.*²⁸⁰

In *Australian Competition and Consumer Commission v Econovite Pty Ltd*,²⁸¹ the respondent, a manufacturer and distributor of livestock food supplements, admitted breaches of the Trade Practices Act in representations about the composition of several of its products and their registration under Western Australian law.²⁸² Consent orders were proposed, among which were three section 86C orders:

- (1) that the respondent produce and distribute throughout Western Australia 5000 copies of an informational pamphlet on specified aspects of cattle nutrition, to be drafted by an independent expert
- (2) that the respondent arrange for an animal nutrition expert to deliver at least three seminars on the same topics for livestock producers in Western Australia
- (3) that the respondent produce 250 copies of a wall chart setting out a 'simple guide to the nutrient supplementation requirement[s] of cattle', to be distributed to 'consumers of livestock feed supplements'.²⁸³

Justice French expressed some doubt as to whether the orders sought related to the contravening conduct to a sufficient degree,²⁸⁴ but was prepared to assume that they were within the scope of section 86C. However, he declined to make the orders for the pamphlet and the seminars on the basis that they would involve significant reliance on third parties and the respondent would lack control over, and responsibility for, the services provided.²⁸⁵ Justice French considered the respondent had the requisite expertise to produce the wall chart, but added the proviso that its proposed text be reviewed by the ACCC prior to production.

Comment was also made on community service orders in *Australian Competition and Consumer Commission v High Adventure Pty Ltd*.²⁸⁶ There, the respondents (a family-owned corporation and its sole director) admitted to various contraventions related to resale price maintenance.²⁸⁷ The ACCC sought the imposition of onerous pecuniary penalties.²⁸⁸ Justice Gray, taking the respondents' conduct to be less culpable than alleged by the ACCC and mindful of their strained financial circumstances, noted that he

drew the attention of counsel for the applicant to s 86C of the [TPA] and raised with him the possibility of a community service order ... in lieu of a financial penalty. In terms of s 86C(1), such orders can only be made on application by the present applicant. I urged counsel for the applicant to seek instructions to make such an application. On the view I take, an order under s 86C, framed so as to require the second respondent to make such use of his skills and knowledge in relation to paragliding in the promotion

of safety in that activity would have been a far more beneficial outcome than the imposition of pecuniary penalties. There would be much merit in forcing the second respondent to give up his time and to perform unpaid work that would enhance the safety of the activity of paragliding. This would have a more powerful deterrent effect, not only on the second respondent himself, but also generally, than the imposition of large pecuniary penalties that were never collected, because the first respondent went into liquidation and the second respondent was forced to become a bankrupt. Counsel for the applicant sought, but was not given, instructions to make an application for an order pursuant to s 86C. I can only conclude that it is the desire of the applicant to ruin the respondents financially.²⁸⁹

The penalties ultimately imposed on the respondents were much lighter than those the ACCC had sought, Justice Gray noting that he imposed them ‘reluctantly’ and reiterating his belief that ‘an order under s 86C would have been of far greater value’.²⁹⁰

3.7 SUPREME COURT POWER TO GRANT *CY-PRÈS* REMEDIES

Whether the court already has the power to grant *cy-près* type remedies is a vexed question.

Under part 4A of the *Supreme Court Act 1986*, in a class action proceeding the court is empowered to determine questions of law and of fact, to make declarations of liability, to ‘grant any equitable relief’, to award damages to group members, to ‘award damages in an aggregate amount’ (‘without specifying amounts awarded in respect of individual group members’) and to:

*make such other order as is just, including, but not restricted to, an order for monetary relief other than for damages and an order for non-pecuniary damages.*²⁹¹

In contrast, the corresponding provision of the Federal Court Act provides that the court may ‘make such other order as the Court thinks just’.²⁹²

Both the federal and Victorian statutory class action provisions also provide for a fund to facilitate the distribution of money to class members.²⁹³ Along with provisions for notifying class members, the making of claims on the fund by eligible class members and the distribution of funds to class members who have established an entitlement to be paid out of the fund, the statutory provisions give the court a *discretion* to make orders ‘for the payment from the fund to the defendant of the money remaining in the fund’.²⁹⁴

In providing that the court ‘may make such orders as it thinks fit’ for payment to the defendant of any surplus in the fund, the legislation appears to assume there may be circumstances

273 *Credit (Administration) Act 1984* s 86AC(1)(a).

274 *Credit (Administration) Act 1984* s 86AC(1)(b). Prescribed bodies are the Australian Bankers’ Association Inc, the Credit Union Services Corporation, the Australian Finance Conference and the Mortgage Industry Association of Australia: *Credit (Administration) (Committee) Regulations 2006*, reg 4(1).

275 *Credit (Administration) Act 1984* s 86AC(1)(c). Prescribed bodies are the Financial and Consumer Rights Council Inc, the Australian Consumers’ Association, the Consumer Credit Legal Service Inc, the Consumer Law Centre of Victoria Limited, the Brotherhood of St Laurence and the Good Shepherd Youth and Family Service Inc: *Credit (Administration) (Committee) Regulations 2006* reg 4(2).

276 See *Consumer Credit (Queensland) Act 1994* (Qld) pt 6.

277 The introduction of community service orders in this context followed a recommendation of the ALRC: ALRC (1994) above n 194, Recommendation 36.

278 *Trade Practices Act 1974* (Cth) s 86C(4).

279 The ALRC commented that such a requirement ‘is necessary to prevent community service orders being used to promote “pet charities”’. In determining the nature of a community service the court should be required to consider what, if any, damage was suffered by the community as a whole as a result of the contravention, and to require a reasonable relationship between the community service project and the nature of the damage’: ALRC (1994) above n 194, [10.17].

280 *Trade Practices Act 1974* (Cth) s 86C(4).

281 [2003] FCA 964 (‘Econovite’).

282 *Econovite* [2003] FCA 964, [4].

283 *Econovite* [2003] FCA 964, [7].

284 *Econovite* [2003] FCA 964, [15]: ‘[I]t is debatable whether mandated general advice about the provision of mineral supplements to livestock is a service that relates to conduct involving mis-statements about the composition of nutrient blocks. The examples of community service orders provided in the statute itself suggest something with a corrective element in relation to the contravention’.

285 *Econovite* [2003] FCA 964 [16].

286 [2005] FCA 762 (‘High Adventure’).

287 *High Adventure* [2005] FCA 762 [1]–[2].

288 *Econovite* [2003] FCA 964 [48]–[49].

289 *Econovite* [2003] FCA 964 [50].

290 *Econovite* [2003] FCA 964 [53].

291 *Supreme Court Act 1986* s 33Z(1)(d), (f), (g).

292 *Federal Court of Australia Act 1976* (Cth) s 33Z(1)(g).

293 *Federal Court of Australia Act 1976* (Cth) s 33ZA, *Supreme Court Act 1986* s 33ZA.

294 *Supreme Court Act 1986* s 33ZA(5), *Federal Court of Australia Act 1976* (Cth) s 33ZA(5).



where the court may decline to make such an order. The reference in the legislation to ‘the money remaining in the fund’ does not seem to contemplate, at least expressly, that the court may order payment to the defendant of only some of the surplus in the fund.

In its report which led to the federal class action provisions, the ALRC not only recommended that a special fund should be established to provide financial assistance in class action proceedings, but also made it clear that any unclaimed residue which had not been otherwise allocated to class members or which was not returned to the defendant ‘might, in appropriate cases, also go to this fund. A fund could be set up to be self-financing to some extent’.²⁹⁵

However, before considering the circumstances where there may be ‘money remaining in the fund’ it is necessary to consider the nature and extent of the power conferred by section 33Z(1)(g). What is the meaning of the words ‘an order for monetary relief other than for damages and an order for non-pecuniary damages’?²⁹⁶ There does not appear to be any Victorian class action case law on the meaning of these terms. Orthodox principles relating to the assessment of damages suggest that there are three types of ‘non-pecuniary’ loss. These comprise pain and suffering, loss of amenities and loss of expectation of life.²⁹⁷

Corrs Chambers Westgarth expressed the view that the power presently conferred on the Supreme Court by section 33Z(1)(g) of the Supreme Court Act is ‘sufficiently broad to allow the court to grant *cy-près* type remedies’.²⁹⁸

If a proper construction of this provision and other powers of the court is that there is no power vested in the court in a case of ‘unjust enrichment’ to do anything other than to order either compensation/damages to those persons individually identified (who come forward and make a claim, prove their entitlement and quantify their loss) or to make orders for the return of any surplus to the defendant, then it is recommended that the court should have such further power. Legislative clarification is necessary to avoid ongoing uncertainty and scope for forensic argument and appeals about the nature and extent of the existing powers.

Although in some jurisdictions, including in Canada, broad powers to order *cy-près* relief have been conferred on courts by class action statutes, such power has been held to be within the equitable or other jurisdiction of those courts. Thus, in the United States at least, *cy-près* jurisprudence has developed through judicial innovation.²⁹⁹

As noted by one author, the situations in which *cy-près* remedies may be appropriate include where:

- individual recovery would be low and the cost of proof of entitlement or distribution would be disproportionate
- the identities of class members are not able to be ascertained
- class members are unlikely to ‘come forward’ to submit claims
- the identity of class members ‘changes constantly’
- the ‘sheer number of class members makes individual distribution of damages difficult’.³⁰⁰

One example of where such a power is clearly required is the recent Australian litigation arising out of the constitutional invalidity of state tobacco excise laws. This gave rise to a multitude of proceedings in the NSW Supreme Court between tobacco retailers and tobacco wholesalers as to who should be entitled to retain the money, after it was held that it could not be validly collected by state revenue authorities. The money in question had in fact been collected from consumers of tobacco products, but the consumers failed in their attempt to bring class action proceedings to recover the money because the individual consumers who had paid the amounts in question were unable to be identified and the court did not have power to order some form of *cy-près* or public interest remedy. Thus, the retailers and wholesalers who litigated the issue were battling over what was a windfall for either party.

Another area where *cy-près* remedies may be particularly appropriate is in the area of price fixing. Current regulatory activity and class action litigation in this area is problematic for a number of reasons.

The regulatory focus is on civil penalties, payable to consolidated revenue, with relatively little effort being made by regulatory bodies to obtain compensation for those who have suffered loss. Although class actions brought on behalf of purchasers of products which have an inflated price because of price fixing or other unlawful anti-competitive conduct are compensatory in nature, there is often

considerable uncertainty as to who in fact suffered loss. Moreover, the loss suffered by various groups is difficult to quantify. First-line purchasers of the price fixed products or services (eg, wholesalers) may pass on some or all of the inflated costs to indirect purchasers (eg, retailers) who may pass on some or all of the inflated prices to consumers.

In the Australian vitamins class action litigation, the class as originally formulated encompassed all groups in this chain of supply, including the ultimate consumers.³⁰¹ Eventually, the ultimate consumers and indirect purchasers were excluded from the ambit of the class. The settlement provided a substantial amount for distribution to first-line purchasers and nothing for those who may have suffered loss further down the line.³⁰² As noted by Berryman:

*A very live issue before Canadian courts is the extent to which a defendant can argue that a direct claimant has incurred no loss because they have been able to pass on the excessive costs suffered to their own consumers, and secondly, whether indirect purchasers, usually consumers, have any class action claim at all.*³⁰³

This is also a live issue before Australian courts. Although to date price-fixing class action litigation has only been commenced in the Federal Court, there is no reason why certain causes of action cannot be brought under the class action provisions in the *Supreme Court Act 1986*. There may, however, be some reluctance to do this given that certain statutory causes of action are within the exclusive jurisdiction of the Federal Court.

Other situations which may be suitable for the application of *cy-près* remedies include the recently reported instances of certain petrol stations secretly transferring lower octane petrol to tanks reserved for higher octane fuel and selling the petrol at higher prices to unsuspecting motorists. In such situations it may be relatively simple to calculate the overall amount of 'unjust enrichment'. However, it may not be economically sensible or practicable to seek to identify each of the individual motorists who have been overcharged.

3.8 CY-PRÈS REMEDIES AND POSSIBLE CLASS MEMBER CLAIMS

There is at least one situation where the exercise of the power to grant *cy-près* type remedies would need to be carefully considered or constrained. There may be circumstances where the relevant limitation law(s) applicable to certain causes of action have not expired and where there is a prospect of further claims by persons who have suffered loss and damage but who are not within the ambit of the group on whose behalf the proceedings are being brought. It would be manifestly unfair to deprive a defendant of the amount of any unjust enrichment through the exercise of *cy-près* type remedies but permit future claims by persons claiming to have suffered loss and damage if the amount of such loss and damage had been 'disgorged' pursuant to the previous *cy-près* remedies.

There are a number of ways in which this potential problem could be addressed. For example, the power to order *cy-près* relief could be limited to situations where there was no real prospect of future claims by individual class members, including where the individual amounts in issue are relatively modest or where the relevant limitation period(s) has expired. Alternatively, this could be a factor required to be taken into account by the court in deciding whether to order *cy-près* remedies or in determining the nature and extent of *cy-près* relief to be ordered.

Another option would be to order that the distribution of any money by way of *cy-près* relief be deferred for a specified period, within which individual class members would have an opportunity to come forward and make claims for payment based on their individual legal entitlements. Depending on the nature of the case, the question of distribution of damages to members of the class would ordinarily be considered first, before the *cy-près* distribution of any residue. However, in cases where the individual payments to class members are likely to be modest and the transaction costs of assessing each individual claim are likely to be disproportionate to the amount in question, *cy-près* remedies may be the preferred or only option other than allowing the defendant to retain monies found to have been unlawfully obtained.

3.9. CY-PRÈS REMEDIES AND LEGISLATIVE CONSTRAINTS

If a provision is introduced which empowers the court to grant *cy-près* type relief—including in circumstances where it is not practicable or cost effective to identify or distribute monies to individual

295 ALRC (1988) above n 36, [312].

296 *Supreme Court Act 1986* s 33Z(1)(g).

297 See Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) 525.

298 Submission ED1 32 (Corrs Chambers Westgarth, confidential submission, permission to quote granted 14 January 2008).

299 See generally, Mulheron (2006) above n 79, 236.

300 *Ibid* 259–62; see also Berryman (2007) above n 139, 11–12.

301 *Bray v F Hoffman–La Roche Ltd* (2002) 118 FCR 1, [2].

302 *Darwalla Milling Co Pty Ltd v F Hoffman–La Roche Ltd (No 2)* [2006] FCA 1388, [5].

303 Berryman (2007) above n 139, 30, referring to J Laskin, L Plumpton and A Kershaw, 'The Certification of Competition-related Class Actions in Canada' in S Pitel (ed.), *Litigating Conspiracy: An Analysis of Competition Class Actions* (2006) 219.



class members who have suffered loss or damage—this will have a bearing on the application of existing provisions which empower the court to prevent a class action continuing, or to prevent it continuing in class action form or in respect of monetary relief, in certain circumstances.

For example, section 33M of the Supreme Court Act provides that in a class action which includes a claim for payment of money to group members, the court may direct that the proceeding no longer continue as a class action or may stay the claim for monetary relief if the court concludes

*that it is likely that, if judgment is given in favour of the [representative party], the cost to the [respondent] of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of the amounts.*³⁰⁴

Section 33N also empowers the court to order that the proceeding no longer continue as a class action, where it is ‘satisfied that it is in the interests of justice to do so’ because:

- (a) the costs would be excessive having regard to the costs of separate proceedings by group members
- (b) relief can be obtained by another type of proceeding
- (c) the class action will not provide an ‘efficient and effective means of dealing with the claims of group members’
- (d) ‘it is otherwise inappropriate that the claims be pursued by means of a [class action]’.³⁰⁵

In order to reconcile any tension between the power to order *cy-près* remedies and the application of the above provisions, the legislative power to grant *cy-près* relief would need to be applicable notwithstanding the provisions of sections 33M and 33N of the Supreme Court Act.

With the commission having resolved, in principle, that the court should have express power to make *cy-près* type orders, it remains to consider various matters of detail as to how such power might be exercised.

3.10 RECIPIENTS OF *CY-PRÈS* DISTRIBUTIONS

An important question arises as to whether a *cy-près* power should only be available for the purpose of distributing money for the benefit of persons who have suffered loss or who fall within the general characteristics of those whose losses have given rise to the ‘unjust enrichment’ in question. For example, to take the well known US case of *Daar v Yellow Cab Co*,³⁰⁶ where the taxi company had overcharged passengers during a certain period, should any relief be only for the benefit of (past, present or future) taxi passengers? Alternatively, should the court be able to apply any monies for the benefit of users of public transport, or consumers generally? If so, would the court be comfortable in exercising such a broad discretion to determine who the beneficiaries should be? Should this be subject to appeal?

The application of *cy-près* remedies under class action legislation in Ontario involves a three-stage process. First, the court must decide that an aggregate assessment of damages is appropriate to the case.³⁰⁷ Second, if the court determines that individual claims must be made to effectively distribute the aggregate award of damages, distributions will be made to eligible class members who establish their entitlement within the time set by the court.³⁰⁸ Thereafter, all or part of any remaining part of an award may be ‘applied in any manner that may reasonably be expected to benefit class members ... if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.’³⁰⁹

The commission believes the court’s powers should not be limited or constrained so as to require that any distribution of money be only for the benefit of persons who fall within the general characteristics of those whose losses have given rise to the ‘unjust enrichment’. For example, to take the tobacco excise litigation: it may not be considered appropriate to apply the funds in question to bring about a reduction in the price of tobacco products. Why should such funds not be allocated, for example, to assist anti-smoking groups and campaigns designed to reduce the incidence of tobacco consumption? In one view, both would be in the ‘interests’ of tobacco consumers. Any decision about how such monies should be distributed will involve value judgements and a choice between various alternatives.

3.11 PAYMENT INTO A FUND

The commission has considered whether the power to grant *cy-près* relief should encompass the power to order monies to be paid into the Justice Fund (or some other fund). The commission believes this option should be open to the court.

3.12 MANNER OF *CY-PRÈS* RELIEF

The commission has considered whether the court should have a general discretion as to how any *cy-près* relief should be implemented or whether the court's role should be limited to approving or choosing between proposals made by the parties to the litigation. The commission believes the court should have a general discretion which should not be constrained by the proposals of the parties.

3.13 INTERVENTION BY OTHER BODIES

The commission believes there should be scope for intervention by public interest organisations or other individuals or entities for the purpose of making submissions on how any proposed *cy-près* distribution should be implemented.

3.14 JUDICIAL APPROVAL OF SETTLEMENT AGREEMENTS

At present, the class action statutory provisions require court approval for any class action settlement.

After reviewing the Canadian experience with *cy-près* remedies, the Canadian academic Professor Jeff Berryman notes that a major criticism of many settlements is the apparent lack of connection between the members of the class and the beneficiaries of *cy-près* distribution schemes.³¹⁰ Although some United States courts have applied *cy-près* schemes in a manner which appears to have only 'tangential links to the original purpose' underlying the class action proceedings, other courts have 'exercised control' and rejected *cy-près* schemes that 'moved too far away from the underlying purpose of the litigation'.³¹¹

Professor Berryman notes that in the United States one author has suggested the following guidelines for adoption:

- i. A proposed *cy-pres* fund should invoke the active involvement of the adjudicator to ensure that indirect distribution benefits absent class members and meet[s] the standards of openness, fairness and effectiveness.
- ii. The process of *cy-pres* distribution begins with a consideration and articulation by the court of the purposes and intended beneficiaries of the fund and the standards for fairness and accountability in distribution.
- iii. The principal role of plaintiff's counsel is to assure that indirect distributions offer the greatest benefits possible to absent class members—not to select and advocate for specific recipients of a *cy-pres* fund.
- iv. When economically feasible, the court should base fluid recovery (benefit *cy-pres*) distributions on an open, competitive application process...
- v. Outreach, evaluation, selection, administration and monitoring functions should be carried out in a competent, cost-effective, and defensible manner.
- vi. Fairness in fluid recovery distributions requires two indispensable conditions: (1) equal access to information and the criteria on which distributions are made, and (2) clear disclosure or prohibition of conflict of interest circumscribing the critical functions of evaluation, recommendation, and selection.³¹²

As Berryman proceeds to note, jurisdictions that have enacted class action regimes have done so to improve access to justice. This is not only to compensate injured parties but 'to empower citizens in deterring illegitimate and widespread practises by economically powerful actors'.³¹³ Although *cy-près* remedies serve to enhance these goals it is important to ensure that class actions are not 'allowed to become the personal fiefdom of class action lawyers, to distribute largesse to favoured charities while at the same time masking their own healthy legal fees'.³¹⁴

The commission believes the court should retain power to *not* approve a settlement agreement reached between the parties as to how any *cy-près* distribution is to be made.

304 *Supreme Court Act 1986* s 33M(b).

305 *Supreme Court Act 1986* s 33N(1).

306 67 Cal 2d 695 (1967). The taxi company had overcharged by unlawfully altering the meters of the cabs. The court ordered the company to reduce the fares below the authorised fares for a specified period.

307 *Class Proceedings Act, SO 1992*, c 6, s 24(1).

308 *Class Proceedings Act, SO 1992*, c 6, s 24(7).

309 *Class Proceedings Act, SO 1992*, c 6, s 26(4).

310 Berryman (2007) above n 139, 29.

311 *Ibid* 33.

312 *Ibid* 34-35, quoting Armando Menocal, 'Proposed Guidelines for *Cy-pres* Distribution' (1998) 37(1) *Judges' Journal* 22.

313 *Ibid* 37.

314 *Ibid*.



3.15 REQUIREMENT TO GIVE NOTICE

The *Supreme Court Act* presently provides for notice to be given of any matter at any stage of a class action proceeding.³¹⁵ The commission believes the parties should be required to give court-approved notice to the public that the power may be exercised and this should include, where appropriate, notice to particular entities that may be eligible for consideration as recipients of the funds.

3.16 RIGHT OF APPEAL

It is necessary to consider whether the exercise of the court's discretion to grant *cy-près* remedies should be subject to appeal. The commission believes there should be only limited appeal rights, based on *House v The King*³¹⁶ type principles, rather than a general right of appeal from the exercise of judicial power to grant *cy-près* remedies.

3.17 CIVIL PENALTIES AS ALTERNATIVE TO *CY-PRÈS* REMEDIES

As an alternative to conferring an express *cy-près* power on the court, the commission has considered whether it might be preferable to create a civil penalty based on the amount of any 'unjust enrichment', or to provide for forfeiture of this amount. Such a penalty could be paid to consolidated revenue or into a designated fund (the Justice Fund), or applied for specified 'public interest' purposes.

In its report on class actions, the Ontario Law Reform Commission favoured forfeiture, rather than return of funds to the defendant, where class members were unable to be individually compensated. This was in recognition of the need for deterrence. The resulting legislation in Ontario provided for *cy-près* distribution of any residue after compensation to individual class members. However, forfeiture was rejected in favour of return of funds to the defendant in the event that *cy-près* distribution is not considered appropriate.³¹⁷ Other Canadian provinces allow for forfeiture.³¹⁸ Although both Ontario and British Columbia have statutory provisions for the return of funds to a defendant, and British Columbia has an additional provision for forfeiture, such provisions have not been 'relied upon or made the subject of a court order'.³¹⁹ Apparently this is because it is common practice to make express provision for *cy-près* distribution in a way that ensures there is no undistributed surplus.³²⁰

Although under the commission's proposal some or all of any amount of the residue of damages may, at judicial discretion, be paid into the proposed Justice Fund, the commission believes the remedy available should be limited to *cy-près* type orders rather than extended to encompass civil penalties or forfeiture.

3.18 STAKEHOLDER VIEWS ON *CY-PRÈS* REMEDIES

3.18.1 Submissions supporting *cy-près* remedies

Support for the introduction of *cy-près* remedies in class action litigation came from a number of sources, including the largest commercial litigation funder in Australia, several large plaintiff law firms, PILCH, Victoria Legal Aid, academics with particular expertise in the area of class actions,³²¹ and the Consumer Action Law Centre.

