



## **Australia - A vital commercial hub in the Asia Pacific region: Victoria - a commercial hub**

*Remarks by the Honourable Marilyn Warren AC, Chief Justice of Victoria to the Federal Court and Supreme Court Commercial Seminar, Monash Law Chambers, Melbourne*

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### **Introduction**

Australia's continued development as a national and regional commercial hub will require a collaborative and co-operative effort by the judiciary, the Bar and the profession.

The potential is there: the thriving economies of the Asia-Pacific region continue to provide exciting opportunities for Australian practitioners and courts.<sup>1</sup> Singapore and Hong Kong remain the most high profile commercial hubs in the region. However, Australia has the potential to become the next major commercial dispute resolution centre and Melbourne in particular, is well placed to support further development and growth.

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<sup>1</sup> Clyde Croft, 'Specialist Arbitration Lists: A Victorian Supreme Court Perspective' (Paper prepared for the AMINZ and ICC International Arbitration Day, Auckland, 18 February 2015).

Support by Australia's superior courts of commercial litigation and arbitration will be crucial. However, the judiciary cannot do it alone: for the legal system in this State to operate at its best and become the regional forum of choice, all parties must work together.

The challenge, I think, involves three questions:

- Firstly, what do commercial clients and the law firms that represent them want from their courts? In other words, what affects clients' choice of forum?
- Secondly, what are we already doing to meet these needs?
- Thirdly, what can we do better? And how do we go about it?

### **What do court users want?**

Investment decisions are necessarily informed by, among other things, the functionality of the local legal system, the courts and the legal profession. In our highly competitive globalised market, clients can afford to 'shop around'.

If we want to cement Australia's (and Victoria's) standing as a regional commercial hub then we must have exceptional courts. Investors and clients must have faith that, should they find themselves in a dispute, then accessible, reliable, timely and cost-effective dispute resolution services are available. Likewise lawyers must have faith enough in our courts to recommend them to their clients.

There are however things we would all agree are important.

One is high quality judges – judges who have the requisite experience, specialisation and expertise to deal effectively and expeditiously with disputes, who are prepared for court and who are cognisant not only of the quality of justice they deliver, but also of their approach to case management. This is true not only within courts, but across jurisdictions. For example, consistency is particularly important in the international arbitration space: a jurisdiction where the courts are inconsistent in their approach and unpredictable in their treatment of arbitral processes and awards does is unlikely to attract any significant arbitration work.<sup>2</sup>

Another is high quality facilities. Parties expect court facilities to be up to date with current technologies. Not only must court rooms be state of the art, but so too must the processes for filing and accessing documents. Courts and the registries and staff that support them must be specialised, accessible and responsive.

Then there is the issue of costs. In a highly competitive legal market, law firms are under increasing pressure from clients to minimise costs. Law firms have responded in a number of ways, for example by negotiating new billing methods and transferring some functions such as document discovery offshore. Litigation can be especially expensive. Cost minimisation may be aided by effective case management and alternative dispute resolution. This is where courts have a role to play.

### **What are we already doing?**

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<sup>2</sup> See generally Clyde Croft, ‘Specialist Arbitration Lists: A Victorian Supreme Court Perspective’ (Paper prepared for the AMINZ and ICC International Arbitration Day, Auckland, 18 February 2015).

I will draw upon the