The Consumer Action Law Centre noted that it often deals with 'disputes which must logically be only one instance of a systemic issue involving large numbers of customers [of] the same trader', and suggested that where representative proceedings are inadequate to ensure that all affected consumers receive compensation '*cy-près* orders would be a better solution than allowing a party to profit from errors or illegal conduct'.³²²

Associate Professor Vince Morabito suggested that lack of a *cy-près* mechanism in the class action regime as it stands is 'largely attributable to unwillingness on the part of the ALRC to embrace behaviour modification as one of the purposes of class action devices'. He suggested that such modification is a 'desirable goal', and that empowering the Supreme Court to use *cy-près* remedies would also enable it to prevent defendants being unjustly enriched as a result of their own unlawful behaviour.³²³

Law firm Maurice Blackburn also supported making *cy-près* relief available in class actions. It noted a number of advantages to doing so:

- *Cy-près* settlements provide a useful mechanism for indirectly benefiting ... persons who suffered loss where the victims of anti-competitive conduct are not identifiable, or their claims are relatively small.

- The current regime allows defendants to retain at least some (if not all) of the proceeds of their unlawful conduct, whereas '[b]y directing damages to consumer advocacy and public interest groups, *cy-près* settlements facilitate the disgorging of illegitimate profits from firms who have engaged in anti-competitive conduct and thus enhance consumer welfare in a broader sense'.
- The current regime encourages representative plaintiffs to attempt to define the 'class' in terms of a high expenditure threshold, to avoid having it struck out under section 33M.
- *Cy-près* schemes would permit the undistributed remainder of an award in class action proceedings to be dealt with in a 'simpler, fairer and more cost-effective' manner, and thus 'promote compliance with the law by ensuring that the wrongdoers do not retain their illicit profits'.³²⁴

Maurice Blackburn proposed that provision be made for the court to order that the undistributed remainder of a class action award be applied *cy-près*. It suggested that sections 33 and 34 of the British Columbian Class Proceedings Act provide an 'appropriate model'.³²⁵

IMF expressed concern that the financial risks involved in acting as a representative plaintiff in class action proceedings, coupled with the difficulty of securing litigation funding in the absence of an opt in approach to class composition, are a significant disincentive to commencing them. In the result, one of the principal objects of class action legislation—the enhancement of access to justice—can be frustrated. IMF proposed as a potential solution that courts be empowered, at the outset of class action proceedings, to make provision for any award of damages to be paid into a fund, from which a litigation funder is entitled to a specified percentage. IMF appeared to regard this as an application of *cy-près* principles, which, it submitted, would have other benefits, such as rendering the enforcement of consumer law more efficient.³²⁶

3.18.2 Submissions opposing *cy-près* remedies

Opposition to the proposed introduction of an express power to grant *cy-près* remedies came from Allens Arthur Robinson and Philip Morris, in a joint submission which was also adopted by Telstra and the Australian Corporate Lawyers Association.³²⁷

Law firm Clayton Utz raised the question of whether the courts are either 'equipped or ought to be the arbiter of any unclaimed residue' and suggested that this was a matter for the legislature. It also contended that there is doubt as to whether liability insurance policies would indemnify a defendant against liability to pay damages on a *cy-près* basis.³²⁸

4. SUBMISSIONS ON GENERAL REFORM OF CLASS ACTION LAWS

In its initial Consultation Paper in October 2006 the commission asked whether the law relating to representative or class actions needs reform. The submissions summarised below were received before the commission released specific reform proposals in Exposure Draft 1. Views were also sought on the need for reform in the funding of representative or class actions. The submissions received are summarised in Chapter 10.

4.1 VICTORIAN BAR

In its initial submission, the Victorian Bar addressed what it considered the 'principal source of dissatisfaction, at least amongst plaintiffs' lawyers or litigation funders, namely trying to "capture" the class for the purpose of the proceeding'.³²⁹

The submission focused on what the commission understands to be recent proposals submitted to the Supreme Court Rules Committee for a change to the representative action rule: Order 18 of the Victorian *Supreme Court Rules*. The Bar contended that the proponents for change are seeking to 'bypass the opt out procedure in Part 4A and instil the opt in procedure through an enlarged Order 18'. The drive for change was said to be coming from commercial litigation funders. The Bar concluded that the sorts of changes envisaged would be 'dubious' and would 'in effect sterilise the utility of Part 4A'.

In its submission the Bar referred to the recent decisions of the Federal Court³³⁰ and the Victorian Supreme Court,³³¹ which had held that the restriction of the class members to those who had instructed a particular firm of lawyers and had opted in for the purpose of the proceedings had the effect of subverting the opt-out regime incorporated in the federal and state statutory class action

315 *Supreme Court Act 1986* s 33X(5).

316 (1936) 55 CLR 499.

317 Law reform proposals and the Canadian experience with *cy-près* remedies are both examined in detail by Berryman (2007) above n 139.

318 British Columbia, Newfoundland, Saskatchewan and Manitoba. See Berryman (2007) above n 139, 14.

319 *Ibid* 15.

320 *Ibid*.

321 Submissions CP 28 (Associate Professor Vince Morabito); ED2 13 (Professor Peta Spender).

322 Submission CP 43 (Consumer Action Law Centre).

323 Submission CP 28 (Associate Professor Vince Morabito).

324 Submission CP 7 (Maurice Blackburn).

325 See *Class Proceedings Act*, RSBC 1996, c. 50 as noted in Submission CP 7 (Maurice Blackburn).

326 Submission CP 57 (IMF (Australia) Ltd).

327 Submission ED1 12 (Allens Arthur Robinson and Philip Morris), adopted by submissions ED1 17 (Telstra); ED1 16 (Australian Corporate Lawyers Association).

328 Submission ED1 18 (Clayton Utz).

329 Submission CP 33 (Victorian Bar).

330 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394.

331 *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449.



procedures.³³² These decisions have been the subject of professional,³³³ academic³³⁴ and, most recently, judicial criticism.³³⁵ In a recent decision (discussed above) the Full Federal Court has held that class actions may be brought under Part IVA on behalf of a limited group of persons who consent to proceedings being brought on their behalf.

The Victorian Bar submission expressed the view that, on the face of it, the present representative action Rule in Victoria, Order 18 of the *Supreme Court Rules*, seems 'broad and beneficent with a sufficient body of case law to tell about the application of the Rule'. The submission also contended that in most cases, the 'same interest' requirement may not present difficulties.³³⁶

The Bar referred to two areas of criticism. First, 'limitations' of the 'same interest' requirement had led some proponents for reform to propose that Order 18 should be amended to incorporate the 'broader criteria for the commencement of [statutory class action] proceedings in section 33C' of the *Supreme Court Act 1986*. Second, there was no power under Order 18, or at least no express power, to expand the class of represented persons after commencement of the representative action proceeding. The Bar contended, based on a recent decision of the High Court,³³⁷ that a representative action cannot be commenced with an 'open' class (in the sense of a class identified generically) with the proceedings thereafter limited to named 'plaintiffs' who agree to the terms of litigation funding and thereby opt in for the purpose of continuing the proceedings for their benefit.³³⁸

The Bar also drew attention to the fact that, at present, members of the class as defined at the commencement of the proceedings have a 'free ride'. They are not required to enter into a litigation funding agreement, they are not required to retain the law firm acting for the representative party and they have statutory immunity from any adverse costs orders. The legislation does, however, provide that in the event of a judgment for damages in favour of class members, they may be required to contribute to any shortfall between the legal costs incurred by the representative party in conducting the proceedings and the amount of costs recovered from the unsuccessful party.³³⁹ Also, there appears to be a legislative power to require these members to contribute to unrecovered costs where they are beneficiaries of a settlement of the class action proceedings.³⁴⁰

This 'free rider' problem has resulted in various attempts to limit both class actions and representative action proceedings to persons who either enter into litigation funding arrangements with a commercial litigation funder or who enter into a fee, and, retainer agreement with the law firm acting on behalf of the representative party.

Although single judges of both the Federal Court and the Victorian Supreme Court, in the cases referred to in the Bar's submissions, have held that this opt-in methodology is not permissible, Justice Finkelstein of the Federal Court recently held that class actions are able to be maintained on behalf of a limited group of persons who each individually consent to the conduct of proceedings for their benefit,³⁴¹ and this decision has been upheld by the Full Federal Court.³⁴²

Insofar as these recent decisions are correct, neither the representative action rule nor the statutory class action provisions need amendment to facilitate the conduct of proceedings for the limited benefit of identified individuals who have given their consent, at least as at the date of commencement of the proceedings. The statutory class action provisions expressly allow for the addition of group members after the proceedings have been initiated³⁴³ but the representative action rule does not.³⁴⁴

In relation to the 'broad and beneficent' meaning of the 'same interest' requirement of the representative action rule in Victoria, a recent decision of the NSW Supreme Court, on an analogous provision of the *Uniform Civil Procedure Rules 2005* (NSW),³⁴⁵ highlights some of the present difficulties.

In that case, Justice White held that the rule did not permit actions for damages on behalf of a group to be brought as a representative action.³⁴⁶ The action was commenced by a representative plaintiff on behalf of herself and a group of identified investors who were unit holders in a property trust.³⁴⁷ The action included claims for declaratory relief and damages on the basis of allegedly misleading and deceptive information in a prospectus. Justice White held that the claim for declaratory relief on behalf of the represented group members should be permitted to proceed but the claims for damages were struck out.³⁴⁸ After reviewing various Australian and English authorities, Justice White held that the representative action Rule only permitted the representative plaintiff to pursue claims, in a representative capacity, which were beneficial or common to all of the group members.³⁴⁹ This would exclude the claims for damages given that each group member would have to establish a causal connection between the alleged contraventions and their loss and because the losses were separate for each person.³⁵⁰

4.2 LAW INSTITUTE OF VICTORIA

In its initial submission the Law Institute of Victoria indicated that the rules relating to representative proceedings were ‘satisfactory’ but that ‘some reform might be necessary in order to recognise the role now played by commercial litigation funding companies ... in representative [and class action] proceedings’.³⁵¹

4.3 MENTAL HEALTH LEGAL CENTRE

The Mental Health Legal Centre stated that class action procedures should be ‘flexible enough to facilitate actions in as many cases as possible’.³⁵²

4.4 ALLENS ARTHUR ROBINSON

In its initial submission, law firm Allens Arthur Robinson contended that there was no need to reform current class action procedures. The submission expressed support for:

- the precise identification or description of class members
- the need for all class members to have claims against all defendants
- compliance with pleading rules in class actions
- preservation of the existing opt-out mechanism.³⁵³

4.5 LEGAL PRACTITIONERS’ LIABILITY COMMITTEE

The Legal Practitioners’ Liability Committee in its initial submission expressed the view that ‘a litigation funder’s involvement in a proceeding should be disclosed to the other parties’.³⁵⁴

4.6 MAURICE BLACKBURN

In its initial submission, law firm Maurice Blackburn identified a number of areas needing reform in class action laws and related practices and procedures.

It contended that class actions should be permitted to be brought on behalf of groups limited to individuals who have consented to particular arrangements such as ‘contributions to a “fighting fund”’, agreement to litigation finance arrangements or appointment of a particular law firm. It proposed two alternative solutions to resolve this problem: amendment of either section 33C of the *Supreme Court Act 1986* or Order 18 of the *Supreme Court Rules*.³⁵⁵

The submission expressed concern at the ‘satellite litigation’ said to be characteristic of much class action litigation. This encompassed interlocutory applications brought for the purpose of achieving tactical delay and attrition or with a view to preventing the proceedings going forward in representative form. The provisions of sections 33N of the *Supreme Court Act 1986* were of particular concern.³⁵⁶

Maurice Blackburn also expressed concern about the present requirement that all group members should have individual claims against *all* defendants where more than one defendant is joined.³⁵⁷ Conflicting decisions on this question mean that there will continue to be ‘practical difficulties’ until the issue is resolved. In a recent decision in the Federal Court, Justice

332 Submission CP 33 (Victorian Bar).

333 See, eg, Peter Cashman, ‘Class Actions on Behalf of Clients: Is This Permissible?’ (2006) 80 *Australian Law Journal* 738; Cashman (2007) above n 4, 197–223.

334 See eg Vince Morabito, ‘Class Actions Instituted only for the Benefit of the Clients of the Class Representative’s Solicitors’ (2007) 29 *Sydney Law Review* 5; Vince Morabito, ‘Group Litigation in Australia—“Desperately seeking” Effective Class Action Regimes’ (National report for Australia prepared for the International Conference on *The Globalization of Class Actions*, Oxford University, 13–14 December 2007, 18–19.

335 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061 (Finkelstein J) [61]–[64]. See, however, the decision of Young J of the NSW Supreme Court in *Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437 (12 December 2007) and the decision of the Full Federal Court in the appeal from the decision of Finkelstein J: *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007).

336 Submission CP 33 (Victorian Bar).

337 *Campbell’s Cash and Carry Pty Ltd v Fostif* (2006) 80 ALJR 1441.

338 Submission CP 33 (Victorian Bar).

339 *Supreme Court Act 1986* s 33ZJ.

340 *Supreme Court Act 1986* s 33ZF.

341 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, [49].

342 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007). This decision is discussed above: see ‘Class actions limited to persons who consent to proceedings’.

343 *Supreme Court Act 1986* s 33K.

344 See *SZ v Minister for Immigration and Multicultural Affairs* [2000] FCA 458 [20] (and its interpretation of the Federal Court Rules 1979 (Cth) O 6 r 3).

345 *Uniform Civil Procedure Rules 2005* (NSW) r 7.4. In November 2007 the NSW representative action rule was amended both in order to overcome a drafting difficulty with the former rule and also to bring the rule more into alignment with s 33C of the *Federal Court of Australia Act 1976* and s 33C of the *Supreme Court Act 1986* (Vic).

346 *O’Sullivan v Challenger Managed Investments Ltd* [2007] NSWSC 383 (‘O’Sullivan’), [48]–[49] (White J).

347 *O’Sullivan* [2007] NSWSC 383, [4].

348 *O’Sullivan* [2007] NSWSC 383, [72]–[74]. Applications for leave to appeal the decision were discontinued after the NSW representative action rule was amended in late 2007.

349 *O’Sullivan* [2007] NSWSC 383 [41].

350 *O’Sullivan* [2007] NSWSC 383 [55]–[56].

351 Submission CP 18 (Law Institute of Victoria).

352 Submission CP 22 (Mental Health Legal Centre).

353 Submission CP 38 (Allens Arthur Robinson).

354 Submission CP 21 (Legal Practitioners’ Liability Committee).

355 Submission CP 7 (Maurice Blackburn).

356 Submission CP 7 (Maurice Blackburn). See also Morabito and Epstein (1997) above n 146, [7.22–7.28].

357 Submission CP 7 (Maurice Blackburn). This position was confirmed by the Full Court of the Federal Court in *Philip Morris v Nixon* (2000) 170 ALR 487, but goes against both earlier and some subsequent cases. See also: *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342, [36] (Hansen J); *Guglielmin v Trescowthick (No 2)* [2005] FCA 138, [24] and [29]; *Johnstone v HIH Insurance Ltd* [2004] FCA 190, [41]. Other courts have taken a different view of this ‘requirement’, and in *Philip Morris* the point was conceded rather than argued and judicially determined: [108]. See *Bray v Hoffman-La Roche Ltd* (2003) 200 ALR 607 and *Milfull v Terranora Lakes Country Club (in liq)* (2004) 214 ALR 228, [3]. See generally Vince Morabito, ‘Class Actions Against Multiple Respondents’ (2002) 30 *Federal Law Review* 295.



Finkelstein has concluded that the earlier Full Federal Court decision in *Philip Morris* is obiter and that the later Full Court decision in *Bray* (in which he was a member of the court) represents the law on this issue.³⁵⁸ To date, however, there appear to be continuing practical problems including battles over pleadings and interlocutory applications, which may give rise to significant expense and delay. In some cases the proceedings may be discontinued, as occurred in the *Philip Morris* case.³⁵⁹

The solution proposed by Maurice Blackburn was amendment of the statutory class action provisions so that a claim could be pursued by ‘any person having a claim ... against every defendant, as representing some or all of the persons having a claim against any of the defendants’.³⁶⁰ This was said to still meet the requirements of the current statutory provision that there must be at least seven persons having ‘claims against the same person’.³⁶¹ However, the amendment proposed would not necessarily mean that a class action would include seven persons with claims against one defendant. The threshold requirement of the proposed reform would be that only the plaintiff must have claims against all defendants. Thereafter the group would encompass ‘some or all’ (without any number specified) of the group members having a claim against any of the defendants.³⁶²

Maurice Blackburn in its initial submission also contended that the Supreme Court should have power, in appropriate circumstances, to order a *cy-près* distribution of damages in class action proceedings. The submission identified a number of policy arguments in favour of *cy-près* remedies, referred to analogous local schemes³⁶³ and examined overseas developments where *cy-près* remedies have been developed, with particular reference to the US and Canada.³⁶⁴

4.7 IMF (AUSTRALIA)

IMF contended that the relatively small number of class actions to date was not because of a shortage of viable meritorious claims but reflected the costs and risks of class action litigation. It said part of the problem was the potential liability of the representative plaintiff for adverse costs (coupled with the statutory immunity of group members), which was a disincentive to take on the role of representative party. The problem is made worse by excessive costs and delays, in part due to lengthy preliminary legal argument.³⁶⁵

Funders are concerned to ensure that costs are spread across all members of the represented group. This has led to cases being brought only on behalf of persons who have agreed contractually with the funder to pay the costs of the funding (including a commission or percentage of the amount recovered) if the claims are successful.³⁶⁶

According to IMF, the impact of the decision in *Dorajay Pty Ltd v Aristocrat Leisure Limited*—that proceedings requiring group members to opt in were ‘inconsistent with the terms and policies of Part IVA’³⁶⁷—is that funders will be ‘unlikely to provide funding for proceedings brought under Part IVA of the *Federal Court Act 1976* or Part 4A of the *Supreme Court Act 1986* (Vic)’.³⁶⁸

Since the decision in *Dorajay* was followed by the Victorian Supreme Court in *Rod Investments* there have apparently been no new class action proceedings commenced in the Victorian Supreme Court. More recent decisions in other jurisdictions, which have come to a different view, are reviewed in an earlier part of this chapter.

4.8 CONSUMER ACTION LAW CENTRE

The Consumer Action Law Centre drew attention to a number of areas where it contended there is a need for reform:

- In cases where a consumer may obtain a just outcome in a legal claim, other affected individuals may not.
- Where regulators take action individual consumers who have suffered loss do not receive compensation.
- The absence of power to award compensation or refunds to consumers is a problem.
- Where identified individuals have suffered loss, a party may ‘still benefit from the inability to identify all those who should be compensated’.
- The cost of taking class action proceedings is ‘not warranted’ for many consumer transactions.
- The doctrine of *cy-près* should be employed to indirectly provide restitution to affected consumers who are not group members in class action proceedings or who are unable to be directly contacted.³⁶⁹

4.9 ASSOCIATE PROFESSOR VINCE MORABITO

In his initial submission in response to the Consultation Paper, Associate Professor Morabito proposed a number of reforms to class action procedures and funding arrangements. In his view, there are 12 major reasons why the two goals of class action mechanisms, 'access to justice and judicial economy', have not been fully attained:

- the problem of 'standing' arising out of 'the requirement that the representative plaintiff ... must have [an individual claim] against the defendant'
- the judicially imposed requirement that each representative plaintiff and each class member must have a claim against each defendant
- endless interlocutory challenges, by defendants, to the employment of the class action procedure
- the conferral on trial judges of extremely broad powers to terminate properly instituted class actions
- formidable cost barriers to the institution of class proceedings
- the limited scope of the statutory provision³⁷⁰ which provides for the gap between costs incurred by the class representative and the costs recovered by from the unsuccessful defendant to be recouped from class members who obtain monetary relief by way of judgment
- the judicial rejection of various criteria used to limit the class members
- several unsatisfactory aspects of class action settlements
- the prospect of costs orders against lawyers acting for representative plaintiffs in class action proceedings
- security for costs orders against representative plaintiffs
- the non-availability of *cy-près* remedies
- the inability to institute defendant class proceedings.³⁷¹

5. RESPONSE TO DRAFT PROPOSALS

As Justice Lindgren has observed, people either love or hate class actions.³⁷² Those who love class actions are 'class action lawyers, litigation funding companies, and ... class action claimants. The haters are the corporations that are on the receiving end of a class action, their officers and lawyers'.³⁷³

Not surprisingly, the submissions in response to the draft class action proposals reflected this dichotomy. Support for the proposals, albeit in some cases qualified, came from law firms acting for claimants in class action proceedings,³⁷⁴ environmental, consumer and legal aid organisations,³⁷⁵ academics with an interest in class actions,³⁷⁶ a larger commercial litigation funder³⁷⁷ and persons involved as plaintiffs in litigation.³⁷⁸ Support for some or all aspects of the proposals also came from the Law Institute of Victoria and State Trustees.³⁷⁹ Opposition to the proposals came from corporations that have been sued in class action proceedings,³⁸⁰ law firms acting for defendants in class action proceedings³⁸¹ and the Australian Corporate Lawyers Association.³⁸²

RECOMMENDATIONS

99. There should be no legal 'requirement' that all class members have legal claims against all defendants in class action proceedings, but all class members must have a legal claim against at least one defendant.
100. There should be no legal impediment to a class action proceeding being brought on behalf of a smaller group of individuals or entities than the total number of persons who may have the same, similar or related claims, even if the class comprises only those who have consented to the conduct of proceedings on their behalf.
101. The Supreme Court should have discretion to order *cy-pres* type remedies where (a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage has accrued to the person contravening the law as a result of such contravention, (c) the loss suffered by others, or the pecuniary gain obtained by the person contravening the law, is capable of

358 *McBride v Monzie Pty Ltd* [2007] FCA 1947 (7 December 2007).

359 Submission CP 7 (Maurice Blackburn).

360 This proposal is based on a draft amendment prepared by Dr K Hanscombe SC and L Armstrong of counsel, and follows from the view of the majority in *Bray v Hoffman-La Roche Ltd* (2003) 200 ALR 607, [122], [130] (Carr J), [248] (Finkelstein J).

361 *Supreme Court Act 1986* s 33C(1)(a), leaving aside, for present purposes, whether this requires all persons to have claims against every defendant.

362 This could presumably encompass a plaintiff with, say, a product liability claim against a product manufacturer (eg, a medical product) and a medical negligence claim against a health service provider involved in prescribing or using the product, with the inclusion of group members (possibly fewer than seven) with medical negligence claims against the provider.

363 Eg, the *Consumer Credit (Victoria) Act 1995* s 38. Some settlement agreements have provided for *cy-près* type distributions of settlement funds. See, eg, *King v AG Australia Holdings Limited* [2003] FCA 980, [4.1.1], where undistributed damages were to be paid to the Australian Institute of Management or the Australian Shareholders' Association.

364 Submission CP 7 (Maurice Blackburn).

365 Submission CP 57 (IMF (Australia) Ltd).

366 Submission CP 57 (IMF (Australia) Ltd).

367 [2005] FCA 1483, [125].

368 Submission CP 57 (IMF (Australia) Ltd).

369 Submission CP 43 (Consumer Action Law Centre).

370 *Supreme Court Act 1986* s 33ZJ.

371 Submission CP 28 (Associate Professor Vince Morabito).

372 Justice KE Lindgren, 'Class actions and access to justice' (Keynote address presented at the International Class Actions Conference, Sydney, 25–26 October 2007, 1).

373 *Ibid.*

374 Eg, in consultations with the firms Maurice Blackburn and Slater & Gordon.

375 Submissions ED1 14 (Environment Defenders Office); ED1 11 (Mental Health Legal Centre); ED1 20 (Public Interest Law Clearing House); CP 43 (Consumer Action Law Centre); ED1 25 (Victoria Legal Aid).

376 Eg, submissions CP 28 (Associate Professor Vince Morabito); ED2 13 (Professor Peta Spender).

377 Submission CP 57 (IMF (Australia)).

378 Who wish to remain anonymous.

379 Submissions ED1 31 (Law Institute of Victoria); ED1 6 (State Trustees).

380 Submissions ED1 12 (Allens Arthur Robinson and Philip Morris); ED1 17 (Telstra).

381 Submissions ED1 12 (Allens Arthur Robinson and Philip Morris); ED1 18 (Clayton Utz).

382 Submission ED1 16 (Australian Corporate Lawyers Association).



reasonably accurate assessment and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered a loss.

102. The power to order cy-près type remedies should include a power to order payment of some or all of the amount available for cy-près distribution into the Justice Fund.
103. The court's power to order cy-près type remedies should not be limited to distribution of money only for the benefit of persons who are class members or who fall within the general characteristics of class members.
104. The court's general discretion as to how any cy-près relief should be implemented should not be limited to any proposal or agreement of the parties to the class action proceeding.
105. Unless the court orders otherwise, the parties should be required to give court-approved notice to the public that the power to order cy-près type remedies may be exercised. Where appropriate, this should include notice to particular entities that the court or the parties consider may be appropriate recipients of funds available for cy-près distribution.
106. Subject to leave of the court, persons other than the parties to the class action proceeding may be permitted to appear and make submissions in connection with any hearing at which cy-près orders are to be considered by the court.
107. There should be no general right of appeal against the exercise of the court's discretion as to the nature of the cy-près relief ordered but there should be a limited right of appeal, based on *House v The King*³⁸³ type principles.



Chapter 9
**Helping Litigants with
Problems and Hindering
Problem Litigants**



Helping Litigants with Problems and Hindering Problem Litigants

1 Introduction

1.1 Self-represented litigants

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- 1.1.2 Problems caused by self-representation
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- 1.3.2 Distinction between self-represented and vexatious litigants
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- 1.3.6 Developments in other jurisdictions
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Recommendations

- 1.3.10 Additional matters

Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts.¹

1. INTRODUCTION

In this chapter we examine some of the problems encountered (and occasionally caused) by particular users of the civil justice system, and make recommendations to ameliorate those problems. The chapter is divided into three sections:

- self-represented litigants
- interpreters
- vexatious litigants.

Chapter 10 discusses the related issue of current limitations on the availability of legal aid funding and assistance.

1.1 SELF-REPRESENTED LITIGANTS

A considerable number of litigants in civil proceedings are not represented by lawyers. This is sometimes a matter of choice, but is more often because people are unable to afford to pay lawyers' fees and do not qualify for any form of legal assistance. Self-representation gives rise to two broad concerns. On the one hand, it places litigants at a disadvantage in presenting their cases and negotiating the court's processes. On the other hand, it has an impact on the efficient administration of the system, because this group of litigants requires a substantial degree of assistance and guidance from the court.

These concerns were raised during our review in consultations and submissions, but have also been examined extensively in other contexts, 'by law reform commissions, parliamentary committees, and other bodies, in reports for government and courts, in academic studies, court annual reports and statistics, and newspaper and journal articles'.²

The problems associated with self-representation are multi-faceted, and there is no single solution. The commission's approach to these problems aims to strike a balance between:

- providing greater access to justice for those who for whatever reason find themselves without legal representation, and
- reducing the number of unmeritorious cases brought before the courts, which inevitably cause a strain on limited public resources.

We believe that measures aimed at providing greater access to the legal system through improved advice and support for self-represented litigants can help reduce the number of unmeritorious claims before the courts, which in turn should increase the effectiveness and efficiency of the civil justice system. The need for further planning and research is also highlighted. Although specific issues arise in relation to individual courts, we have attempted to identify common issues, needs and strategies, particularly in the superior courts.

1.1.1 Profile of self-represented litigants

Litigants appearing in the court system without legal representation have been variously termed 'self-represented litigants', 'unrepresented litigants' or 'litigants in person'. For the purpose of consistency, this report refers to self-represented litigants. A small proportion of the category of self-represented litigants may be described as 'querulous' or 'vexatious', that is, 'litigants whose approach to advancing their cause or matters is irrational or obsessive'.³ It is important to distinguish between this group and the needs of the majority of self-represented litigants. Vexatious litigants are considered later in this chapter.

Although it is not possible to provide definitive information on the number of self-represented litigants across the Victorian court system, some limited information is available. For the period between 8 May 2006 and 16 April 2007, 4.2% of civil cases commenced in the Trial Division of the Supreme Court and 11.4% of cases commenced in the Court of Appeal were cases involving one

1 Mason CJ, Brennan, Deane, Dawson and McHugh JJ in *Cachia v Hanes* (1994) 120 ALR 385 [40] 391.

2 Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-represented Litigants: Report* (2005)1 <www.ajia.org.au/online/SRLForumReport.pdf> at 15 February 2008.

3 *Ibid.*

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or more unrepresented parties.⁴ The numbers of self-represented litigants are much higher in other jurisdictions; for example, the Family Court observed in that in 2006–2007 34% of litigants may be without legal representation at trial.⁵

In overseas jurisdictions the numbers of self-represented litigants in civil matters are higher again. Canadian Chief Justice Beverly McLachlin has recently noted, '[in] some courts [in Canada], more than 44% of cases involve a self-represented litigant'.⁶ In Hong Kong in 2000, 42% of High Court hearings involved at least one litigant in person.⁷

The individual characteristics and circumstances of self-represented litigants vary, as do the nature of the issues and the demands faced in each case:

*Self-represented litigants are not a homogenous group, but exhibit a wide range of very diverse needs for information, advice and direction as well as exhibiting a wide range of emotional states and responses to litigation.*⁸

Self-represented litigants do, however, share a position of disadvantage in the legal system:

*By definition litigants in person lack the skills and abilities usually associated with legal professionals. Most significantly, lack of knowledge of the relevant law almost inevitably leads to ignorance of the issues that are for the curial resolution for the court or tribunal ... this ranges from lack of knowledge of courtroom formalities, to a lack of knowledge of how the whole court process works from the initiation of a proceeding to hearing. Litigants in person also lack familiarity with the language and specialist vocabulary of legal proceedings.*⁹

Self-represented litigants are also disadvantaged by a lack of objectivity, which bears on their ability to assess the merits of their case.¹⁰ The process of translating facts into legal form requires

*knowledge of law and the rules by which a case may be established in a court, that is, familiarity with the rules of procedure and evidence. It is a process which is conditioned by, but which goes beyond, the relevant. Overarching these considerations, just as doctors and patients have different understandings of an illness, so lawyers and clients understand a legal wrong in different ways ... It suffices to say that there is a difference between subjective and objective knowledge. It is vastly more difficult for litigants in person to display the required objectivity.*¹¹

Commentators have observed that 'adversarial litigation in common law civil justice systems is designed on the assumption that litigants will be represented by competent, legally trained professionals' and that 'when people represent themselves, conventional assumptions about how the case will be conducted do not apply because most self-represented litigants will have none of the attributes the system design assumes they will have—knowledge of civil procedure, advocacy, evidence and law, and duties to the court'.¹²

Some self-represented litigants are without legal advice or representation for all stages in the process of litigation. Others receive legal assistance at some stages of a dispute. Other litigants are partially represented.

Just as self-represented litigants are a diverse group of individuals and their levels of representation vary, so too do their reasons for failing to secure legal assistance. Reasons include:

- they cannot afford private legal representation
- they do not meet merit-based criteria for pro bono representation or are otherwise unable to secure pro bono representation
- government-funded legal aid is not available
- community legal centres do not have the resources to provide ongoing representation
- they cannot find a lawyer who will agree to represent them (for example, if their case does not have any legal merit)
- they choose not to engage a lawyer.

The increasing level of self-representation in courts at all levels has been observed and documented in a range of contexts and echoed in the submissions.¹³ The reason most often identified for this increase is the cost of engaging private legal representation, which is prohibitive for many, and the unavailability of legal aid in most civil cases.¹⁴ The Victorian Bar suggested that 'the substantial

reduction in legal aid in the past 10 or so years has placed a considerable strain on the civil justice system in Victoria. It has resulted in an exponential increase in the number of self-represented litigants'.¹⁵

The Public Interest Law Clearing House (PILCH) noted that despite an increase in the number of people it refers to pro bono assistance and/or representation the number of people appearing unrepresented in courts has not abated. PILCH suggested the following explanations for this trend:

- restrictions on the availability of legal aid
- the increasing cost of litigation
- society becoming more litigious
- information about the law and legal remedies which have been pursued in the courts gaining increasing coverage in the media, including on television and the Internet.¹⁶

PILCH further observed that the gap in the availability of legal advice and representation in civil law areas for those who cannot afford to pay for legal services is compounded for disadvantaged groups such as those who have a mental illness or are from culturally and linguistically diverse communities.¹⁷

Despite the significant contribution of legal practitioners in Victoria to pro bono schemes, such schemes cannot meet the needs of every person requiring assistance. PILCH noted that its existence 'and the significant ongoing contribution of pro bono practitioners are not enough to ensure the self-represented litigants are able to be heard fairly and expeditiously'.¹⁸

The pro bono work of the Victorian legal community and the limitations of legal aid funding are discussed in detail in Chapter 10.

1.1.2 Problems caused by self-representation

As noted above, there are two main dimensions to the issues or problems posed by self-represented litigants. On the one hand, self-represented litigants generally have significant difficulty representing themselves effectively and thereby place their substantive rights at risk. Litigants' ability to assert or defend their rights in the court system is undermined if they lack the skills and knowledge to do so.¹⁹

On the other hand, self-represented litigants place a significant burden on the effective and efficient functioning of the court system. The court, registries, lawyers and other parties often find it difficult to deal with self-represented litigants. Processes such as negotiation, case management and hearings are often more difficult and protracted.

In relation to court procedure and practice and documentation, research reveals patterns such as:

- incorrect use of forms
- detailed correspondence with the registry, often containing applications
- misdirection of correspondence containing formal submissions or requests

4 See Supreme Court of Victoria, *Perception or Reality: Project Report, Self-represented Litigants Co-ordinator 2006-2007* (internal report only, made available to the commission by the Chief Justice) (2007), 1, , 5. The figures were based on quantitative and qualitative data collected by the Self-represented Litigants Co-ordinator.

5 28% have one self represented litigant. 6% have both parties unrepresented. Family Court of Australia, *Annual Report 2006-2007*, 54.

6 See The Right Hon Beverly McLachlin, 'The Challenges We Face' (Speech presented at the Empire Club of Canada, 8 March 2007, Toronto) <http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges_e.asp> at 25 March 2008. See also Anne-Marie Langan, 'Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario' (2005) 30 *Queen's Law Journal* 825, as cited by McLachlin. Langan cites data compiled by the Ontario Ministry of the Attorney-General stating that 43.2% of applicants in the Family Court Division of the Ontario Court of Justice were unrepresented when they first filed with the court. For 1998-2003 the average percentage of self-represented litigants in Ontario family courts was 46%.

7 Chief Justice's Working Party on Civil Justice Reform (HK), *Civil Justice Reform: Interim Report and Consultative Paper* (2001) Appendix C Table 21.

8 Supreme Court (2007) above n 4, 1.

9 Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) 3. This description of disadvantage was adopted by Bell J in *Tomasevic v Travaglini* [2007] VSC 337, [79].

10 AIIA (2001) above n 9, 4.

11 Joseph M Jacob, *Civil Justice in the Age of Human Rights* (2007) 144.

12 Camille Cameron, Elsa Kelly and Eric Wing Hong Chui, 'Judges' Perspectives on the Impact of Self-representation in Hong Kong Civil Cases' (2006) 8 (3) *Australian Journal of Asian Law*, 262, 263.

13 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 181-3.

14 Courts Consultative Council, *Courts Strategic Directions Project* (2004), Part B: Strategic Directions Statement, 102-103.

15 Submission CP 33 (The Victorian Bar).

16 Submission CP 34 (Public Interest Law Clearing House).

17 Submission CP 34 (Public Interest Law Clearing House).

18 Submission CP 34 (Public Interest Law Clearing House).

19 See also discussion in Attorney-General's Department, Parliament of Australia, *Federal Civil Justice System Strategy Paper* (2003) 92-125.

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- requests for extensions of time
- wrongly framed requests for relief, particularly judicial review.²⁰

In its submission to our review, the Supreme Court said that self-represented litigants:

- have difficulty in preparing documents which express their case in a form acceptable to the court
- may bring applications that are misguided
- have difficulty articulating their cases, and
- may take up a lot of time in court.

These difficulties have the tendency to hamper and prolong court proceedings and 'also create a risk that meritorious claims brought by self-represented litigants may be obscured by, or fail because of, poor articulation, incoherence or procedural irregularity'.²¹ The court submitted that the lack of representation can lead to inefficient use of court time because matters often have to be adjourned to enable litigants to recast their claims or applications (which in turn adds to cost and delay for other parties). It also reported that for court staff, dealing with self-represented litigants 'can cause a great deal of stress. Animosity and, in extreme cases, threats of violence towards staff may result'.

The recent report of the Self-Represented Litigants Project in the Supreme Court provides a further insight into some of the issues or problems posed by self-represented litigants.²² Some of the problems identified include:

- Despite formalising a referral process for self-represented litigants to possibly obtain legal assistance and/or representation, there remains an unsatisfied need for such assistance and there are gaps in such legal assistance service delivery.
- Advice regarding procedure may ensure fairness of process, but is not sufficient to enable self-represented litigants to place their case within a legal context without accompanying legal assistance and/or advice.
- Compliance with procedural rules and/or orders by self-represented litigants is difficult to enforce even with careful and repetitive explanation, direction and instruction.
- Litigation is a polarising process particularly where there is one or more unrepresented party involved. Without early intervention polarisation is likely to become more pronounced. Such polarisation has the potential to make alternative dispute resolution/mediation difficult, if not impossible.

As manager of the County Court Medical List, Judge Wodak has observed that some litigants are unable to secure new representation after a solicitor ceases to act. He noted that:

Sadly, in some of these cases, the former solicitor exercises a lien over the file, for unpaid costs, and the client is unable or unwilling to pay the outstanding costs, and cannot show a prospective new solicitor the file ... The willingness of many legal firms to take on a proceeding on a no win no fee basis does not help, where a plaintiff cannot show a potential new solicitor the existing file, and the solicitor, understandably, is reluctant to take the case on, sight unseen.²³

Judge Wodak also echoed concerns that self-representation can cause complications in case and list management and for other parties.

Australian Law Reform Commission research reveals that self-represented litigants may be less successful in the case outcome than represented parties and that they are more likely to withdraw, cease defending or have their cases determined following a hearing.²⁴ Research in the Federal Court has also indicated that self-represented litigants are less likely to be successful, are more likely to discontinue their actions and are more likely to have costs ordered against them.²⁵ The Supreme Court's submission included statistics from the Court of Appeal which similarly indicated 'an extremely low rate of success of self-represented litigants'. These findings may not be due entirely to the absence of representation. Many such litigants may not have meritorious claims or defences, either at first instance or on appeal.

1.1.3 Addressing the problem

A number of strategies have been suggested or implemented in Victoria and elsewhere to assist self-represented litigants to navigate the legal system. Broadly, such initiatives involve:

- improving the availability of legal representation through legal aid and pro bono schemes
- improving the availability of legal advice and assistance through duty lawyer schemes
- providing procedural and practical advice by dedicated court staff
- providing written information and kits for self-represented litigants
- providing resources such as computer access and photocopying
- developing plans to assist courts to address the needs of self-represented litigants
- training and educating judicial officers and court staff
- developing guidelines for the legal profession
- researching and monitoring the incidence of self-representation and its impact on the system.

We discuss some recent developments in this area, before considering the views expressed in submissions and consultations.

A recent study by the co-ordinator of the Queensland Public Interest Law Clearing House, Tony Woodyatt, investigated overseas developments aimed at addressing the needs of self-represented litigants, with a view to informing the establishment of necessary services in the superior courts of Queensland.²⁶ In particular the study focused on the work of the Justice Citizens Advice Bureau in the Royal Courts of Justice (UK) and developments in Minnesota.

Some of the key strategies and initiatives identified in Woodyatt's report included:

Minnesota

- the 'ask an attorney program' in the St Louis District Court which involves volunteer attorneys attending court for '2 afternoons per month for 3–4 hours to provide legal advice and to guide litigants in person through court forms'
- the establishment of 'computer terminals and access to court materials and research tools in the court library in order to assist litigants to prepare their case' and to provide access to self-help materials issued by other courts in the state²⁷
- self-help centres in the Fourth Judicial District Court, where assistance is provided through a range of government and community agencies. On arrival at a self-help centre clients are triaged and assigned to work stations. Computers are available to provide access to forms and information. Two attorneys are available to provide procedural advice and assistance with form completion and some limited legal advice. The self-help centres are also able to field online questions from self-represented litigants.²⁸ In 2006 'the self-help centres assisted 35 000 people'²⁹ and the program was being significantly expanded throughout Minnesota in 2007.

UK

- The Justice Citizens Advice Bureau provides direct assistance to litigants appearing before the Royal Courts of Justice. The bureau is staffed by a solicitor and an honorary legal advisor who is a full time lawyer drawn from the 60 firms that support the service. Clients are seen in three hour morning and afternoon sessions, five days a week for 45 minute sessions. Assistance includes drafting court documents, writing letters and explaining processes. Any documents prepared by the bureau include the clause that they have been prepared with the assistance of the Advice Bureau but that the bureau does not represent that party. Detailed file notes are taken by advising solicitors, and staff members usually only attend two sessions per week to allow enough time for research, administration and record keeping.³⁰
- The bureau is supported by the Personal Support Unit, which uses trained volunteers to provide moral and practical support. Volunteers may accompany litigants to court, assist at court offices, and provide emotional support and information about what happens in court.³¹

- 20 John Dewar, Bronwyn Jerrard and Fiona Bowd, 'Self-representing Litigants: A Queensland Perspective' (2002) 23 *The Queensland Lawyer*, 65, 68.
- 21 Submission CP 58 (Supreme Court).
- 22 Supreme Court (2007) above n 4, Executive Summary, 1–5.
- 23 Judge Tom Wodak, 'Optimising Process Workflow; The County Court Medical List 2005–2006', (Paper presented at the Law Institute of Victoria Medicine and Law Conference, 23 November 2006), 39 and 41.
- 24 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [1.58]; ALRC, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999) [9.53] as cited in Attorney-General's Department (2003) above n 19, 96.
- 25 See H Gamble and R Mohr, 'Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal' (Paper presented at the 16th Annual Conference of the Australian Institute of Judicial Administration, 4–6 September 1998, Melbourne) 3 as cited in Attorney-General's Department (2003) above n 19, 96. See also Law Society of NSW, *Self-Represented Litigants: Position Paper* (2002) 9.
- 26 Tony Woodyatt, *Report to Investigate and Study Overseas Developments Addressing the Needs of Self-represented Litigants* (The Winston Churchill Memorial Trust of Australia) (2007).
- 27 *Ibid* 8.
- 28 *Ibid* 10.
- 29 *Ibid*.
- 30 *Ibid* 11–14.
- 31 *Ibid* 15.

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Overall Woodyatt noted that:

Whilst there is criticism that self-help services encourage self-representation, the experience in the USA and England is that the services are responding to need and demand, and a failure to respond to that demand results in greater clogging of the courts with unrepresented litigants and underscores the failure of the legal system to provide equal justice to those who cannot afford a lawyer.³²

On the basis of his inquiries Woodyatt made several recommendations for Queensland including:

- the establishment of a self-help centre located in the Supreme and District Courts
- appropriately designed simple English materials, based on current best practice, describing court procedures, legal terminology, form completing requirements
- the provision of easy access forms through the courts and community based services
- training for staff and volunteers in communication skills, client behaviour characteristics and needs as well as options for assistance and referral for problem resolution
- the establishment of a scheme similar to the UK Bar's Free Representation Unit involving new barristers and law students to provide free representation before some tribunals
- that the Queensland Bar Association and Law Society pro bono schemes be funded to streamline their operations and be coordinated with all other relevant free and low-cost legal services to augment services to those self-representing in Queensland courts
- the establishment of a foundation to raise money for legal services for the poor.³³

Queensland PILCH has since implemented the first community-based trial court civil law advice and assistance scheme for self-represented litigants in Australia.³⁴ The pilot program began in October 2007 and is situated in the District Court of Queensland. It assists with matters in both the trial divisions of the superior courts and the Court of Appeal. The Self-Representation Civil Law Service has been established and funded as one part of 'accessCourts', which is a three-part coordinated approach to assisting litigants in person.³⁵

The service is closely modelled on the UK Justice Citizens Advice Bureau. Direct advice is provided in the clinic that is run three mornings and three afternoons a week. It is staffed by a service solicitor and para-legal and by volunteer lawyers. Volunteer barristers provide assistance in relation to Court of Appeal matters.

In addition, dedicated registry staff in the Supreme and District Court Registries provide self-represented litigants with information about how to fill in court forms. Computers are available in the registry for use by self-represented litigants, and volunteer networkers provide emotional support and practical advice to self-represented litigants.

Improving levels of assistance and support

Recommendations for improving access to the legal system by self-represented litigants generally include calls for increasing the level of assistance and support provided by the courts and the profession. Typically this involves suggestions for legal assistance, including duty lawyer schemes, and the provision of specially trained court staff.

The Law Reform Commission of Western Australia's review of the civil and criminal justice system in that state suggested a number of responses to self-represented litigants, including the establishment of a duty counsel scheme.³⁶ The Federal Civil Justice System Strategy Paper also supported the further development of duty lawyer schemes in the federal courts.³⁷

In Victoria the Courts Strategic Directions Project broadly recommended increasing the level of legal advice and support for self-represented litigants by the extension to courts of additional duty lawyers, resources or the utilisation of judicial registrars to assist self-represented litigants with pre-hearing procedures and the completion of court documents.³⁸ The report suggested that:

Consideration should also be given to creating the position of In Person Litigant Procedural Co-ordinator in each Court and Tribunal to be a contact point, give procedural advice, handle difficult users, arrange interpreters and provide referrals to Legal Aid and the Dispute Settlement Centre.³⁹

The project also recommended that the following practical measures should be assessed and where appropriate implemented and adequately resourced:

- development of litigant-in-person plans to provide necessary information to unrepresented persons
- increasing the level of legal advice and support for litigants in person including extension to courts of additional duty lawyers or registrars
- training and educational material for judicial officers through the Judicial College of Victoria in dealing with litigants in person
- greater engagement of the legal profession in the provision of pro bono services for litigants in person in appropriate cases including the utilisation of existing pro bono structures
- development of simpler procedures to facilitate appropriate outcomes for litigants in person
- initiation of a program to collect and analyse data about litigants in person as basis for seeking improvements for the support of such litigants.⁴⁰

Aside from established and formalised pro bono referral schemes supported by professional associations and law firms (discussed in Chapter 10), the private profession continues to embark on initiatives aimed at assisting those in need. The most recent example is a pilot Duty Barrister Scheme in the Melbourne Magistrates' Court that has commenced with a view to potential extension of the scheme to other courts if the pilot is successful.⁴¹ Duty lawyers are provided by Victoria Legal Aid at VCAT, and in the Magistrates' Court by Legal Aid and community legal centres. In the Magistrates' Court these lawyers typically deal with criminal and family violence matters. There are currently no duty lawyer schemes operating in the Supreme and County Courts.

Submissions to our review reiterated the need for adequate legal assistance and support. The Human Rights Law Resource Centre submitted that the right to legal advice and representation is one of the basic elements of a right to a fair hearing which is now recognised in the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).⁴² The centre observed that human rights jurisprudence indicates that 'an individual's access to justice should not be prejudiced by the reason of his or her inability to afford the cost of independent legal advice or legal representation'.⁴³ The submission noted that human rights jurisprudence in relation to the right to legal advice and representation does not provide an obligation on the state to provide free legal assistance in civil matters. However, it observed that it does 'require the state to make the court system accessible to everyone which may itself entail the provision of legal aid. Indeed, the complexity of some cases may actually require legal aid to ensure a fair hearing'. It further suggested that an individual's access to the justice system should not be prejudiced by reason of inability to afford the cost of independent legal advice or legal representation.

The National Pro Bono Resource Centre advocated the provision of funding for duty lawyers at courts,⁴⁴ and the Public Interest Law Clearing House (PILCH) recommended the provision of additional resources for duty lawyer programs in all courts in Victoria.⁴⁵ Corrs Chambers Westgarth submitted that:

*To alleviate the impediment of self-represented litigants, which in our experience creates procedural impediments to the Court and adversaries often resulting in delay, cost burdens (borne by the legally represented party), we believe that a duty solicitor should be appointed and made available in the Supreme Court, to assist and, if necessary, appear for self-represented parties. Relevant resources from the Department of Justice may be properly required to fund and maintain the duty solicitor. In this way we believe this measure would greatly assist not only self-represented litigants, but would also assist their adversaries and, more importantly, the court.*⁴⁶

Although the commission acknowledges the ongoing need for more legal assistance for self-represented litigants, we believe the expansion of duty lawyer schemes requires careful consideration to identify appropriate contexts and methods of delivery. Duty lawyer schemes may be inappropriate in the higher courts because most complex disputes would not necessarily be suitable for one-off ad hoc legal assistance. Further, an expansion of these schemes, if they are to be conducted by Legal Aid, would no doubt require additional allocation of legal aid resources, an issue which is beyond the scope of this stage of the review.

32 Ibid 7.

33 Ibid 22.

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

35 Queensland Public Interest Law Clearing House Incorporated, *Launch of accessCourts* (2007) <www.qpilch.org.au/01_cms/details.asp?ID=384> at 25 February 2008.

36 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) 153–60. See, in particular, Recommendation 205.

37 Attorney-General's Department (2003) above n 19, 112. See, in particular, Recommendation 13.

38 Courts Consultative Council (2004) above n 14, 104.

39 Ibid. This recommendation would appear to be a precursor to the establishment of the SRL Co-ordinator pilot program in the Supreme Court in 2006–7.

40 Ibid 105.

41 The Victorian Bar, *Annual Report* (2007) 10 <www.vicbar.com.au> at 15 February 2008.

42 Submission CP 36 (Human Rights Law Resource Centre). See *Charter of Human Rights and Responsibilities Act 2006* s 24.

43 Submission CP 36 (Human Rights Law Resource Centre).

44 Submission CP 16 (National Pro Bono Resource Centre).

45 Submission CP 34 (Public Interest Law Clearing House).

46 Submission CP 42 (Corrs Chambers Westgarth, confidential submission, permission to quote granted 16 January 2008).

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In 2006 the Supreme Court of Victoria commenced a one year pilot program employing a Self-Represented Litigants Co-ordinator based in the Supreme Court Registry. The co-ordinator acts as the primary contact for self-represented litigants on a day-to-day basis, but does not provide legal advice. The system has been likened to a triage system.⁴⁷ The major tasks of the co-ordinator include:

- providing accurate and consistent procedural and practical advice to self-represented litigants, short of giving legal advice
- assisting litigants to complete necessary forms and file documents
- liaising with other court staff, including judges and associates, registry and prothonotary staff and lower courts, in order to expedite self-represented litigants' proceedings
- keeping statistics on self-represented litigants
- monitoring best practice responses to self-represented litigants from other jurisdictions
- providing referrals to other agencies including PILCH, Victoria Legal Aid and community legal centres. The co-ordinator also works to build relationships with other such agencies and, in particular, has developed a memorandum of understanding with PILCH.⁴⁸

Importantly, the co-ordinator helps to manage the expectations of self-represented litigants before the court by providing information about what the court can and cannot do.⁴⁹

The Supreme Court submission to the Consultation Paper noted:

While contacts vary with each case, a significant amount of time is usually required to listen to the litigant, identify issues and supply information. In some cases a whole day may be spent dealing with a litigant with particularly complex issues. There are often repeat contacts with litigants.

This is intensive work that involves dealing with complex issues, difficult individuals and people in times of great stress. Ideally, the functions currently undertaken by the Co-ordinator would be performed by a team, to allow breaks from the frontline work and conferencing with multiple staff and to avoid fixation by certain litigants on an individual.⁵⁰

Submissions and consultations have provided consistently positive reports about the effectiveness of the appointment of the Self-represented Litigants Co-ordinator in the Supreme Court. The court itself noted that '[d]emand for the new position has far outstripped our expectation. Some 170 referrals were made to the co-ordinator in the first five months of her tenure and there have been over 320 referrals to date, not including repeat contacts'.⁵¹ The court also stated that results have been favourable for self-represented litigants, the court and other litigants.⁵² The Supreme Court called for the ongoing investment of resources in the co-ordinator position. It noted that the expansion of such services would enable the development of policy, court practice and documentation and the acquisition of resources and information.⁵³

The Law Institute of Victoria, Legal Aid, the Federation of Community Legal Centres, the Consumer Action Law Centre, the National Pro Bono Resource Centre, PILCH, the Mental Health Legal Centre, Springvale Monash Legal Service and the Human Rights Law Resource Centre all supported the self-represented litigants co-ordinator initiative. Most of these agencies also called for the role to be funded on an ongoing basis, and implemented in all courts, including suburban and regional registries. PILCH advised that it would work closely with co-ordinators to ensure they understand PILCH's eligibility criteria and processes and what assistance can be provided on a pro bono basis to applicants in regional, rural and remote areas.⁵⁴

The Law Institute noted that PILCH had worked closely with the Self-Represented Litigants co-ordinator in the Supreme Court and that as a 'result of that collaboration, many self-represented litigants who would have otherwise been unaware of the scheme were referred to solicitors who provided legal representation and advice on a pro-bono basis'. The Law Institute also submitted that having a co-ordinator was an ideal way of improving self-represented litigants' knowledge of the court's processes and procedures.⁵⁵

The Federation of Community Legal Centres advised that many of its clients have their claims rejected by the courts, not for the content of the claim but because they have not used the form required by the court. It argued for a dedicated court worker to assist people to understand and complete

documents required for court hearings. The Federation noted that 'if court procedures do not provide flexibility, for example to take into account literacy issues, courts must be resourced to provide necessary support to litigants'.⁵⁶

Some reservations were, however, expressed about the role of self-represented litigants co-ordinators. Legal Aid cautioned that co-ordinators should not 'simply function to siphon "difficult" litigants away from courts and towards bodies such as VLA',⁵⁷ and also expressed concerns about the expansion of the program into a duty lawyer scheme:

*The SRL Co-ordinator functions effectively because it does not provide legal advice, nor does it file and/or appear on behalf of the litigant (as a 'duty lawyer' would do).*⁵⁸

Judge Wodak noted that even though the co-ordinator's role is not to give legal advice and he considers this to be an appropriate role, legal advice is often what is actually required.⁵⁹

Court-based pro bono assistance and referral

Another strategy pursued by courts to assist self-represented litigants is the development of pro bono assistance or referral schemes. Models of court-based pro bono referral schemes range from formal pro bono referral schemes (for example, the Federal Court Legal Assistance Scheme established under Order 80 of the Federal Court Rules) to informal schemes such as that conducted by the registrar of the Victorian Court of Appeal in criminal appeals.

Under the formal schemes, referrals are generally made by the court to a registrar, who refers a self-represented litigant to a barrister or solicitor for specified assistance. For example, Order 80 rule 4 of the Federal Court Rules provides:

The Court or a Judge may, if it is in the interests of the administration of justice, refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel for legal assistance.

The court registries maintain lists of lawyers who have agreed to participate in the schemes. There is no stated means or merits test. However, the court may take into account the litigant's means and capacity to obtain legal assistance, the nature and complexity of the proceedings and any other matter it considers appropriate. A referral may be made for the following kinds of assistance:

- advice in relation to the proceeding
- representation on direction, interlocutory or final hearing or mediation
- drafting or settling of documents to be filed or used in the proceeding
- representation generally in the conduct of the proceeding or of part of the proceeding.⁶⁰

A referral is not intended to be a substitute for legal aid, nor is it a guarantee of representation or an indication that the court has formed an opinion on the merits of the litigant's case.⁶¹

In 2004 a report of the Australian Institute of Judicial Administration (AIJA) forum on self-represented litigants noted that most existing court and tribunal-based pro bono schemes are fairly limited and there is little in the way of evaluation.⁶²

In its submission to the Consultation Paper the National Pro Bono Resource Centre cautioned against a further proliferation of court-based pro bono schemes until those currently operating are evaluated, and a needs analysis is undertaken, in consultation with court users and access to justice sector service providers. The centre also refrained from advocating the expansion of pro bono services generally as a solution to challenges associated with self-represented litigants:

*Pro bono can, however, provide some limited assistance, but it should not be used as a substitute for properly funded legal services to disadvantaged people who cannot afford to pay for legal services.*⁶³

There are arguments for and against formal court-based pro bono schemes. On the one hand, considerable legal work is already done on a pro bono basis by the Victorian legal profession, in particular, through PILCH and the pro bono schemes run by the professional bodies. It is possible that court-based pro bono referral schemes would generally draw on the same pool of volunteer lawyers that already provide their services to other pro bono referral schemes. There is also a considerable degree of coordinated referral work done, in particular under the auspices of PILCH, and there is a need to ensure that services are not duplicated.

- 47 Submission CP 58 (Supreme Court of Victoria).
- 48 PILCH has advised that several matters have been referred to it by the SRL Co-ordinator and that it has worked closely with the co-ordinator: See Submission CP 34 (Public Interest Law Clearing House).
- 49 Submission CP 16 (National Pro Bono Resource Centre). See also their reference to the *Australian Financial Review* (Sydney), 16 June 2006, 57.
- 50 Submission CP 58 (Supreme Court of Victoria).
- 51 Submission CP 58 (Supreme Court of Victoria).
- 52 Submission CP 58 (Supreme Court of Victoria).
- 53 Submission CP 58 (Supreme Court of Victoria).
- 54 PILCH indicated that self-represented litigant co-ordinators in rural areas would 'assist SRL's to understand and navigate the services which are available, including where appropriate, referrals to PILCH's members for pro-bono advice and/or representation'. See Submission ED2 18 (Public Interest Law Clearing House). See also Submission CP 34 (Public Interest Law Clearing House).
- 55 Submission ED2 16 (Law Institute of Victoria).
- 56 Submission ED2 9 (Federation of Community Legal Centres).
- 57 Submission ED2 10 (Victoria Legal Aid).
- 58 Submission ED2 10 (Victoria Legal Aid).
- 59 Submission ED2 5 (Judge Wodak).
- 60 *Federal Court Rules 1979* (Cth) O 80 r 5.
- 61 A referral under the Federal Court's Order 80 Legal Assistance Referral Scheme only 'imposes upon the Registrar an obligation to attempt to arrange for the legal assistance mentioned in the certificate'. See *Taylor v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 319, [12].
- 62 AIJA and Federal Court (2005) above n 2, 19.
- 63 Submission CP 16 (National Pro Bono Resource Centre).

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On the other hand, court-based pro bono schemes have the potential to add another dimension to the assistance provided to self-represented people. Some lawyers who would not otherwise volunteer to provide their services to a pro bono referral scheme may be inclined to do so if the scheme is conducted by the court. Further, as is the case with the Federal Court Order 80 scheme, a court-based scheme is not subject to a rigorous means and merits test and therefore may provide a streamlined way of the court securing legal assistance for a party in relation to certain aspects of a proceeding.

The Consumer Action Law Centre supported the establishment of a pro bono referral scheme in all Victorian courts and tribunals. Support was extended to both a formal system of referral (similar to Order 80) and an ad hoc system of referral administered by the self-represented litigants co-ordinator. It also supported links with existing organisations such as PILCH.⁶⁴

The Federation of Community Legal Centres also supported the proposal on the proviso that it should not be a substitute for properly funded legal aid programs. The Federation recommended that case management and pro bono schemes be extended to the Magistrates' Court, on the basis that the majority of community legal centre clients appear in that court, 'where crowded lists and summary procedures mean that self-represented litigants are most likely to be ignored'.⁶⁵

Judge Wodak expressed support for a pro bono scheme that could provide assistance either in 'acting for an otherwise unrepresented person in a proceeding or in trouble shooting, that is, in providing assistance on specific issues in a proceeding'.⁶⁶

The Mental Health Legal Centre argued that consideration should be given to the court having the power to not only approach legal aid and pro bono providers to seek assistance for a party, but to effectively order that representation be provided unless this becomes untenable through exceptional circumstances.⁶⁷

The Law Institute recommended that greater funding be given to bodies such as the Law Aid Scheme, Legal Aid and community legal centres to deliver legal assistance and representation to self-represented litigants in civil proceedings. It also recommended that in the absence of adequate funding of Legal Aid and community legal centres, the profits of the proposed Justice Fund should be applied to provide pre-litigation advice to potential litigants. The potential litigant could then use that advice to decide whether to pursue the claim, and if the claim went ahead the court could 'feel more confident about requiring such litigants to comply with court rules and timetables'.⁶⁸

Although PILCH supported the investigation and consideration of further avenues to assist self-represented litigants, it was concerned that a court based scheme would draw on the same pool of law firms and lawyers who already provide their services through PILCH and 'create an additional, duplicate referral scheme, which would potentially entail a separate referral protocol'.⁶⁹ PILCH argued that courts should refer litigants to PILCH, which would then assess the applicant's eligibility through the various schemes that it administers.⁷⁰ It emphasised that the existing system works well, is efficient and should continue to be utilised.

PILCH also noted that its members have had difficulties with referrals through the Order 80 scheme because referrals often involve people who choose to remain self-represented and to ignore legal advice, and also because once the referral has been made the solicitor is 'locked in', even if the solicitor does not believe that a client has a reasonable chance of success.

Special masters

Court resourced strategies to address the issues posed by self-represented litigants have typically focused on:

- the provision of referral, information and self-help advice provided by court staff or
- the deployment of judicial resources in the form of judges taking extra time to manage matters, to explain procedures and the rules of evidence or distil arguments put forward by self-represented litigants.

There are limitations to both these strategies.

First, many of the programs that have been implemented to meet the challenges of self-represented litigants have focused on providing guidance and information and have fallen short of providing legal assistance. However, often what is needed is substantive legal advice and assistance.

Second, there are restrictions on the role judges can play because of resource constraints and the proper exercise of judicial power. There are obvious difficulties in judges providing 'advice' or assistance to particular litigants. The role of the judge is to provide resolution of the dispute through adjudication. Judges cannot descend into the arena of the dispute without jeopardising their perceived impartiality and objectivity or giving rise to the potential for an application for disqualification on the grounds of reasonable apprehension of bias.

Hence, there is a gap between what the court can offer in the way of practical assistance, on the one hand, and adjudication by a judge, on the other. In order to address this gap the commission proposed in Exposure Draft 2 that a judicial officer of a lower tier than a judge (a 'special master') be appointed to intensively case manage proceedings where one or more of the parties is without legal representation.

The appointment of special masters in complex commercial disputes and class actions is discussed in this report in the context of alternative dispute resolution (ADR) and the recommended adoption of a wider range of ADR processes (see Chapter 4) as well as in the discussion about discovery (see Chapter 6). The proposed adaptation of the role of special master would incorporate elements of the US model, the existing role of court masters and the role of a special referee under Order 50 of the *Supreme Court (General Civil Procedure) Rules 2005*.

The commission believes that the appointment of a special master may be appropriate to assist in a case involving self-represented litigants where, for instance:

- the matter is of some complexity
- the effective and adequate supervision of the matter has the potential to absorb a disproportionate amount of 'judge time'
- the effective and adequate supervision of the matter is beyond the proper scope of the judicial role (that is, it requires the judge to descend into the arena of the dispute)
- it is an appropriate use of resources likely to bring about the early resolution of the matter.

We envisage that the appointment would be of an independent person (for example, a master of the court or senior legal practitioner not otherwise involved in the litigation) to become actively involved in the proceeding. The appointee would derive a degree of authority, having been appointed by the court. The special master could provide early intervention and an investigation of the issues in dispute, with the aim of adopting appropriate case management strategies and achieving early resolution of the dispute. The special master would have the power to report back to the court as to the future conduct of the proceeding. However, unlike the US model, the special master would not hear evidence on oath and would not make findings of fact.

The role is distinct from that of a mediator, who can meet privately with parties and attempt to resolve the dispute. Absent settlement, a mediator can do little more than report back to the court that the matter has not settled. A mediator is unable to screen out baseless claims.

The special master could be involved with both parties, not just the self-represented litigant. We envisage that a special master may:

- meet the parties together. With the consent of the parties, the special master may also meet with the self-represented party privately
- conduct meetings and/or hearings in a more informal manner than a usual court hearing. This is likely to be less threatening to the self-represented litigant
- conduct interlocutory hearings in an inquisitorial style
- explain the parties' duties pursuant to the overriding obligations and other relevant rules governing the conduct of civil litigation
- investigate and help the parties to identify the key legal issues in dispute
- prepare a report to the court as to the recommended future conduct of the proceeding, in particular, about:
 - whether the matter involves an apparently unmeritorious claim deserving of a summary judgment application or other form of summary disposal. Subject to amendment to the rules, such applications may be brought on the court's own motion or by one of the parties

- 64 Submission ED2 12 (Consumer Action Law Centre).
- 65 Submission ED2 9 (Federation of Community Legal Centres).
- 66 Submission ED2 5 (Judge Wodak).
- 67 Submission CP 22 (Mental Health Legal Centre).
- 68 Submission ED2 16 (Law Institute of Victoria). The Mental Health Legal Centre also noted that if legal aid or pro-bono representation was unavailable, at a 'very minimum entitlement should be a comprehensive expert assessment of the merits of a claim ... before the proceedings commence'. It suggested that this would 'hopefully go a long way towards reducing delays and costs': Submission CP 22 (Mental Health Legal Centre).
- 69 Submission ED2 18 (Public Interest Law Clearing House).
- 70 Submission ED2 18 (Public Interest Law Clearing House).

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- whether the matter is potentially meritorious and deserving of pro bono assistance
- whether the matter is appropriate for early judicial intervention or mediation or some other form of ADR (such as early neutral evaluation).

The special master, with the agreement of the parties, could conduct meetings or hearings at a time and place convenient to the parties and not necessarily at the court.

If the matter is to be mediated we envisage that someone other than the special master would conduct the mediation.

Some of the perceived advantages of this approach would be:

- a saving of 'judge time' in dealing with self-represented litigants
- a shift from the present court model which has limitations for self-represented litigants in particular, who often require substantive assistance in identifying legal issues or formulating their case properly
- employment of proactive case management and, where appropriate, strategies for early disposal of unmeritorious proceedings.

The best candidate for the role of special master is one whose independence and neutrality cannot reasonably be questioned. It is also important that the person can communicate effectively with the parties, and in particular the self-represented party. The court should make every effort to appoint a person acceptable to the parties. It would generally be preferable to appoint a special master with the parties' consent, and either to permit the parties to agree on the selection or to make the appointment from a list submitted by the parties (or a court panel).

The commission's preliminary proposal was supported by a confidential submission from a private litigant who suggested that a special master have the power to 'throw out unmeritorious matters'.⁷¹

Other submissions supported the proposal but raised concerns about the costs of the special master.⁷² The Consumer Action Law Centre argued that self-represented litigants would be disadvantaged if costs of the special master were costs in the cause. It noted that it 'was not just or equitable to impose a requirement on self-represented litigants that a Special Master be present, and then make them pay for this master if they are unsuccessful'. The centre believed the costs of a special master should be funded through the court, and not paid for by the parties.

The Federation of Community Legal Centres argued that because special masters would be appointed to improve case management in the courts, not to directly assist the parties, it would be inequitable to order that the costs be in the cause. The Police Association also queried whether costs of the special master placed an additional financial burden on someone with limited means.⁷³

The Law Institute argued that the appointment of a special master would not be an adequate substitute for the provision of legal advice and assistance to self-represented litigants. It was concerned about issues of liability on the part of the judicial officer. The Law Institute submitted that the proposed functions of the special master are already provided for (for example parties are assisted to identify dispositive legal issues in dispute during mediation), and argued that the proposal would add to the cost of litigation without any benefit to the parties.⁷⁴

The Police Association submitted that self-represented litigants 'should be allowed some leniency in the preparation of and the conduct of their presentation/submission. It may be appropriate that they be allowed access to court officers, who can inform them of court protocols so as to maintain formalised practices within the proceedings'.⁷⁵

Information and education

For self-represented litigants

As noted above, self-represented litigants typically encounter difficulties in the conduct of legal proceedings. They may have difficulty identifying or formulating relevant legal issues, gathering and testing relevant evidence and gauging the strengths and weaknesses of their case. They are also likely to struggle with substantive law and court procedure and practice.

Although they are constrained in the provision of substantive advice, Victorian courts have generally taken steps themselves to provide information to self-represented litigants. In Victoria this has been one of the main focuses of court-based assistance for self-represented litigants.

In the Supreme Court the Self-represented Litigants Co-ordinator has been responsible for the development of materials including:

- plain language materials to assist self-represented litigants
- updating of the Supreme Court website to cater specifically for self-represented litigants, in conjunction with the existing website development project
- materials to assist judges, masters and staff to work effectively with self-represented litigants.

The materials to assist self-represented litigants include information about Supreme Court procedures such as:

- preparation and swearing of affidavits
- making application for leave to appeal from an order of the Victorian Civil and Administrative Tribunal (VCAT)
- making application for bail
- disputing a solicitor's bill
- amending pleadings
- a civil litigation flowchart relating to proceedings commenced by writ.

The co-ordinator has also produced templates for commonly used court documents with basic instructions for their completion. The topics addressed so far have been identified on the basis of the types of applications more commonly made by self-represented litigants, and the procedures that pose frequent difficulties for them.⁷⁶

According to the Supreme Court this material is being reviewed and will be made available in the registry and on the court's website.⁷⁷ The Supreme Court expects that this material will benefit those who use it and assist to reduce the court time consumed by procedural irregularities generally. It is anticipated that it will have a 'significant impact on access to justice and improve the operation of the civil justice system'.⁷⁸

The County Court of Victoria has produced a *Guide for Self Represented Litigants* aimed at improving self-represented litigants' knowledge of court processes and procedures.⁷⁹ The guide is available on the court's website.

Overseas courts have developed court-based self-help centres aimed at supporting self-represented litigants with a range of information and resources.

For example, in the United States, the Judicial Council has provided funding for projects to address the needs of self-represented litigants. The Los Angeles County Superior Court established a program to create a centralised Self-Help Management Centre to develop partnerships with the local courts, the Bar, law schools and social services organisations.⁸⁰ The services provided by the centre include the provision of information, materials about the court and its proceedings and procedures, instructions on how to complete forms, and the provision of reference materials regarding legal service providers, social service agencies and government agencies, as well as other educational material. Clients can also attend workshops or receive one-on-one assistance.

Other courts have worked to apply technological solutions to the delivery of information to self-represented litigants. In the Supreme Court of California, County of Contra Costa, for example, a program has been established to emphasise the use of technology in providing services. The goals of the program are to explore the use of technological solutions for completion of forms, provision of information, meeting with litigants at a distance, and other services. The program aims to combine and deliver expert information and assistance via the Internet, computer applications, and real time videoconference workshops to develop a Virtual Self-Help Law Centre for self-represented litigants with divorce, child custody and visitation, domestic violence, civil and guardianship cases. The centre's resources are intended to help parties to navigate the court process, complete, file and serve court forms, handle their court hearings, and understand and comply with court orders.⁸¹

Submissions received by the commission consistently pointed to the need for additional information and resources to be made available to self-represented litigants.

71 Submission ED2 2 (Confidential, permission to quote granted 17 January 2008).

72 Submissions ED2 12 (Consumer Action Law Centre), ED2 18 (Public Interest Law Clearing House).

73 See Submissions ED2 9 (Federation of Community Legal Centres) and ED 15 (The Police Association).

74 Submission ED2 16 (Law Institute of Victoria).

75 Submission CP 6 (The Police Association).

76 Submission CP 58 (Supreme Court of Victoria).

77 Submission CP 58 (Supreme Court of Victoria).

78 Submission CP 58 (Supreme Court of Victoria).

79 County Court of Victoria, *Self Represented Litigants Information Kit* (2004) <www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Information_Guides/file/srp_web.rtf> at 25 February 2008.

80 Judicial Council of California, *Administrative Office of the Courts – Model Self-Help Centers Pilot Program*. More information is available at <www.courtinfo.ca.gov> at 25 February 2008.

81 See the California Courts Online Self-Help Center, <www.courtinfo.ca.gov/selfhelp> at 25 February 2008.

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Fitzroy Legal Service identified a general need for additional resources to explain court processes and to provide sample court documents. It submitted that ‘unrepresented litigants find it too difficult to manage the preparation of pleadings and so ultimately do not pursue their claim’. It also advised that court documents in the Magistrates’ Court are often rejected by the registry for non-compliance with the rules, but with no explanation of the basis for the rejection.⁸²

The National Pro Bono Resource Centre recommended better resourcing of courts and tribunals to produce and provide accessible self-help information for self-represented litigants, as well as trained support staff. The centre suggested that resources could include workshops, community legal information and access to free document generation facilities at courts.⁸³

PILCH recommended exploring developments with a technological focus, such as:

- publication of written materials (proposed above) on the court’s website
- provision of information
- links to Victoria Legal Aid, the Federation of Community Legal Centres, pro bono referral services, social service agencies and government complaint bodies and agencies
- completion of forms online and
- helping self-represented litigants at a distance to submit questions to the self-represented litigants co-ordinators at the courts.⁸⁴

In Exposure Draft 2 the commission made a number of preliminary proposals for the provision of information and educational materials to self-represented litigants, judicial officers and court staff.

We suggested that an audio-visual aid to explain the processes of civil litigation be produced and made available on the courts’ websites, as well as in court registries.

The Consumer Action Law Centre and the Law Institute supported this proposal. The Law Institute also suggested it was vital that self-represented litigants are informed about the costs implications if proceedings are unsuccessful.⁸⁵

Legal Aid suggested that an audio-visual aid may be insufficient to respond to the needs of self-represented litigants and ‘workshops’ may be more appropriate, and noted that the Legal Aid Libraries have a role in providing this information to the public.

For judicial officers

In *Tomasevic v Travaglini* Justice Bell of the Supreme Court of Victoria discussed the role of the judge in cases involving self-represented litigants:

Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

Most self-represented persons lack two qualities that competent lawyers possess—legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed.⁸⁶

For some time, there has been recognition of the specialised skills required by judicial officers in dealing with self-represented litigants. In 2004 the County Court published a Trial Management Guide for the Judiciary specifically dealing with self-represented litigants.⁸⁷

One of the practical measures in relation to self-represented litigants recommended in the Courts Strategic Directions Statement was the provision of training and educational material for judicial officers about how best to deal with self-represented litigants. It was recommended that such training be provided by the Judicial College of Victoria.⁸⁸

Currently, the Judicial College undertakes a number of training programs aimed at providing Victorian judicial officers with practical skills, in particular, to assist them in dealing with self-represented litigants. The programs are based on interactive experiential learning rather than an information-based model.

As a part of a judicial orientation course, newly appointed judicial officers from across the courts and VCAT are given the opportunity to engage in 'court craft' sessions. Sessions include opportunities for role-playing and developing practical strategies and techniques for addressing conflict in court, particularly involving self-represented litigants or difficult counsel. A court craft program is also conducted annually for 10 existing judicial officers. The program incorporates actors and facilitators in a workshop format.

In 2007 the college also embarked on a pilot online educational forum about self-represented litigants. The forum was moderated and six judicial officers from the Magistrates' and County Courts in Victoria participated, together with judicial officers from Canada and New Zealand. It involved problem-based scenarios involving self-represented or partially represented litigants in criminal proceedings.

In the latter half of 2008 the college will deliver a two-day program for Victorian judicial officers focusing specifically on managing the challenges posed by self-represented litigants. The first day of the program will address the law, particularly the obligations to ensure procedural fairness and a fair hearing. The second day will be aimed at the development and practice of skills and techniques that will assist judicial officers to best deal with self-represented litigants in court.

The recently introduced *Courts Legislative Amendment (Judicial Education and Other Matters) Act 2007* provides the heads of the four Victorian jurisdictions with power to direct their respective judicial officers to participate in professional development and judicial education activities.⁸⁹

In his submission, Judge Wodak supported the commission's preliminary proposal for the expansion of training and education for court officials and judicial officers in dealing with and managing self-represented litigants. He suggested that such training was particularly important for judicial officers and court staff who are active in case and list management, because they have greater contact with self-represented litigants. He also believed additional support would be required for judicial officers and court staff dealing with self-represented litigants at trial.⁹⁰

The Consumer Action Law Centre supported ongoing judicial and court staff education in this area, and believed it would be useful to develop a specific manual to assist them to deal even-handedly with self-represented litigants.⁹¹ The centre also submitted that the way judicial officers and court staff interact with self-represented litigants should be reviewed to ensure that these litigants are dealt with fairly.⁹²

PILCH suggested that the Victorian Government provide additional funding to prepare, publish and deliver training and educational material for judicial officers on best practice management of self-represented litigants.⁹³

Professional guidelines for lawyers

Some jurisdictions have developed ethical guidelines for lawyers acting for parties opposed to self-represented litigants.⁹⁴

The Law Society of Alberta's Code of Professional Conduct, for example, provides that when dealing with an unrepresented party, a lawyer has an obligation to ensure that there is no misunderstanding as to whose interests the lawyer is acting to protect.⁹⁵ In addition, the lawyer must advise the other party to retain independent counsel, because in the conduct of negotiations the lawyer may have particular opportunity to use an unrepresented party's inexperience, lack of education or lack of legal knowledge to improperly further the interests of the lawyer's client.⁹⁶ The lengths to which a lawyer must go in ensuring a party's understanding of these matters will depend on all relevant factors, including the party's sophistication and relationship to the lawyer's client and the nature of the agreement in question. Assuming that a lawyer has complied with his or her duty the lawyer may thereafter represent the client in the same manner as though the other party were represented by counsel.⁹⁷

82 Submission CP 44 (Fitzroy Legal Service).

83 Submission CP 16 (National Pro Bono Resource Centre).

84 Submission CP 34 (Public Interest Law Clearing House).

85 Submission ED2 16 (Law Institute of Victoria).

86 *Tomasevic v Travaglini & Anor* [2007] VSC 337 (13 September 2007) [139]-[141].

87 Elizabeth Richardson, *Self Represented Parties: A Trial Management Guide for the Judiciary* (2004).

88 Courts Consultative Council (2004) above n 14 154.

89 *Courts Legislative Amendment (Judicial Education and Other Matters) Act 2007* s 3-6.

90 Submission ED2 5 (Judge Wodak).

91 Submission ED2 12 (Consumer Action Law Centre).

92 Submission ED2 12 (Consumer Action Law Centre).

93 Submission CP 34 (Public Interest Law Clearing House).

94 In relation to guidelines for judicial officers dealing with self-represented litigants in the Family Court, see *Re F: Litigants in Person Guidelines* (Family Law) [2001] FamCA 348.

95 The Law Society of Alberta, *Code of Professional Conduct* (2007) <www.lawsocietyalberta.com/files/Code.pdf> at 10 April 2008, ch 11, r 5(a).

96 *Ibid* r 5(b).

97 *Ibid* r 5.

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The NSW Bar Association has published guidelines for barristers dealing with self-represented litigants, as has the Law Society of NSW for solicitors.⁹⁸

The Law Society of NSW has explained the rationale for its guidelines as follows:

*Legal practitioners are officers of the court, subject to the provisions of the Legal Profession Act and professional conduct and practice rules, and interact with other legal practitioners on that shared understanding ... Self represented litigants do not have these parameters and legal practitioners would therefore be assisted by a framework of ethical principles to guide them in court appearances where the other party is not represented.*⁹⁹

The Law Society guidelines:

- outline the general duties solicitors are bound to perform to self-represented opponents
- state that solicitors should deal with a self-represented party to the same standard as they would a represented party
- explain that solicitors should set the parameters for dealing with a self-represented party
- clarify that solicitors can and should advance points and take all objections and make all submissions reasonably open to them in advancing their client's case.¹⁰⁰

In setting the parameters of the relationship between the solicitor and the self-represented party the guidelines suggest that certain matters may need to be brought to the attention of the self-represented party, including that he or she should communicate with the solicitor and not the solicitor's client, preferably in writing.¹⁰¹ Solicitors are also advised to explain, in all dealings with a self-represented party, that they are neither acting for nor providing advice to the party.¹⁰² Other suggestions relate to conducting negotiations and concluding settlement.¹⁰³ The guidelines also specify that solicitors should instruct their staff on how to deal with a self-represented party.¹⁰⁴ The Law Society guidelines also incorporate useful information sheets for self-represented parties, which explain key concepts that help to clarify relationships and obligations between legal representatives and self-represented parties.

In Exposure Draft 2 the commission proposed that the Law Institute and the Victorian Bar develop professional guidelines to assist solicitors and barristers in dealing with self-represented litigants to whom they are opposed.

The Law Institute strongly supported this proposal. However, some concern was expressed that self-represented litigants may consider these guidelines mandatory and use them as a basis for instigating complaints proceedings.¹⁰⁵

The proposal was also supported by PILCH and the Consumer Action Law Centre. However, the Consumer Action Law Centre noted that it would be important to ensure the guidelines did not 'perpetuate the prejudiced and inaccurate stereotypes that exist' in relation to self-represented litigants. It suggested that self-represented litigants are widely misunderstood and prejudiced in legal and non-legal circles. In this regard, the centre referred to the commission's suggestion that the guidelines consider 'personal security issues', noting that 'the judiciary and court staff need to accept that self-represented litigation is here to stay, forms a substantial percentage of civil proceedings, and is due primarily to individuals' lack of funds to pay lawyers combined with a lack of public funding to low-income earners for civil litigation'.¹⁰⁶

Research

Although the problems associated with self-representation are widely recognised, there is little data collection or qualitative research about the phenomenon. Some courts have started to collect data about self-represented litigants, albeit relatively recently.

In 2004, a Commonwealth Senate committee recommended that federal courts and tribunals should report publicly on the number of self-represented litigants.¹⁰⁷ The Senate committee also recommended that state governments commission research to quantify the economic effects that self-represented litigants have on the justice system and the social welfare system.¹⁰⁸ Victoria Legal Aid specifically endorsed these recommendations in its submission to our review.¹⁰⁹

A program to collect and analyse data about self-represented litigants was also one of the practical measures recommended in the Courts Strategic Directions Statement.¹¹⁰

In Exposure Draft 2 the commission proposed that properly resourced programs be implemented in all courts to provide information about the numbers of self-represented litigants, their impact on the court system and the effectiveness of measures adopted to assist and manage matters involving self-represented litigants.

The Law Institute and PILCH supported this proposal.¹¹¹ Similarly the Consumer Action Law Centre strongly supported additional research on self-represented litigants, possibly funded through the proposed Justice Fund, in particular in relation to the way judicial officers and court staff interact with self-represented litigants. The centre suggested that such research could 'consider outcomes in forums where self-representation is commonplace, and perhaps even mandated, such as the civil claims list of VCAT'.¹¹² It also submitted that objective research may dispel many of the inaccurate perceptions held about self-represented litigants.

Management plans

Self-represented litigant management plans are a form of strategic planning in the courts aimed at developing a well thought out strategy for assisting such litigants.

In 2001 the Australian Institute of Judicial Administration (AIJA) produced a report, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, in which it raised issues to be addressed in the courts' process of strategic planning. It noted that management strategies require collaboration and cooperation with the legal profession, including law firms and practitioners, the Bar, legal aid providers, government departments in the justice sector and advice agencies.¹¹³ The AIJA followed up on this report by organising a forum on self-represented litigants, attended by representatives of courts and tribunals across Australia, as well as observers including the National Pro Bono Resource Centre and legal aid representatives.

The Courts Strategic Directions Project also recommended the development of litigant-in-person plans in the courts and VCAT 'to provide essential information to enable unrepresented persons appropriate access to the Courts'.¹¹⁴

In 2002 the Federal Court adopted a Self Represented Litigants Management Plan. The plan identified a number of management practices to address the needs of self-represented litigants.¹¹⁵ As a result of that plan the court has implemented the following:

- arrangements to improve the nature and quality of statistical and other information collected by the court on self-represented litigants and their needs
- a re-writing of court brochures and guides to ensure that they use clear language and are simple to understand
- the provision of further staff training on giving appropriate advice and assistance to self-represented litigants and on handling difficult situations involving such litigants
- the development of rules and practices that will allow the court to more effectively deal with self-represented litigants.¹¹⁶

The court has indicated that it is currently compiling a new management plan.¹¹⁷

In 2007 the Federal Court also developed new functions to enable its new electronic case management system (Casetrack) to produce a range of statistical reports which will enable the court to more closely monitor the impact that self-represented litigants have on the litigation process and to measure the effectiveness of initiatives to assist them.¹¹⁸

The Law Institute, PILCH and the Consumer Action Law Centre supported the commission's proposal that courts develop self-represented litigant management plans for consideration in overall organisation and planning.

Deterring or curtailing unnecessary litigation

Some self-represented litigants are involved in matters which ought not to have been commenced, either because the litigant does not have a meritorious claim, or because the matter could or should have been resolved without commencing proceedings. Similarly, some self-represented defendants do not have a meritorious defence to the claim against them.

In this report we make a number of recommendations designed to deter or curtail unnecessary litigation. For example, we recommend that parties should take certain steps before commencing litigation in an attempt to resolve their dispute. Pre-action protocols may help self-represented parties

- 98 NSW Bar Association, *Guidelines for Barristers on Dealing with Self-represented Litigants* (2001) <www.nswbar.asn.au/docs/resources/publications/selfrepresented16_10.pdf> at 25 February 2008; Law Society of NSW, *Guidelines for Solicitors Dealing with Self-represented Parties* (2006) <www.lawsociety.com.au/uploads/files/1147303074860_0.17867041264764721.pdf> at 25 February 2008.
- 99 Law Society of NSW, *Self-Represented Litigants: Position Paper* (2002) 14.
- 100 Law Society of NSW (2006) above n 98, [1.2].
- 101 *Ibid* [1.2(c)].
- 102 *Ibid* [3.3].
- 103 *Ibid* [1.2(c)].
- 104 *Ibid* [3.2].
- 105 Submission ED2 16 (Law Institute of Victoria).
- 106 Submission ED2 12 (Consumer Action Law Centre).
- 107 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 187, see Recommendation 53.
- 108 *Ibid* Recommendation 54.
- 109 Submission CP 31 (Victoria Legal Aid).
- 110 Courts Consultative Council (2004) above n 14, 154.
- 111 Submissions ED2 16 (Law Institute of Victoria) and ED2 18 (Public Interest Law Clearing House).
- 112 Submission ED2 12 (Consumer Action Law Centre).
- 113 AIJA (2001) above n 9, 11.
- 114 Courts Consultative Council (2004) above n 14, 104.
- 115 Federal Court, *Annual Report 2006-2007* (2007), 29.
- 116 See comments in Federal Court, *Annual Report 2003-2004* (2004) Chapter 2.
- 117 Federal Court, above n 115.
- 118 *Ibid*.

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to understand the cases they face, and take appropriate action at an earlier stage to avoid being sued. The proposed overriding obligations seek to ensure that frivolous, vexatious and unmeritorious claims and defences are not conducted. Under our proposal the court would have power to make orders bringing such proceedings to a swifter conclusion. Later in this chapter we also make recommendations designed to improve the process for having problematic litigants declared vexatious. Such measures, we believe—when combined with strategies designed to assist self-represented litigants to pursue their cases effectively—should relieve some of the burdens experienced by the courts in dealing with the problems associated with self-representation.

However, the Federation of Community Legal Centres expressed concern that a number of the commission's preliminary proposals emphasised deterrence over assistance. It submitted that 'access to the courts is a civil right and in the absence of civil legal aid, self-representation is a necessity for many people. Deterrents to self-representation are not only counter productive but they fuel unacceptable prejudices against self-represented litigants'.¹¹⁹

1.1.4 Conclusions and recommendations

Despite the increased attention given to self-represented litigant issues in recent years, the problems associated with such litigants are ongoing. It seems to be increasingly recognised that they will remain a feature of the Australian legal system. For that reason, it is important that ongoing work is undertaken to accommodate those who for whatever reason seek to navigate the system without representation, and to find ways for them to participate properly in the process. Of course, these objectives must be balanced against the need for courts to administer the civil justice system efficiently and fairly.

Self-represented Litigants Co-ordinator

The Self-represented Litigants Co-ordinator has proven to be successful in the Supreme Court and there was strong support in the submissions for the continuation and expansion of this program. We believe the initiative should be funded on an ongoing basis, and should also be implemented in other courts to broaden the support and assistance available to self-represented litigants and to relieve some of the pressures on existing court and registry staff. We also support calls for the program to be implemented in suburban and regional registries of the courts.

Court-based pro bono referral

Although the Self-represented Litigants Co-ordinator works closely with established pro bono referral programs, we believe that further consideration of a formal, court-based pro bono scheme is warranted. The proposed Civil Justice Council would be best placed to conduct further research, analysis and consideration in consultation with the courts, VCAT and the existing pro bono schemes operating in Victoria.

Special masters

The use of special masters has the potential to greatly assist in cases involving self-represented litigants. A special master would be a judicial officer of lower tier than a judge, or an independent legal practitioner, and would take on the role of case managing a proceeding where one or more parties was self-represented and required considerable assistance from the court. The commission stresses that the appointment of a special master would be an option to assist the court only where appropriate, and that the court would retain a broad discretion in relation to the recoverability of the costs of an external special master.

Information for self-represented litigants

The provision of information, material and practical assistance for self-represented litigants should be considered an integral part of the services provided by courts. Although such measures are not a substitute for face-to-face legal advice or legal representation, they are invaluable in ensuring litigants have the capacity to participate effectively in the system. The use of technology in delivering such information has the obvious benefit of improving accessibility for those who may face barriers to attending court in person, particularly litigants who may be living in rural or remote areas.

One particular measure we believe would assist self-represented (and indeed represented) litigants would be the production of an audio-visual aid, such as a DVD, explaining the fundamental principles and procedures of the civil justice system. The Victoria Law Foundation is one agency that may have the requisite expertise and resources to develop such an aid. Not only would this provide

much-needed information to litigants, but it would also help reduce the time spent by court staff and lawyers explaining such matters. This would free up time to provide information specific to a particular case. The aid could be made available for viewing at court registries and on the Internet, and could be distributed to key service providers such as community legal centres and Victoria Legal Aid. Viewing of the DVD by self-represented litigants at the outset of proceedings could potentially be made compulsory to ensure they have been provided with consistent, accurate information about the procedures of the court, and their rights and responsibilities as participants in the civil justice system.

Judicial officer training programs

Self-represented litigants will continue to be a significant group of users of the Victorian court system. In light of the *Tomasevic* decision, where it was held that the right to a fair trial 'can only be enhanced' by the Charter, the courts are under an obligation to assist litigants without legal representation to ensure them a fair trial.¹²⁰ It is therefore imperative that judicial officers are adequately equipped to deal with these litigants' particular needs and the issues they raise in court. This involves not just retaining control of proceedings but appreciating the needs of self-represented litigants and developing an appropriate and acceptable approach. As Lord Woolf said:

*Courts and judges must be more responsive to the needs of litigants in person ... In proceedings where litigants appear in person, judges at all levels should adopt a more interventionist approach to hold the ring and ensure the adequate presentation of the litigant's case. This new role will require adequate training.*¹²¹

Focus on this aspect of the judicial role should be considered an integral part of ongoing training and education for judicial officers. The Judicial College of Victoria is likely to be able to play a key role in that training. Judicial officers who have participated in the college's programs consider them to be very valuable. Such programs provide scope for new judicial officers to develop skills and strategies and help existing judicial officers to rejuvenate their approach to the challenges posed when a party appears in court unrepresented.

While the college is already undertaking innovative work in this area, there is scope to provide more of such training. By necessity the numbers of judicial officers who are participating in these specialised programs each year is relatively small. Subject to funding, the college is well placed to take the lead in the extension of such programs to more members of the Victorian judiciary.

Training for court staff

It is also important for targeted training and education programs to be extended to all non-judicial court staff who come into contact with self-represented litigants. Submissions to our review supported ongoing training for court staff.

Professional guidelines

Professional guidelines for lawyers opposed to self-represented litigants would be of benefit to both practitioners and self-represented litigants.

If the commission's recommended overriding obligations are implemented, all participants in the civil justice system, including parties represented or otherwise, will be subject to explicit standards of conduct. In these circumstances it will be all the more important for guidelines to be developed that will elaborate on and provide a commentary about the content and ramifications of these obligations.

The NSW Law Society guidelines provide a very useful basis on which to found a similar tool in Victoria. However, where there is relevant divergence between states the new guidelines should address specific matters relating to the civil justice system in Victoria and, in particular, matters arising out of the overriding obligations (in the event they are implemented). Guidelines could address issues such as general duties and obligations, parameters of relationships, protocols for communication, keeping records of conversations, conduct during negotiations, concluding settlement and, when necessary, personal security issues.

Research

There is minimal data available on the numbers of litigants before Victorian courts who are self-represented. Data collection is important for identifying the numbers of such litigants (and determining whether their incidence is increasing), their key characteristics and the types of matters in which they are involved. There would also be value in obtaining data about their level of participation in court proceedings and the impact on the court system. For instance, do matters involving self-represented

119 Submission ED2 9 (Federation of Community Legal Centres).

120 *Tomasevic v Travaglino & Anor* [2007] VSC 337 (13 September 2007) [72].

121 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 23, [20].

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litigants require more attendances at court registries and/or more court appearances? Do they always take longer? What are the cost implications of extra time taken by court staff and judicial officers in assisting self-represented litigants? It would also be valuable to ascertain through appropriate research whether self-representation is relevant to the outcome of the proceedings as suggested in some studies mentioned above.

Research would help ascertain the most effective court-based programs and case management strategies for assisting self-represented litigants, and would enable informed decision-making about proper resourcing of the courts and how resources should be best directed.

Such research could be conducted or commissioned by the proposed Civil Justice Council. Relevant data could potentially be gathered using court-based technology systems including the Integrated Courts Management System.

Management plans

We believe management plans can be useful for the development of integrated strategies for responding to the needs of self-represented litigants. Such plans should be an integral part of court organisational planning so that measures to meet the challenges of self-represented litigants are well targeted and outcomes can be measured against identified aims and objectives.

RECOMMENDATIONS

108. The Self-represented Litigants Co-ordinator program in the Supreme Court of Victoria should be resourced and funded on an ongoing basis and the scope of the existing program should be extended. For instance, additional positions should be resourced and funded in the County Court and the Magistrates' Court (initially in the Melbourne registries, with a view to extending services to suburban and regional registries).
109. The proposed Civil Justice Council, in conjunction with the courts and VCAT, should investigate the possibility of implementation of a court-based pro bono referral scheme (along the lines of the Order 80 scheme in the Federal Court) in each of those courts.
110. In appropriate cases, the Supreme and County Courts should have the option of appointing a special master in matters where one or more of the parties are self-represented. A special master should be a judicial officer of a lower tier than a judge, or a senior legal practitioner, who will case manage proceedings in proactive manner in order to facilitate the appropriate disposition of the proceeding. The costs of any externally appointed special master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.
111. Courts at all levels should be properly resourced to develop information and material for self-represented litigants and to enhance the delivery of resources of this kind, where possible, through technological solutions. Such resources should be considered an integral part of the services provided to court users.

In particular, an audio-visual aid should be produced (possibly by or with the assistance of the Victoria Law Foundation) to explain in broad terms the processes of civil litigation. This resource could be made available on the courts' websites, as well as in court registries.
112. Existing training programs for judicial officers addressing the needs of, and the challenges posed, by self-represented litigants should be resourced to allow for the extension and further development of such programs to a greater number of judicial officers in Victoria each year. Where it is not already the case, programs should be extended to masters and court registrars. Such programs should be considered an integral part of ongoing training and education for judicial officers.
113. To the extent that it is not already the case, courts of all levels should provide training for all court staff who come into contact with members of the public, including registry staff and judges' associates, about the needs of and challenges posed by self-represented litigants. In particular, training is required for court staff to develop strategies to help them:
 - work with self-represented litigants
 - avert and manage difficult situations
 - provide accurate information about services and resources and, in particular, to distinguish between information and advice.

114. The Law Institute and the Victorian Bar should develop professional guidelines to assist solicitors and barristers in dealing with self-represented litigants to whom they are opposed. Guidelines could address issues such as protocols for communication, record keeping, conduct during negotiations and personal security issues.
115. Programs should be put in place in all courts and properly resourced to provide:
- reliable data about the numbers of self-represented litigants and their levels of participation in the court system
 - analysis of data to assess the impact of self-represented litigants on the court system
 - qualitative research to assess the effectiveness of measures adopted to assist self-represented litigants and manage matters in the court system where at least one party is unrepresented.
116. Where appropriate, data collection should be a by-product of the Integrated Courts Management System or other existing systems. Analysis of the data and qualitative research should be undertaken or commissioned by the proposed Civil Justice Council.
117. Courts at all levels should develop self-represented litigant management plans. Such plans should be considered an integral part of overall planning by the courts so that measures put in place to meet the challenges of self-represented litigants are well targeted and outcomes can be measured against identified aims and objectives.

1.2 INTERPRETER SERVICES

1.2.1 Introduction

The lack of accessible interpreting services in civil matters was raised in submissions as a matter requiring 'urgent redress'.¹²²

A language barrier or hearing impairment may fundamentally impact on the basic communication required between a litigant and the court, affecting access to court services and the efficient and proper disposition of court business. The situation is compounded when a party is self-represented and is impecunious. A language barrier may also dissuade a person from bringing an otherwise meritorious claim, or pursuing a valid defence.

In its submission the Human Rights Law Resource Centre argued:

*In Victoria, the court plays no role in civil proceedings in organising an interpreter to be present or to ensure that the services of an interpreter are available where required. The unavailability of interpreting services in the courts presents a major barrier to access to justice. A party's ability to participate in the legal process is severely undermined where he or she is unable to afford to pay for an interpreter to attend a hearing.*¹²³

Non-English speaking or hearing impaired litigants need assistance to communicate with court staff or judicial officers and to understand court proceedings to ensure the justice system operates fairly. Assistance is also required during ADR processes such as mediation.

In some limited circumstances involving the exchange of basic information (such as during attendances at a court registry) it may be adequate for the assistance to be provided by another person known to the litigant (such as a friend or relative) or even a member of the court staff who is proficient in the litigant's first language or other means of communication. However, it is not appropriate for such people to interpret during appearances in court. Friends or family members, for instance, may not be objective or independent from the dispute, and there may be issues about the accuracy of the interpretation. Despite this, sometimes people related to a litigant do, in fact, take on that role in court. PILCH provided the following case study in its submission:

122 Submission CP 34 (Public Interest Law Clearing House).

123 Submission CP 36 (Human Rights Law Resource Centre).

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Mr H, an elderly man who speaks limited English, had a fruit and vegetable stall at a primary school. Proceedings were brought against him in the County Court by a plaintiff who alleged that he fell over a box of vegetables at the stall and suffered injuries. The school did not have public liability insurance. Mr H was referred to a pro bono practitioner for representation in the County Court who advised Mr H that he had reasonable prospects of success in defending the matter. Mr H was unable to afford the cost of an interpreter to be present during court proceedings, the court would not provide an interpreter, and Mr H had to rely on his daughter to interpret for him. It is unclear at this stage who will pay for an interpreter in the event that Mr H needs to be cross-examined.¹²⁴

1.2.2 Current position in Victoria

When represented by Legal Aid or a community legal centre a litigant will generally be provided with an interpreter at court.¹²⁵ However, this is not the case when litigants are represented by lawyers acting pro bono, or are self-represented.

As a matter of long-standing practice, in criminal proceedings in the Supreme Court, interpreters are generally provided by the Crown. There are also a number of legislative provisions directed to guaranteeing interpreters in such proceedings. In the County Court if a judge requests an interpreter to assist someone in court the registry will book one through the Legal Interpreting Service. In this case the court will pay for the cost of the interpreter attending court.¹²⁶

In the Magistrates' Court a specific legislative provision ensures interpreters for non-English speaking defendants in most criminal proceedings. Section 40 of the *Magistrates' Court Act 1989* provides:

If—

- (a) *a defendant is charged with an offence punishable by imprisonment; and*
 - (b) *the Court is satisfied that the defendant does not have a knowledge of the English language that is sufficient to enable the defendant to understand, or participate in, the proceedings—*
- the Court must not hear and determine the proceeding without a competent interpreter interpreting it.¹²⁷*

We also understand that the Magistrates' Court makes interpreters available when required in proceedings under the *Crimes Family Violence Act 1987*.

Section 526 of the *Children, Youth and Families Act 2005* also provides:

If the Court is satisfied that a child, a parent of a child or any other party to a proceeding has a difficulty in communicating in the English language that is sufficient to prevent him or her from understanding, or participating in, the proceeding, it must not hear and determine the proceeding without an interpreter interpreting it.

The Charter also specifically guarantees the provision of interpreters in criminal matters. Section 25(2) relevantly provides with respect to 'rights in criminal proceedings' that a person charged with a criminal offence is entitled to certain minimum guarantees, including:

- (i) *to have the free assistance of an interpreter if he or she cannot understand or speak English; and*
- (j) *to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance.¹²⁸*

The position in civil proceedings is different. There are no specific legislative requirements for the provision of interpreters in civil matters. Generally, it is considered the responsibility of parties and their legal representatives to provide interpreters when required and the court plays no role in organising such assistance. We understand that in the Supreme Court, in some circumstances, a judge may make arrangements for an interpreter. However, this occurs on an ad hoc and discretionary basis. In contrast, VCAT will arrange for an interpreter where it is needed in civil disputes at no cost to any party.¹²⁹

We also note that none of the Victorian courts has a publicly available and published policy concerning the provision of interpreters in the courts.

1.2.3 Other models

The Federal Magistrates Court of Australia provides a valuable comparison. It has a detailed policy about the provision of interpreters and translators in that court.¹³⁰ The policy has the stated objective of ensuring 'uniform access to interpreter services throughout the Federal Magistrates Court of Australia'.¹³¹ It states further:

*The basic principle of access and equity is that no client of the Court should be disadvantaged in proceedings before the Court or in understanding the procedures and conduct of court business, because of a language barrier or hearing or speech impairment. The two-way process of communication and understanding between the client and the Court may require that the Court engages an interpreter, or on rare occasions a translator.*¹³²

The Federal Magistrates Court Policy addresses issues such as:

- when to use an interpreter
- funding of interpreter services
- accreditation of interpreters
- deaf, hearing impaired and/or speech impaired clients
- registry managers' responsibilities
- feedback and complaints.

The Federal Court also acknowledges the difficulties faced by litigants who have little or no understanding of English. The court's annual report states that it will 'not allow a party or the administration of justice to be disadvantaged by a person's inability to secure the services of an interpreter'.¹³³ The report also states that the policy is to 'provide these services for litigants who are unrepresented and who do not have the financial means to purchase the services, and for litigants who are represented but have an exemption from, or have been granted a waiver of fees under the Federal Court of Australia Regulations'.¹³⁴

The Family Court's Interpreters Policy states that the court will arrange for interpreting services both via telephone and onsite. Interpreting services are provided externally by the Translating and Interpreting Service (TIS), which is funded by the Department of Immigration and Citizenship. There is no charge to the parties for the use of this service. The court states that:

*The basic principles of access and equity are that no Court client should be disadvantaged in proceedings before the Court or in understanding the procedures and conduct of Court business, because of a language barrier. The two-way process of communication and understanding between the client and the Court may require that the Court engage an interpreter or a translator.*¹³⁵

In South Australia interpreting services are arranged through the various courts and paid for by the court in which the matter is heard. Practice Direction 5.2 in the Supreme Court indicates that an interpreting service is available in criminal and civil proceedings and to persons required to give evidence in either criminal or civil proceedings in court.¹³⁶

In the Tasmanian Magistrates' Court any person who is unable to understand or who has difficulty with English can ask for an interpreter in the courtroom. If the interpreter is arranged by the court there will be no cost to the person who needs the service. The court's approach is said to be consistent with the government's policy, *Tasmania's Culturally Diverse Society*.¹³⁷

1.2.4 Victorian Government policy

A Victorian government project undertaken in 2001 aimed to produce a needs analysis of language services in Victoria and developed a strategy to improve interpreting and translating services for Victorians from culturally and linguistically diverse backgrounds. As part of the project, a report prepared in 2002 recommended that 'further investigation was required into the provision of interpreting services in the corrections, courts and tribunal areas to establish the extent to which demand is met by parties other than the government agency and the extent and nature of remaining

124 Submission CP 34 (Public Interest Law Clearing House).

125 Submission CP 32 (Federation of Community Legal Centres).

126 See County Court of Victoria, *Multicultural Directory* (2005) <www.justice.vic.gov.au/CA256DB80025241B/page/Justice+Services-Courts+and+Tribunals-County+Court+of+Victoria?OpenDocument&1=15-Justice+Services-&2=10-Courts+and+Tribunals-&3=20-County+Court+of+Victoria->> at 25 February 2008.

127 See also *Crimes Act 1958* s 464D.

128 See also Article 14(3)(f) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Similar provisions are contained in the *Human Rights Act 1998* (UK) and the *Human Rights Act 2004* (ACT) s 22.

129 See VCAT, *Hearings: Civil Disputes/ Small Claims* (2006) <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Civil+Disputes-Small+Claims-Hearings?OpenDocument&1=45-Civil+Disputes-Small+Claims-&2=10-Hearings-&3=->>> at 26 February 2008. Section 63 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that unless the tribunal directs otherwise a party may be assisted in a proceeding by an interpreter or another person necessary or desirable to make the proceeding intelligible to that party.

130 Federal Magistrates Court, *Federal Magistrates Court Interpreter and Translator Policy* (2007) <www.fmc.gov.au/services/html/interpreters.html> as at 26 February, 2008.

131 *Ibid* [1.1].

132 *Ibid* [1.2].

133 Federal Court (2007) above n 115.

134 *Ibid*.

135 Family Court of Australia, *Interpreters Policy: Guidelines to Ensure Uniform Access to Interpreter Services Throughout the Family Court of Australia* (2006) <www.familycourt.gov.au/presence/connect/www/home/about/business_administration/plans_policies/plans_and_policies_intpreters_policy_2006> as at 26 February, 2008.

136 South Australian Supreme Court, *Practice Directions 2006: Part I—Direction 5.2, 'Interpreters in Court'* (2006) (as amended to 1 January 2008 (Amendment No. 3)) <www.courts.sa.gov.au/lawyers/practice_directions/2006-SC-pd/SC-PDs-am03.pdf> at 26 February 2008. The court requires reasonable notice to arrange for an interpreter from an external provider (the Interpreting and Translating Centre).

137 See Magistrates Court of Tasmania, *Interpreters* (last modified 2007) <www.magistratescourt.tas.gov.au/services/interpreters> at 26 February 2008.

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unrevealed demand'.¹³⁸ In 2003 the government produced its policy on *Improving the Use of Translating and Interpreting Services: A Guide to Victorian Government Policy and Procedures*.¹³⁹ This policy noted the right of the accused in most criminal trials to an interpreter, but in relation to civil matters dealt only with witnesses:

*The party calling a witness may decide to provide an interpreter but a witness does not have an automatic right to give evidence in their native language. However for the convenience of the Court and to make the trial fair it would be preferable for the witness to give evidence through an interpreter.*¹⁴⁰

In 2004 the government produced a report outlining some of the major projects which had been undertaken at 'the halfway mark of the Strategy'.¹⁴¹ Other than in relation to a project in the Family Violence Division of the Magistrates' Court, the 2004 report makes no mention of developments in the courts and tribunals areas. Apparently, the government concluded the strategy in June 2006.

In June 2006 the Department of Justice published a Language Services Policy and Guidelines for Working with Interpreters and Translators.¹⁴² It states that one of the minimum standards for the Department of Justice is as follows:

Clients who are not able to communicate through written or spoken English should be given access to professional interpreting and translating services:

- *when required to make significant decisions concerning their lives; or*
- *where essential information needs to be communicated to inform decision making.*¹⁴³

It would appear that the current position in the courts in civil proceedings is inconsistent with this policy.

1.2.5 The Human Rights Charter

As referred to above, the right to the free assistance of an interpreter is guaranteed in criminal proceedings by the Charter. It is also arguable that the failure to provide an independent and competent interpreter to a party who requires it in a civil proceeding is inconsistent with the right in section 24 of the Charter of every person to a fair hearing.¹⁴⁴

On 23 August 2007, the United Nations Human Rights Committee adopted General Comment No 32 on the right to a fair trial and equality before courts and tribunals pursuant to article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). The General Comment is an important source of guidance on the interpretation and application of section 24 of the Charter in Victoria.¹⁴⁵ One of the key features of the General Comment is the recognition that:

*The right to equality before courts and tribunals also ensures equality of arms ... [and] applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.*¹⁴⁶

1.2.6 Pro bono representation

If a non-English speaking litigant is unrepresented, it is up to him or her to secure an interpreter. In its submission, PILCH specifically pointed to issues concerning the availability of interpreters that may arise where a non-English speaking litigant is represented by a lawyer acting pro bono.¹⁴⁷ It is foreseeable that in such a case the client will not have the means to afford the services of an interpreter. PILCH provided one specific case study as follows:

Mr C was the defendant in civil proceedings arising from a car accident. He did not speak any English. However, VLA determined he was not eligible for assistance. He was referred to a pro bono solicitor and barrister to represent him at the hearing in the Magistrates' Court. The barrister paid for an interpreter to be present in court out of his own pocket as the court would not provide an interpreter.

It is not only in court that the issue arises. Lawyers acting pro bono do not have the benefit of interpreting services to assist with communication with their clients. By comparison, lawyers at Victoria Legal Aid or at a community legal centre have the benefit of telephone interpreting services.¹⁴⁸

1.2.7 Submissions

The need for interpreters

A number of submissions specifically addressed the need for the provision of interpreters in civil proceedings for litigants who require them.

PILCH argued that the unavailability of interpreting services in the courts for impecunious litigants presents a major barrier to access to justice which requires urgent redress.¹⁴⁹

The Federation of Community Legal Centres suggested that the absence of access to interpreters in the civil jurisdiction was a significant barrier for its clients when attending court. The Federation suggested that the provision of interpreters in civil jurisdictions in Victoria would achieve greater fairness in the courts and would 'expedite civil proceedings and ensure that all people have access to justice regardless of their financial means'.¹⁵⁰

Springvale Monash Legal Service noted that more than 50% of the population in its local government area are born overseas and that it is one of the largest users of interpreters in Victoria. The service advised that many of its clients from non-English speaking backgrounds have difficulties in accessing legal information or actively participating in legal proceedings. It noted that interpreting services are not provided as a matter of course in civil proceedings even though 'the implications of losing a civil matter can have a much bigger impact on their lives than a criminal matter'.¹⁵¹ The expansion of court interpreting services to all civil matters was called for as well as the availability of court documents in plain English and languages other than English to prevent language from being a barrier to civil justice.¹⁵² The service indicated that it would like to see the Magistrates' Court replicate VCAT's interpreting services.¹⁵³

Fitzroy Legal Service indicated that 40% of its clients are from culturally and linguistically diverse communities and that a lack of understanding of English is an enormous barrier to understanding the system and its processes. This is compounded by a lack of interpreting services. It argued that further resources for civil interpreting services should ameliorate this problem.¹⁵⁴

The Civil Law Reform Working Group of the Federation of Community Legal Centres recommended the provision of court-based interpreting services for civil litigants in financial need.¹⁵⁵

The Human Rights Law Resource Centre noted that in the UK public authorities must ensure that any person subject to a decision-making process has access to an interpreter if required.¹⁵⁶ The centre lamented that the courts do not play a role in the provision of interpreting services in civil cases in

138 The Allens Consulting Group, *A Needs Analysis of Language Services: Executive Summary* (Report to the Department of Premier and Cabinet, Victorian Office of Multicultural Affairs) (2002) <[www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Executive+Summary/\\$file/Executive+Summary.pdf](http://www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Executive+Summary/$file/Executive+Summary.pdf)> at 26 February 2008.

139 Victorian Office of Multicultural Affairs, *Improving the Use of Translating and Interpreting Services: A Guide to Victorian Government Policy and Procedures* (2003) <[www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Improving+the+Use+of+Translating+and+Interpreting+Services/\\$file/Improving+the+Use+of+Translating+and+Interpreting+Services.pdf](http://www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Improving+the+Use+of+Translating+and+Interpreting+Services/$file/Improving+the+Use+of+Translating+and+Interpreting+Services.pdf)> at 26 February 2008.

140 *Ibid* 12.

141 Multicultural Affairs, *Language Services Strategy Report Card* (2004) <[www.dvc.vic.gov.au/web17/voma/rwpgslib.nsf/549C66914048D264CA2569D600063620/26968FDA90680D78CA2570C00011B4AD/\\$file/Language%20Services%20Strategy%20Report%20Card.pdf](http://www.dvc.vic.gov.au/web17/voma/rwpgslib.nsf/549C66914048D264CA2569D600063620/26968FDA90680D78CA2570C00011B4AD/$file/Language%20Services%20Strategy%20Report%20Card.pdf)> at 26 February 2008.

142 Department of Justice, *Language Services Policy and Guidelines for Working with Interpreters and Translators* (2006) <www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebf244099f0c07c/Language_Service_Policy_Guide_2006.pdf> at 26 February 2008.

143 *Ibid* 7.

144 *Charter of Human Rights and Responsibilities Act 2006* s 24 provides: 'Fair hearing—A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.

145 This is particularly so given the statement in the Explanatory Memorandum that s 24 of the Charter is 'modelled on art 14(1)' of the ICCPR and the direction in s 32(2) of the Charter to consider international law and the judgment of international courts and tribunals relevant to a human right.

146 United Nations Human Rights Committee, *General Comment No 32: Art 14: Right to Equality before Courts and Tribunals and a Fair Trial*, UN Doc CCRP/C/GC/32.

147 Submission CP 34 (Public Interest Law Clearing House). See also submission ED1 31 (Law Institute of Victoria).

148 PILCH referred to its use of the Victorian Interpreting and Translating Service and the Department of Immigration's Translating and Interpreting Service (TIS). See Submission CP 34 (Public Interest Law Clearing House). TIS provides telephone interpreting services free of charge to non-profit, non-government, community-based organisations for case work and emergency services where the organisation does not receive funding to provide these services. See <www.immi.gov.au/living-in-australia/help-with-english/help_with_translating/index.htm>

149 Submission CP 34 (Public Interest Law Clearing House).

150 Submission ED1 9 (Federation of Community Legal Centres). See also submission CP 32 (Federation of Community Legal Centres).

151 Submission CP 59 (Springvale Monash Legal Service).

152 Submission ED1 26 (Springvale Monash Legal Service).

153 Submission CP 59 (Springvale Monash Legal Service).

154 Submission CP 44 (Fitzroy Legal Service).

155 Submission CP 61 (Civil Law Reform Working Group of the Federation of Community Legal Centres).

156 Submission CP 36 (Human Rights Law Resource Centre) citing Department of Constitutional Affairs, *Human Rights: Human Lives* (2006) 23 <www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf> at 26 February 2008.

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Victoria. It strongly endorsed the call for the provision of court-based interpreting services in all civil cases in Victoria. It also supported the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.¹⁵⁷

In Exposure Draft 2 the commission made a number of preliminary proposals regarding the provision and funding of interpreting services in Victorian courts. Submissions received in response to the draft proposals strongly supported the proposals.

The Law Institute submitted that the 'current policy of the Supreme Court and County Court regarding the provision of interpreters in civil matters is inadequate and creates a barrier to making pro bono referrals to members of the Law Institute who would otherwise be prepared to provide pro bono advice and representation to clients through the Scheme'.¹⁵⁸

The Institute was also concerned that the current practice may be inconsistent with the human right to a fair hearing as provided for in section 24 of The Charter. The Institute and PILCH recommended that interpreting services be made available in all civil proceedings in the Magistrates', County and Supreme Courts and the Court of Appeal.¹⁵⁹

The Consumer Action Law Centre advised that it frequently deals with consumers from non-English speaking backgrounds that are 'deeply disadvantaged by the civil litigation process'. It argued that an interpreters fund would go 'a long way to address this disadvantage'.¹⁶⁰

State Trustees believed that the broader use of interpreters as suggested by the commission would promote greater access to justice, and would move the justice system forward in its responsiveness to litigants from diverse backgrounds.¹⁶¹

The Federation of Community Legal Centres and Victoria Legal Aid strongly supported the commission's proposals.¹⁶²

Interpreting fund

One of the commission's preliminary proposals was that a fund be established to fund interpreters in civil proceedings in Victorian courts in appropriate cases. The Law Institute, Legal Aid, the Consumer Action Law Centre and PILCH supported the creation of an interpreting fund.¹⁶³

The commission proposed that the following factors should be considered in deciding whether to recommend payment from the interpreting fund:

- the means of the litigant
- the capacity of the litigant to obtain an interpreter
- the nature and complexity of the proceedings and
- any other matter that the court considers appropriate.

The commission received a number of submissions addressing these proposed discretionary factors. The Consumer Action Law Centre submitted there should be a rebuttable presumption that funding for an interpreter is available to all defendants in all cases. It argued that the presumption could be rebutted by evidence that the party had a certain level of assets or income.¹⁶⁴

Legal Aid thought the discretion should be broader than the commission's preliminary proposal, and that funding should be available if 'a person, who is not able to communicate effectively in English, is required to make significant decisions concerning their lives or where essential information needs to be communicated to them to inform decision making'. Legal Aid suggested that this approach was in line with the Department of Justice's Language Services Policy and submitted that the power to confer payment from the proposed interpreting fund should be consistent with this policy.¹⁶⁵

PILCH and the Law Institute suggested that it was only necessary to consider the means of the litigant.¹⁶⁶ In PILCH's view none of the other factors listed in the commission's preliminary proposal were appropriate. It noted that it will always be in the interests of justice for those who need interpreters to have them and the only relevant factor is the litigant's ability to pay for the service.¹⁶⁷

State Trustees supported the commission's preliminary proposal and noted that it would be well placed to assist the courts in the administration of such a fund.¹⁶⁸

Costs

In Exposure Draft 2 the commission proposed that the provision of interpreting services be the subject of a party-party costs order and any funds recovered should be reimbursed to the interpreting fund. Such orders would be subject to the general judicial discretion in relation to costs.

Submissions generally supported this proposal.¹⁶⁹ The Consumer Action Law Centre argued that the costs of interpreting services be recoverable by the interpreting fund from an unsuccessful plaintiff, but not from an unsuccessful defendant, unless that defendant had sufficient financial means.¹⁷⁰

PILCH and the Law Institute argued that the proposal should be re-formulated so that interpreting services 'may be' subject to party-party costs, not 'should be'. It maintained that it was important that the court retain its discretion to award costs.¹⁷¹

Definition of interpreter

Our proposal for a legislative definition of an 'interpreter' was supported by PILCH¹⁷² and was commended by the Law Institute.¹⁷³

Telephone interpreting service

The commission also proposed that the Department of Justice provide funding for the provision of telephone interpreting services for lawyers acting on a pro bono basis through a Victorian pro bono referral scheme. This proposal was supported by the Law Institute, the Consumer Action Law Centre and PILCH.¹⁷⁴

Policy formulation

Support for the commission's proposal for the courts to develop detailed policies about the provision of interpreters and make such policies publicly available was expressed by Legal Aid, PILCH and the Law Institute.¹⁷⁵

1.2.8 Conclusions and recommendations

The commission remains of the view that it is highly desirable that proper provision is made for interpreting services in civil proceedings in Victorian courts and that proper resources are made available to achieve this end. Such provision is fundamental to the proper administration of justice, and is essential for ensuring a person a fair hearing.

Some minor modifications have been made to the commission's preliminary proposals in light of the responses we received to Exposure Draft 2. In particular, we have reconsidered the factors we believe the court should consider in deciding whether to recommend payment from the interpreting fund. The commission agrees with PILCH that the only relevant consideration should be the means of the litigant. The commission has also included a discretion to allow the court to consider any other matter it thinks appropriate.

RECOMMENDATIONS

Interpreting fund

118. A fund should be established ('the interpreting fund') which may be drawn on to fund interpreters in civil proceedings in Victorian courts in appropriate cases (as provided for below).

Payment from the interpreting fund

119. Victorian courts should be given the discretion to recommend that it is in the interests of justice for payment to be made from the interpreting fund for interpreting services in civil proceedings for litigants who require it. In exercising the discretion the court should be able to take into account:

- (a) the means of the litigant
- (b) any other matter that the court considers appropriate.

Costs of interpreter

120. Insofar as the existing rules do not so provide, there should be, subject to judicial discretion in relation to costs, provision for an order that such services should be the subject of a party-party costs order and any funds recovered should be reimbursed to the interpreting fund.

- 157 Submission CP 36 (Human Rights Law Resource Centre).
- 158 Submission ED1 31 (Law Institute of Victoria).
- 159 Submissions ED1 31 and ED2 16 (Law Institute of Victoria), ED2 18 (Public Interest Law Clearing House).
- 160 See submission ED2 12 (Consumer Action Law Centre).
- 161 Submission ED2 7 (State Trustees Limited).
- 162 Submissions ED2 9 (Federation of Community Legal Centres), ED2 10 (Victoria Legal Aid).
- 163 Submissions ED2 16 (Law Institute of Victoria), ED2 10 (Victoria Legal Aid), ED2 12 (Consumer Action Law Centre), ED2 18 (Public Interest Law Clearing House).
- 164 See Submission ED2 12 (Consumer Action Law Centre).
- 165 See Submission ED2 10 (Victoria Legal Aid).
- 166 See Submissions ED2 16 (Law Institute of Victoria) and ED2 18 (Public Interest Law Clearing House).
- 167 See Submission ED2 16 (Law Institute of Victoria).
- 168 See submission ED2 7 (State Trustees).
- 169 See submission ED2 10 (Victoria Legal Aid).
- 170 Submission ED2 12 (Consumer Action Law Centre).
- 171 Submissions ED2 16 (Law Institute of Victoria), ED2 18 (Public Interest Law Clearing House).
- 172 Submission ED2 18 (Public Interest Law Clearing House).
- 173 Submission ED2 16 (Law Institute of Victoria).
- 174 Submissions ED2 16 (Law Institute of Victoria), ED2 12 (Consumer Action Law Centre), ED2 18 (Public Interest Law Clearing House).
- 175 Submissions ED2 10 (Victoria Legal Aid), ED2 16 (Law Institute of Victoria), ED2 18 (Public Interest Law Clearing House).

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Definition of interpreter

121. The legislation should provide a definition of interpreter along the following lines: *‘interpreter’ means an interpreter accredited with the National Accreditation Authority for Translators and Interpreters Limited.*

Telephone interpreting service

122. The Department of Justice should provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis through a Victorian pro bono referral scheme.

Development of policies

123. All Victorian courts should develop detailed policies about the provision of interpreters and such policies should be made publicly available.

1.3 VEXATIOUS LITIGANTS

1.3.1 Introduction

Among self-represented litigants is a small subset of people labelled ‘vexatious litigants’ who demonstrate particular behaviour in pursuing litigation inappropriately in the courts. Such behaviour includes ‘taking legal action without any reasonable grounds, a repetition of arguments which have already been rejected, disregard for the court’s practices and rulings, and persistent attempts to abuse the court’s processes’.¹⁷⁶ Typically, vexatious litigants will pursue the same person or persons or cause repeatedly.

The court has the power to control abuse of process during the course of proceedings, and can ultimately declare a litigant a vexatious litigant. It is a mechanism that may be warranted only when all other filters and barriers cease to be effective. Once declared vexatious, the person requires leave of the court to institute or continue proceedings. This has the effect of removing the person from the court system.

This is a dramatic step. As has been noted by Justice Kirby in *Re Attorney-General; Ex parte Skyring*:

*It is regarded as a serious thing in this country to keep a person out of the courts. The rule of law requires that, ordinarily, a person should have access to the courts in order to invoke their jurisdiction. It is a rare thing to declare a person a vexatious litigant.*¹⁷⁷

The issue was also addressed in submissions, specifically by the National Pro Bono Resource Centre, which drew attention to the issue from a different angle. It submitted that:

*The impact [of some self-represented litigants] on the administration of justice may from time to time result in a perceived need to divert certain vexatious litigants from the court[s]. However, a broader cost-benefit analysis of the ‘problem’ of self-represented litigants would likely reveal that ... removing citizens’ ability to defend or pursue their rights in the courts results in the diversion of these litigants to other sectors of government responsibility. In effect, diverting self-represented litigants out of the civil justice system and into other sectors such as the welfare sector is simply a cost-shifting exercise.*¹⁷⁸

Although having a person declared a vexatious litigant should be done sparingly and with utmost caution, it should nonetheless be possible to take such a step efficiently and in a straightforward manner when necessary. As we discuss below, the current Victorian provisions for having a litigant declared vexatious suffer from a number of limitations. For example, they do not deal with litigants who display vexatious behaviour in the context of a single proceeding, and do not permit interested parties to make the relevant application.

1.3.2 Distinction between self-represented and vexatious litigants

It has been noted that:

*Whilst it cannot by any means be said that all litigants in person are vexatious practically all vexatious litigants are litigants in person. No consideration of one can be undertaken without an understanding of the challenges presented by the other.*¹⁷⁹

However, what is critical in distinguishing ‘vexatious’ litigants from other self-represented litigants is their approach to litigation:

*A ‘normal’ complainant believes they have experienced a loss and if the loss is assessed as being caused by an external agency they feel aggrieved. They may seek redress, usually in the form of reparation or compensation.*¹⁸⁰

By contrast the ‘morbid’ or ‘querulous’ litigant has been described as follows:

*In general, they have belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss were personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self and others). There will be evidence of significant and increasing loss ... in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, Judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge rather than compensation or reparation.*¹⁸¹

Even if a party exhibits many of the characteristics of a ‘morbid’ or ‘querulous’ litigant, that does not necessarily make him or her vexatious. To qualify as a vexatious litigant under the current law a person must habitually and persistently and without reasonable cause institute vexatious proceedings. For a proceeding to be vexatious it must be brought in bad faith or for an improper purpose or be utterly hopeless.¹⁸² A further explanation of these requirements appears below.

1.3.3 Scope of the problem

Only 14 people in Victoria have been declared vexatious in the almost 80 years between 1930 and 2007.¹⁸³ Of these, six were declared vexatious in the past decade.

In the context of increasing concerns about the numbers of self-represented litigants, it is not possible to point to why the number of people actually declared vexatious litigants is so small. It does not appear to be, at least in recent years, a disparity between the number of applications for an order and the number of orders actually made; that is, applications for a declaration that a person is vexatious are generally successful.¹⁸⁴ However, there is no way of ascertaining whether more applications could or should appropriately be made. It may be that the category of people with standing to bring applications is too limited, or that the test to be fulfilled is too stringent. It certainly seems, anecdotally at least, that many more litigants exhibit vexatious tendencies or bring vexatious proceedings than have been declared vexatious.

Conversely, it may be that the legislation achieves a reasonable balance, given the rights to be curtailed. It may also be that the numbers of litigants who exhibit the necessary extremes of behaviour to qualify for an order are in fact relatively small, compared to the overall number of self-represented litigants.

1.3.4 Victorian legislation

In all Australian jurisdictions legislation provides for a person to be declared a vexatious litigant. The relevant order generally prevents the vexatious litigant instituting or continuing litigation without leave of the court. Leave will only be granted where the court is satisfied that the proceeding is not an abuse of process.

The application is typically made in the jurisdiction’s Supreme Court, which makes an order binding on the conduct of the person in all other courts in that jurisdiction. Historically, most orders of this kind are made on the application of the Attorney-General, although there are variations and, in some cases, recent reforms to extend standing. In the Family Court an order restraining a person from initiating further proceedings without leave can only be made on an application by a party to the proceedings.¹⁸⁵ In the Federal Court such an order may be made on the court’s own motion, on the application of the Attorney-General or Solicitor-General of the Commonwealth or of a state or territory or on the application of the registrar.¹⁸⁶ The Federal Court Rules also provide for applications to be made by a ‘person aggrieved’ by a vexatious litigant, that is, a person against whom the litigant

176 Explanatory Notes, Vexatious Proceedings Bill 2005 (Qld) 1.

177 *Re Attorney-General, Ex parte Skyring* (1996) 135 ALR 29, 31–2.

178 Submission CP 16 (National Pro Bono Resource Centre).

179 Claire Thompson, ‘Vexatious litigants—Old Phenomenon, Modern Methodology: A Consideration of the Vexatious Proceedings Restriction Act 2002 (WA)’ (2004) 14 *Journal of Judicial Administration* 64, 68.

180 Diana Bryant CJ, ‘Self Represented and Vexatious Litigants in the Family Court of Australia’ (Paper presented at Monash University Access to Justice: How Much is Too Much? Conference, Prato Italy, 30 June–1 July 2006) 4 citing Dr Grant Lester, ‘The Vexatious Litigant’ (2005) 17(3) *Judicial Officers’ Bulletin* 17.

181 Lester (2005) *Ibid* 18.

182 See *Attorney-General v Wentworth* (1988) 14 NSWLR 481, 491; *Attorney-General v Michael* [1999] WASCA 181, [126] (Anderson J); *Attorney-General v Weston* [2004] VSC 314, [14]–[19].

183 Based on records kept by the Prothonotary of the Supreme Court of Victoria.

184 Consultation with Victorian Government Solicitors Office and Department of Justice (17 July 2007).

185 *Family Law Act 1975* (Cth) s 118(1)(c).

186 *Federal Court Rules 1979* (Cth) r 21(1) (2).

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'habitually and persistently and without reasonable grounds' institutes a vexatious proceeding.¹⁸⁷ Other recent state reforms in this respect are discussed further below. In Victoria the applicable provision is found in section 21 of the *Supreme Court Act*. It relevantly provides:

- (1) *The Attorney-General may apply to the Court for an order declaring a person to be a vexatious litigant.*
- (2) *The Court may, after hearing or giving the person an opportunity to be heard, make an order declaring the person to be a vexatious litigant if it is satisfied that the person has—*
 - (a) *habitually; and*
 - (b) *persistently; and*
 - (c) *without any reasonable ground—*
 - instituted vexatious legal proceedings (whether civil or criminal) in the Court, an inferior court or a tribunal against the same person or different persons.*
- (3) *An order under subsection (2) may provide that the vexatious litigant must not without leave of—*
 - (a) *the Court; or*
 - (b) *an inferior court; or*
 - (c) *a tribunal constituted or presided over by a person who is an Australian lawyer—*
 - do the following—*
 - (d) *continue any legal proceedings (whether civil or criminal) in the Court, inferior court or tribunal; or*
 - (e) *commence any legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal; or*
 - (f) *commence any specified type of legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal.*
- (4) *Leave must not be given unless the Court, or if the order under subsection (2) so provides, the inferior court or tribunal is satisfied that the proceedings are not or will not be an abuse of the process of the Court, inferior court or tribunal.*

Before the Supreme Court can exercise its discretion to make such an order, the threshold test in subsection (2) must be met. The test for obtaining an order requires that there has been a level of recurrence and lack of reasonableness in the institution of vexatious legal proceedings. Specifically the test requires that a person has habitually and persistently without any reasonable grounds instituted vexatious legal proceedings. The Act does not provide a definition of 'vexatious legal proceedings'. If an order is made, a vexatious litigant cannot without leave of the court commence or continue proceedings in any court or tribunal in Victoria.

In *Attorney-General v Weston* [2004] VSC 314, Justice Whelan summarised the legal principles applying to an application under section 21 as follows:

- (1) *The application seeks a remedy of a most serious nature and a clear and compelling case must be shown to warrant it.*
- (2) *The requirements of the section are that the person must have*
 - *instituted proceedings*
 - *which are vexatious*
 - *and to have done so habitually and persistently and without reasonable cause.*

If the requirements are met, the Court must then consider whether an order ought to be made.
- (3) *A proceeding is 'instituted' where originating process is filed, and also where a person counterclaims, appeals against an otherwise final determination of the substantive matter, or applies to have an otherwise final determination set aside. Interlocutory applications and appeals [from determinations on] interlocutory applications do not ordinarily constitute the institution of proceedings.*

(4) *Vexatious proceedings are proceedings which have either been brought for an improper purpose, or which have been revealed to be hopeless. Hopelessness ought to be apparent from the ultimate disposition. A genuine claim, or element of a claim, may exist within a vexatious proceeding, where it is deeply buried in untenable claims and bizarre allegations.*

(5) *Vexatious proceedings are instituted 'habitually' where they appear to be commenced as a matter of course. 'Persistence' suggests determination and an element of stubbornness. An absence of reasonable grounds will necessarily be the position where the proceedings have been revealed to be hopeless.*

*If the requirements of the section are met, the person's conduct as a whole must be then assessed to determine if, in all the circumstances, an order ought to be made.*¹⁸⁸

1.3.5 Limitations

Standing

Application by Attorney-General only

One of the major limitations of the existing Victorian provision is that an order may only be made on the application of the Attorney-General. No other parties may apply, nor can the court make an order under section 21 of its own initiative.

Having the Attorney-General as the only party with standing arguably provides an appropriate protection and reduces the risk of the process being used oppressively by private parties. However, it has been suggested that this is one of a number of explanations for the small number of orders that have been made.¹⁸⁹

Some commentators have pointed to potential concerns about limiting standing to the Attorney-General, as it 'inevitably adds a political dimension to the initiating process that inhibits the number of applications'.¹⁹⁰ It has also been noted that:

*There are many reasons why an Attorney-General may not wish to take an application, including the merits, but also including for political and other reasons. It is not difficult to see that an Attorney-General might be reluctant to bring an application particularly in circumstances where the litigant's actions were primarily directed at commercial interests, for example a bank.*¹⁹¹

By comparison, private litigants have different motivations which may prompt them to be more expeditious in making applications to protect their own interests.¹⁹² However, they may face other obstacles. For instance, private litigants may not have the resources to bring an application. Or they may be loath to take assertive action for fear of inflaming ongoing disputation.

The court's own motion

As part of its inherent jurisdiction, a court may restrain a party from making unwarranted and vexatious applications in a pending proceeding, including of its own motion.¹⁹³ However, the court's inherent jurisdiction is limited to controlling a proceeding which has actually commenced and hence the court has no power, other than pursuant to subsections 21(3)(e) and (f), to prevent the commencement of proceedings by a person who in the past has instituted proceedings inappropriately.¹⁹⁴

Definitional problems

Other limitations of the existing provision include the inherent difficulties of satisfying all of the requirements. For instance, no statutory definition of 'proceedings' is provided and therefore, as appears from Justice Whelan's summary (above), interlocutory applications and appeals in such applications do not constitute the institution of proceedings for the purposes of the provision. Further, it is not possible to take proceedings instituted in the High Court, Federal Court or interstate courts into consideration. Further, as noted above, there is also no statutory definition of 'vexatious legal proceedings'.

Delay

Because there is a delay between initiating the proceedings for an order declaring a person to be vexatious and the first hearing in the application, the litigant may issue further proceedings without restraint.¹⁹⁵ It is not until the first return date that an interlocutory order for a stay of existing

187 *Federal Court Rules* 1979 (Cth) r 21(2).

188 *Attorney-General v Weston* [2004] VSC 314, [23].

189 Grant Lester and Simon Smith, 'Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On' (2006) 13 *Psychiatry, Psychology and Law* 1, 18.

190 *Ibid.*

191 Thompson (2004) above n 179, 79.

192 *Ibid* 77 citing Dewar et al (2002) above n 20.

193 See *Commonwealth Trading Bank of Australia v Inglis* (1974) 131 CLR 311; *Wentworth v Graham* [2003] NSWCA 307, *Wentworth v Graham* [2003] NSWCA 229.

194 In consultation we were informed that as a matter of practice some magistrates have been making orders restraining applications under the *Crimes Family Violence Act 1987* without leave of the court. The orders are made under s 136 of the *Magistrates Court Act 1989*, which gives the court the discretion to make directions for the conduct of a proceeding: Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

195 Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

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proceedings or a prohibition against the issuing of further proceedings can be made.

Evidence

The legislation does not specify the type of evidence that may be relied on to prove the application or the manner in which the evidence is to be given. For instance, it is not clear from the legislation whether evidence of ‘information and belief’ is acceptable. Currently in Victoria, the practice is generally for evidence to be given on affidavit sworn by a solicitor for the applicant. The deponent is generally exposed to lengthy cross-examination by the respondent.

Notification

The legislation requires the Attorney-General to cause a copy of any order made to be published in the *Government Gazette*.¹⁹⁶ There is no other requirement for notifying other interested parties, including other courts. This raises the possibility that an order may be made but may not come to the attention of those who may need the benefit of it, or who are required to practically enforce it, such as court registry staff.

Applications for leave to commence proceedings

Litigants who have been declared vexatious may make repeated applications for leave to commence proceedings. In some cases this may effectively thwart the intent of the original order. In one such case the Attorney-General has applied to vary the original order to avoid the need for a hearing or response from other parties unless the court considered the application to have merit.¹⁹⁷ The application was made following the possibility of making such an order being raised by the court in relation to one of the litigant’s applications.¹⁹⁸ At the time of writing the application was in abeyance to enable the litigant to obtain legal representation.

Court fees

The issue of court fees was also raised in consultation. In bringing contempt proceedings, the Attorney-General is exempt from payment of court fees.¹⁹⁹ This is not the case in proceedings relating to vexatious litigants. However, in such matters the volume of material to be collated and copied from court files is generally voluminous. Hence, it was suggested that consideration be given to providing an exemption from paying court and photocopying fees in such matters.

1.3.6 Developments in other jurisdictions

The Commonwealth, state and territory governments have been reviewing the legal and policy issues associated with vexatious litigants through the Standing Committee of Attorneys-General. The committee has considered options for reform and has considered developing a nationally consistent legislative approach.

Accordingly, a Model Vexatious Proceedings Bill 2004 has been developed.²⁰⁰ The Model Bill apparently builds on the Western Australian *Vexatious Proceedings Restriction Act 2002*, which implemented recommendations made by the Law Reform Commission of Western Australia.²⁰¹

Under section 4 of the WA Act, where a court is satisfied that a person has instituted or conducted vexatious proceedings or it is *likely* that the person will institute or conduct vexatious proceedings, the court may stay the proceedings (or part of the proceedings) and/or prohibit the person from instituting proceedings without leave of the court. The inclusion of the word ‘likely’ allows the court to speculate about the possible future conduct of a litigant.

Section 3 of the WA Act defines proceedings in broad terms and clearly stipulates that interlocutory proceedings and appeals are included. It also provides a comprehensive definition of ‘vexatious proceedings’ as those:

- (a) *which are an abuse of the process of a court or a tribunal;*
- (b) *instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose;*
- (c) *instituted or pursued without reasonable ground; or*
- (d) *conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any other wrongful purpose.*

An order may be made by the court on its own motion or on the application of

- the Attorney-General; or
- the Principal Registrar of the Supreme Court or the Principal Registrar of the District Court; or,

with the leave of the court,

- a person against whom another person has instituted or conducted vexatious proceedings, or
- a person who has a sufficient interest in the matter.

The definition of 'vexatious proceedings' in the WA Act gives some clarity to the criteria to be used by the court in making its determination. Such a definition is absent from the Victorian legislation. The WA Act also requires evidence that the person has instituted or conducted vexatious proceedings or is likely to. This can be contrasted with the Victorian position, which requires evidence that a person has previously instituted vexatious proceedings habitually, persistently and without reasonable grounds. Also, unlike in Victoria, the WA Act permits the court to take into account interlocutory proceedings. The categories of person who may make an application for the order is notably broader than in Victoria.

In 2005 Queensland also enacted new legislation to prohibit or limit actions brought by vexatious litigants.²⁰² The Queensland Act also specifically provides powers in relation to persons acting in concert with vexatious litigants. It appears that the Queensland Act largely gives effect to the Model Bill. The definition of 'vexatious proceedings' is the same as that in the WA Act, as is the definition of 'proceeding', which includes:

- any cause, matter, action, suit, proceeding, trial, complaint or inquiry of any kind within the jurisdiction of any court or tribunal; and*
- any proceeding, including any interlocutory proceeding, taken in connection with or incidental to a proceeding pending before a court or tribunal; and*
- any calling into question of a decision, whether or not a final decision, of a court or tribunal, and whether by appeal, challenge, review or in another way.*²⁰³

The categories of person with standing to make application under the Queensland Act are substantially the same as under the WA Act, but also include the Crown solicitor.²⁰⁴ However, there is no requirement that a person against whom another person has instituted or conducted vexatious proceedings or a person with sufficient interest must obtain leave of the court before bringing the application.

There are some other points of difference between the WA Act and the Queensland Act. In particular, pursuant to the Queensland Act:

- the court must be satisfied that a person has 'frequently' instituted or conducted vexatious proceedings in Australia or has acted in concert with such a person²⁰⁵
- for the purpose of establishing the above requirement, the court can have regard to proceedings commenced in any Australian court or tribunal²⁰⁶
- among the orders available to the court is 'any other order ... [it] considers appropriate in relation to the person'.²⁰⁷ The notes to this provision in the Queensland Act provide the following examples of the 'other order' that may be made:
 - an order directing that the person may only file documents by mail
 - an order to give security for costs
 - an order for costs.²⁰⁸
- the registrar of the court must arrange for a copy of the order to be
 - published in the gazette within 14 days
 - entered in a publicly available register kept in the registry of the court.

The registrar may also arrange for details of the order to be published in another way, for example, on the court's website.²⁰⁹

196 *Supreme Court Act 1986*, s 21(6).

197 In seeking the variation, the Attorney-General is relying on the court's power under s 21(5) of the *Supreme Court Act 1986* to vary the original orders and the court's power to regulate its own proceedings, as well as arguing that the variation could be made on the basis of the court's inherent jurisdiction to make orders to prevent an abuse of its processes.

198 See *A-G v Kay* [2006] VSC 9; also [2006] VSC 11.

199 Consultation with Victorian Government Solicitor's Office and the Department of Justice (17 July 2007).

200 Model Vexatious Proceedings Bill 2004 as noted in the Explanatory Notes, Vexatious Proceedings Bill QLD 2005, 2.

201 Thompson (2004) above n 179, 77–8. See also Bryant (2006), above n 180, 37–38.

202 *Vexatious Proceedings Act 2005* (Qld).

203 *Vexatious Proceedings Act 2005* (Qld), s 3, schedule dictionary.

204 *Vexatious Proceedings Act 2005* (Qld), s 5.

205 *Vexatious Proceedings Act 2005* (Qld), s 6(1).

206 *Vexatious Proceedings Act 2005* (Qld), s 6(5).

207 *Vexatious Proceedings Act 2005* (Qld), s 6(2)(c).

208 *Vexatious Proceedings Act 2005* (Qld), s 6(2)(c), notes. We were told in consultations that in Victoria the Attorney-General generally does not seek costs on applications in relation to vexatious litigants: Consultation with Victorian Government Solicitors Office and Department of Justice (17 July 2007).

209 *Vexatious Proceedings Act 2005* (Qld), s 9(3), notes.

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In early 2007, a *Vexatious Proceedings Act 2007* was also enacted in the Northern Territory. It is substantially the same as the Queensland Act.

1.3.7 Victorian Parliamentary Law Reform Committee

The Victorian Parliamentary Law Reform Committee is currently inquiring as to the effect of vexatious litigants on the justice system and the individuals and agencies who are victims of vexatious litigants. The committee is due to report no later than 30 September 2008. Specifically, it is to:

- inquire into the effectiveness of current legislative provisions in dealing with vexatious litigants
- make recommendations which better enable the courts to more efficiently and effectively perform their role while preserving the community's general right of access to the Victorian courts.

1.3.8 Exposure Draft 2 proposals and responses

It is desirable that reform to the vexatious aspect of self-representation be given some momentum, particularly in light of legislative developments in other jurisdictions. To this end, the commission made a number of preliminary reform proposals regarding vexatious litigants in Exposure Draft 2. In response to these proposals the commission received a number of responses, which are summarised here.

Standing

The commission proposed that the persons with standing to bring an application for a vexatious proceedings order should be broadened to include:

- the Victorian Government Solicitor
- the Prothonotary of the Supreme Court or the Principal Registrar of the County Court, a person against whom another person has instituted or conducted vexatious proceedings, or someone with 'sufficient interest' in the matter. It was proposed that this second limb be subject to the leave of the court.

Rather than empower the court to bring an application of its own motion (as provided in the Queensland Act) it was proposed that the court be given the power to refer a matter to the prothonotary or the registrar. Similar provision is made in Victoria in relation to contempt proceedings, where the judge can direct the prothonotary or registrar to bring an application.²¹⁰

State Trustees noted that in 'recent times, vexatious litigants appear to have increased in number and organisation' and lauded the commission's proposal to expand standing provisions. It noted that this proposal, combined with moves to liberalise the test applied to such applications, 'promises a reduction in these unmeritorious matters'.²¹¹

The Law Institute supported the expansion of standing in accordance with Order 21(1)(2) of the Federal Court Rules, namely, to the court of its own motion as well as the Attorney-General, the Victorian Government Solicitor and the registrar. The Law Institute said feedback from its members suggested that some litigants 'forum shop' by moving their particular proceedings around between different courts and tribunals. It believed that this problem would be reduced by expanding the class of people who can seek to have a litigant declared vexatious.²¹²

The Consumer Action Law Centre did not support extending standing to parties or those with sufficient interest in the matter, and argued that the Attorney-General's standing is appropriate. It was concerned that wider standing may be used as a procedural weapon, particularly because a declaration would prevent the issuing of new proceedings.²¹³

PILCH supported the extension of standing to the Victorian Government Solicitor and the prothonotary/registry, provided that these parties practice an impartial and independent approach. PILCH also supported the extension of standing to parties to the litigation subject to the leave of the court, but was concerned about extending standing to persons with 'sufficient interest' on the basis that this would only amplify the inefficiencies of the current application process. PILCH also submitted there was no guarantee that persons with 'sufficient interest' or defendants would make applications in good faith. It argued the impartiality of the Attorney-General and the Victorian Government Solicitor provides for a fairer application process as would the leave requirement for parties.²¹⁴

PILCH also noted the tendency to label people with disabilities as vexatious or unreasonable, and was concerned that widening standing would further amplify the vulnerability of the mentally ill. PILCH also observed that the social and personal implications of declaring someone vexatious are significant and supported the need for a cautious approach to reform. It referred to the media coverage which is 'merciless and unforgiving' and also the 'severe impact on an individual's reputation and position in the community'.

PILCH acknowledged that ultimately standing may be able to be extended more broadly; however, it suggested that this should not occur until the legislation and the process is better defined and operational.²¹⁵

Adoption of legislative reforms in other states

The commission proposed that a number of legislative developments in other jurisdictions should be taken up in Victoria to streamline and simplify the process of obtaining a vexatious proceedings order.

State Trustees and an individual litigant supported the commission's proposal that the requisite test be liberalised along the lines of that contained in the Queensland Act.²¹⁶

The commission also proposed that the court be given powers to make orders prohibiting and limiting the right of a person acting in concert with a vexatious litigant. The Consumer Action Law Centre opposed this proposal, noting that the purpose of vexatious litigant laws is to prevent the repeated filing of unmeritorious claims, not 'to prevent people communicating with one another, even if that communication amounts to encouraging vexatious litigation'. It argued that section 6 of the Queensland Act was too broad.²¹⁷

The proposal that the court be empowered to extend its orders to encompass corporate entities or incorporated associations affiliated with the vexatious litigant was specifically supported by an individual litigant.²¹⁸

In relation to the publication of vexatious proceedings orders the commission proposed that orders be entered in a register that would be made available by the court on request. The commission did not propose that the prothonotary have a broad discretion to publish the details of any order. Instead, the prothonotary would be required to notify the heads of all jurisdictions in Victoria and the principal registrars in all jurisdictions in Victoria of any order made.

The Law Institute suggested that a list of vexatious litigants should be published on the Supreme Court's website. This is the practice in NSW, where a list of vexatious litigants appears on the NSW Supreme Court website together with a fact sheet on vexatious litigants.²¹⁹

Legal Aid was concerned to ensure that a person who is ruled vexatious but later has a case with merit has the opportunity to be heard.²²⁰

Vexatious proceedings in other courts and tribunals

Traditionally legislative powers in relation to vexatious litigants have been conferred on and exercised by the Supreme Court only. This reflects the seriousness of the potential curtailment of rights and gravity of the orders that may be made. There is no change to this approach in the Queensland Act or the WA Act. These Acts give the Supreme Court in each of those states the power to make orders that have effect in any court or tribunal in those states.

In Exposure Draft 2 the commission discussed the arguments for and against broadening of this approach to allow each of the courts in Victoria, and VCAT, to make vexatious proceedings orders in respect of proceedings in that particular court or tribunal.

This would enable courts or tribunals to control abuses of the processes in their own jurisdictions. It would also obviate the need to bring proceedings in the Supreme Court, particularly where the activities of a litigant have been focused in another jurisdiction. However, orders made by courts or tribunals other than the Supreme Court would necessarily be limited in scope. This may result in matters being dealt with in a piecemeal way or the need for multiple applications. For instance, where an application is brought in one court, the activities of a litigant in another jurisdiction may be overlooked. It is also foreseeable that a litigant whose activities are curtailed in one court may simply shift activity to another jurisdiction, which would in due course require another application. Conferring jurisdiction on all courts in Victoria and VCAT would also be a divergence from the move to nationally consistent legislation.

210 See *Supreme Court (General Civil Procedure) Rules 2005* O 75.

211 Submission ED2 7 (State Trustees).

212 Submission ED2 16 (Law Institute of Victoria).

213 Submission ED2 12 (Consumer Action Law Centre).

214 Submission ED2 18 (Public Interest Law Clearing House).

215 Submission ED2 18 (Public Interest Law Clearing House).

216 Submissions ED2 2 (Confidential, permission to quote granted 17 January 2008), ED2 7 (State Trustees).

217 Submission ED2 12 (Consumer Action Law Centre).

218 Submission ED2 2 (Confidential, permission to quote granted 17 January 2008).

219 Supreme Court of New South Wales, *Fact Sheet on Vexatious Litigants* (last updated 2007) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_vexlitstable> at 26 February 2008. See also s 84 of the *Supreme Court Act 1970* (NSW) and rr 13.4, 4.10, 4.15 of the *Uniform Civil Procedure Rules 2005* (NSW).

220 Submission ED2 10 (Victorian Legal Aid).

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Legal Aid supported this proposal, but emphasised that the operation of these procedures needs to adequately implement the rights contained in the Charter in particular the right to a fair hearing in section 24(1).²²¹

Declaring proceedings a nullity

In Exposure Draft 2 the commission proposed that if proceedings were commenced despite a vexatious proceedings order, such proceedings should be a nullity. This proposal was supported by State Trustees, which noted that it was an ‘appropriate and even-handed reform’ given the costs imposed on a party otherwise forced to defend itself from vexatious proceedings.²²²

Other preliminary proposals

The commission did not receive any responses to the remainder of its preliminary reform recommendations, namely:

- the introduction of a statutory definition of vexatious proceedings
- the introduction of a provision setting out the types of orders a court can make in relation to a vexatious litigant
- the automatic stay of proceedings once an application for a vexatious proceedings order is made and the prohibition on initiating further proceedings unless ordered by the court
- that evidence in support of an application be on affidavit on the basis of ‘information and belief’ and that cross-examination on affidavit evidence should only be allowed with leave
- that legislation provide that, unless otherwise ordered, vexatious proceedings applications be determined on the papers
- that the prothonotary have the discretion to waive court fees and charges associated with orders in relation to a vexatious litigant.

1.3.9 Conclusions and recommendations

Significant obstacles exist to bringing a vexatious proceedings order under the current Victorian legislation. The commission is mindful of the reforms that have been implemented in other jurisdictions, and believes similar reforms should be introduced in Victoria to ensure that vexatious litigants can be dealt with more effectively and efficiently. The commission notes that it has also sought to ensure that any changes preserve fundamental rights to access the courts. We are also mindful that the Victorian Parliamentary Law Reform Committee is undertaking a detailed review of these laws, and we invite the committee to take our recommendations into consideration when developing its responses.

It is important for further information about the ambit of the problem of vexatious litigants to be gathered.

The categories of people who have standing to bring a vexatious proceedings order should be broadened. We are conscious of the concerns expressed in submissions about extending standing to persons with ‘sufficient interest’ in a matter. The commission believes that this extension would allow those most affected by the conduct of vexatious litigants to take some action, and that the requirement that private litigants are entitled to do so only with leave of the court builds in an appropriate protection against misuse of the process. This safeguard should help prevent the process being used as a procedural weapon. The court will be in the best position to appropriately assess the circumstances and merits of the parties’ cases.

We acknowledge that for a range of reasons initiating an application may not be possible or desirable for a private litigant. A person may nonetheless have insights into the behaviour or activities of a particular litigant that may provide an appropriate foundation for a public officer to make an application. The commission therefore considers it desirable that a procedure or protocol be developed to assist private litigants who cannot or do not wish to bring proceedings themselves to nonetheless have proceedings instituted by an appropriate public officer.

The acting in concert reforms are intended to specifically target litigation that is brought in a coordinated manner for vexatious purposes, and are not intended to prevent freedom of communication or expression.

The commission is now of the view that the names of people declared vexatious litigants should be available by searching a database through the Supreme Court's website. This would enable interested parties to ascertain if a particular person has been declared vexatious.

RECOMMENDATIONS

Research

124. Empirical research should be undertaken to ascertain the ambit of the problem of 'vexatious' litigants, not limited to those who may be subject to an order under existing provisions. Research identifying the impact of vexatious litigants on the courts would be useful, as well as research considering the impact or effectiveness of the making of orders declaring a person to be vexatious.

Standing

125. The categories of persons who should have standing to bring an application should be broadened:

125.1 The Victorian Government Solicitor should be included, in addition to the Attorney-General, as a public officer with standing to bring an application.

125.2 The commission is not of the view that it is necessary or desirable to provide that the court of its own initiative may bring an application (as provided in the Queensland Act). Rather the court should be empowered to refer a matter to the prothonotary or registrar for action.

125.3 The categories of parties who have standing to make an application should be widened to include not only the Attorney-General and the Victorian Government Solicitor but also:

- the Prothonotary of the Supreme Court or the Principal Registrar of the County Court; or,

with the leave of the court,

- a person against whom another person has instituted or conducted vexatious proceedings, or
- a person who has a sufficient interest in the matter.

Adoption of legislative reforms in other states

126. The following reforms (which are largely in place in the Queensland Act and the WA Act) should be introduced:

126.1 The requisite test should be liberalised to reflect the test contained in the Queensland Act, namely, where a person has 'frequently' instituted or conducted vexatious proceedings in Australia the court may make orders prohibiting or limiting the right of a person to take or continue legal action.

126.2 The court should be empowered to make an order prohibiting and limiting the right of a person acting in concert with a vexatious litigant to take or continue a legal action. Legislation should also prevent a vexatious litigant from acting in concert with, or directing, another person to bring legal proceedings that are the subject of the order against the vexatious litigant. Such provisions appear in the Queensland Act.

126.3 A statutory definition of 'vexatious proceedings' should be introduced along the lines of the definition in the Queensland Act and the WA Act.

126.4 The court should be empowered to have regard to 'proceedings' broadly defined, including interlocutory and appellate proceedings (as in the definition in the Queensland Act and the WA Act) as well as proceedings in any Australian court or tribunal (as in the Queensland Act).

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- 126.5 A provision should be introduced that sets out the types of orders that the court may make, including orders staying existing proceedings and prohibiting the institution of proceedings and 'any other order the court considers appropriate' (as in the Queensland Act). The last of these options envisages orders restraining certain conduct or orders awarding costs.
- 126.6 A provision should be introduced that specifically allows the court to extend its orders to corporate entities or incorporated associations affiliated with the litigant the subject of the order.
- 126.7 In addition to the gazetting of any order, a provision should be introduced that requires the Prothonotary of the Supreme Court to enter any order in a register at the court. This register should be able to be searched through the Supreme Court's website so as to determine if a particular party is a vexatious litigant. Unlike under the Queensland Act, it is not proposed that the prothonotary have broad discretion to publish the details of any order. Rather it is proposed that the legislation require the prothonotary to notify the heads of all jurisdictions in Victoria and the principal registrars in all jurisdictions in Victoria of any order made.

Vexatious proceedings in other courts and tribunals

- 127. Each of the courts and tribunals in Victoria (other than the Supreme Court) should have express power to make a vexatious proceedings order limited to proceedings within the jurisdiction of that court or tribunal. The Supreme Court should retain the power to make orders in respect of any court or tribunal in Victoria.

Automatic stay

- 128. Once an application for a vexatious proceedings order is made, there should be an automatic stay in relation to pending proceedings and a prohibition on the commencement of further proceedings pending the hearing unless the court orders otherwise.

Evidence

- 129. Evidence in support of the application should be on affidavit and may be provided on the basis of 'information and belief'. Cross-examination on affidavit evidence should only be allowed with leave of the court.

Declaring proceedings a nullity

- 130. If, despite the making of a vexatious proceedings order, proceedings are commenced by the person the subject of the order, such proceedings should be a nullity.

Determination on the papers

- 131. To circumvent the problem of vexatious litigants absorbing court time by making repeated applications for leave to commence proceedings, legislation should provide that, unless the court otherwise orders, such applications should be determined on the papers without the need for a formal oral hearing.

Discretion to waive court fees

- 132. The prothonotary or registrar should have the discretion to waive court fees and photocopying and other charges otherwise payable by the applicant in proceedings for orders in relation to a vexatious litigant.

1.3.10 Additional matters

There are a number of additional issues relating to vexatious litigants that have been brought to the commission's attention. The commission is of the view that these matters require further consideration. Some or all of these issues, which are briefly summarised below, may be considered by the Victorian Parliamentary Law Reform Committee in the course of its inquiries.

Law Institute's reform suggestions

The Law Institute made a number of reform recommendations in its submission in response to Exposure Draft 2.²²³ It noted that people who regularly institute frivolous or vexatious proceedings may also have outstanding costs orders against them in previous matters which have been struck out or dismissed. To combat this problem the Law Institute recommended that the registrar for each Victorian court or tribunal develop, and maintain, a list of applicants with outstanding cost orders in proceedings which have been struck out or dismissed. Litigants on this list could be required to deposit a costs bond, or some other security for costs, with the court to prevent further potential abuse of the system. It noted that the proposed bond could be reviewed or reversed if at the directions hearing a judge or tribunal member found that the litigant's claim was meritorious.

It also recommended that a person who has initiated multiple actions in relation to the same matter have all those related matters heard before the same judge. It was suggested that this would save court time and resources because the judge hearing the case would already be familiar with its history.

Mental health issues and the appointment of litigation guardians

Consultations and academic literature have raised the relationship between mental health issues and the vexatious or inappropriate use of legal proceedings exhibited by some litigants.²²⁴

The issues that warrant further consideration include:

- the appointment of a litigation guardian and/or a guardian or administrator (or both) in appropriate cases; and
- incorporating strategies in the vexatious proceedings regime that specifically take into account mental health issues in the management of or assistance for those litigants who engage in inappropriate or vexatious use of litigation.

Not all litigants that exhibit behaviour which involves inappropriate or vexatious use of litigation are under a disability and would qualify for the appointment of a litigation guardian. However, there may be circumstances where it is appropriate. Mechanisms currently exist in Victoria for the appointment of a litigation guardian in circumstances where a person is under a disability and has an inability to manage his or her affairs in relation to a proceeding.²²⁵ Otherwise there is no test provided in the rules for determining whether the person is capable of managing his or her affairs. Further:

*The cases do not consider the level of mental capacity required to be a 'competent' litigant in person but it cannot be less than that required to instruct a solicitor. It should be greater because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.*²²⁶

A litigation guardian stands in the place of a party to a proceeding. Except where he or she is a lawyer, a litigation guardian usually will have to employ a lawyer to be an advocate.²²⁷ The role of litigation guardian is a potentially onerous task, requiring a person to assume full power and authority as a party in the proceeding and risk exposure to the other parties' costs. A litigation guardian can be any person who is not under a disability and has no interest in a matter which is adverse to the person he or she represents. In practice, a litigation guardian must be willing to act in the role and will often be a friend or family member.

It is important that where a litigant displays the requisite criteria, a litigation guardian is appointed rather than allowing the litigant to proceed unrepresented. Failure to do so may render any decision subject to being overturned on appeal.²²⁸

The issue also arises as to the proper process to be followed in relation to the appointment of a litigation guardian and/or a guardian or administrator (or both) under the *Guardianship and Administration Act 1986*.²²⁹ An administrator is entitled to 'bring and defend legal actions' on behalf of the represented person²³⁰ but there is no such provision for guardians in relation to litigation that is not to do with a person's estate. A guardian appointed under the *Guardianship and Administration Act 1986* may have to be appointed the represented person's litigation guardian in order to act in litigation.

It is foreseeable that the litigant concerned may not acquiesce or consent to such an appointment. Indeed in consultations we were informed of one recent matter that had proceeded in both the County and Supreme Courts where the process for the appointment of a guardian and/or

223 See Submission ED2 16 (Law Institute of Victoria). These submissions were also made to the Victorian Parliamentary Law Reform Committee's Inquiry into vexatious litigants. See Law Institute, *Vexatious Litigants—6 September 2007* (2007) <www.liv.asn.au/members/sections/submissions/20070906_89/index.html> at 26 February 2008.

224 Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

225 See generally *Supreme Court (General Civil Procedure) Rules* O 15. See also s 66(1) of the *Guardianship and Administration Act 1986*, which provides that if in any civil proceedings before a court the court considers that a party may need to have a guardian or administrator or both appointed, the court may refer the issue to VCAT for its determination.

226 *Murphy v Doman* [2003] NSWCA 249, [35].

227 *Supreme Court (General Civil Procedure) Rules* r 15.02(3).

228 See, eg, *Murphy v Doman* [2003] NSWCA 249.

229 See *Guardianship and Administration Act 1986* s 66(1) and above n 225.

230 *Guardianship and Administration Act 1986* s 58B(2)(i).

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administrator has been the subject of appeal by the litigant against whom the order was sought to be made.²³¹ It is therefore critical that a proper process is followed in relation to such matters and that the litigant in question is afforded procedural fairness and natural justice, including a right to be heard.

With particular reference to litigants who engage in inappropriate or vexatious use of litigation, the matters that may require further consideration include:

- identifying matters where the appointment of a litigation guardian and/or guardian or administrator (or both) may be appropriate
- the proper process to be followed by parties and courts in initiating the appointment of a litigation guardian and/or guardian or administrator (or both)
- the effectiveness of the process for the appointment of litigation guardians in Victoria, particularly in restraining inappropriate or vexatious conduct.

Some academic and judicial commentary suggests there may be a correlation between the conduct of vexatious litigants and a psychiatric disorder or mental illness and that accordingly psychiatric assistance should be one of the methods employed to deal with the problem.²³² We note the following observation:

*Courts are not equipped to provide this type of assistance and it is clear from the legislation ... that there is no power to make orders requiring a litigant to undergo some type of psychiatric assessment or treatment either as a result of being declared vexatious, or as a prerequisite to commencing further litigation following an order being made declaring them vexatious. Perhaps this is something for a future Law Reform Commission to consider.*²³³

Victoria Legal Aid expressed some concern about the current operation of litigation guardians in the civil justice system. It suggested that the reason that many people or organisations do not act as litigation guardians is because by doing so they potentially expose themselves to adverse cost orders. Accordingly, Legal Aid called for the consideration of the introduction of cost indemnities for litigation guardians.²³⁴ It did not support any requirement for compulsory psychiatric examination of vexatious litigants, as this would overly intrude on a person's private life and may raise mental health issues unrelated to the court proceedings.²³⁵

Criminal prosecutions

During consultations we became aware that some litigants inappropriately bring private prosecutions for criminal offences against public officials.²³⁶ Subject to a statutory provision restricting the identity of persons who can lay a private information, any person can lay an information for either a summary or indictable offence. Some of these prosecutions are what would be described in civil proceedings as frivolous, vexatious or an abuse of process of the court. Once the prosecutions are issued they create considerable intrusion into the role of public officers and require significant resources to bring about a resolution.

In civil matters issued in the Supreme Court, the prothonotary may refuse to accept an originating process without the direction of the court where he or she considers that the form or contents would be irregular or an abuse of the process of the court.²³⁷ No equivalent rule exists in relation to criminal proceedings. The Director of Public Prosecutions may, however, take over the proceedings and, if appropriate, withdraw or discontinue the charges.²³⁸ This process, nonetheless, involves substantial cost and considerable inconvenience.

In NSW, the registrar can refuse to accept criminal proceedings if they are not within the rules of court.²³⁹

Consideration should be given to making legislative provision for the registrar to also refuse to accept an originating process for criminal proceedings where he or she considers that the form or contents would be irregular or an abuse of the process of the court. The commission notes that a proposal of this sort is beyond the scope of this review.

Preventing conduct of claim unless party is legally represented

Another issue that may warrant further consideration is the possibility of providing the court with a power to prevent the pursuance of a claim unless a party is legally represented. It has been suggested that in certain circumstances where it appears to the court that a self-represented litigant is pursuing a claim or defence that appears vexatious or without any merit, the court should be given the power

to make an order (similar to the present situation in relation to corporations) that the claim or defence cannot be pursued on behalf of the person except by a legal practitioner with a practising certificate. The engagement of a legal practitioner may assist to distil the meritorious dimensions of the claim from otherwise overwhelmingly irrelevant material or vexatious conduct. The legal practitioner would also be subject to the overriding obligations, ethical standards and, if necessary, appropriate disciplinary sanctions.

The policy rationale in favour of such a proposal is the need to ensure that cases are conducted efficiently and with regard to the real issues.

Arguments against this proposal include:

- access to justice issues
- offending against the principle of the right to appear in person
- potential inconsistency with the provision in the *Charter of Human Rights and Responsibilities Act (2006)* providing for a right to a fair hearing
- imposition of an unreasonable financial burden on persons of limited means.

It was also argued that compelling a lawyer to act on behalf of someone is problematic because they may not be paid even if the litigant succeeds.

Legal Aid opposed preventing parties from pursuing a claim if they are not represented. It argued that this would 'arbitrarily restrict that person's access to justice, flout the right to appear in person, is overly expensive, and is likely to be in contravention of the right to a fair hearing contained in the Charter. of Human Rights and Responsibilities.²⁴⁰

The Law Institute also expressed concern at this proposal. It argued that it imposed a burden on litigants and required resources for legal representation.²⁴¹

231 Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

232 See discussion by Bryant (2006) above n 180. [5–6]. See also Ian Freckelton, 'Querulent Paranoia and the Vexatious Complainant', (1988) 11 *International Journal of Law and Psychiatry*, 129; Alan Murdie, 'Vexatious Litigants and de Clerambault Syndrome', (2002) 152 *New Law Journal* 61.

233 Thompson (2004) above n 179, 70.

234 Submission ED2 10 (Victoria Legal Aid).

235 Submission ED2 10 (Victoria Legal Aid).

236 See for example *Attorney-General for the State of Victoria v Shaw* [2007] VSC 148.

237 *Supreme Court (General Civil Procedure) Rules 2005* r 27.06.

238 See *Public Prosecutions Act 1994* ss 22(1)(b)(ii) and 25.

239 See *Criminal Procedures Act 1986* (NSW) s 49 and 179.

240 Submission ED2 10 (Victoria Legal Aid).

241 Submission ED2 16 (Law Institute of Victoria).

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Chapter 9

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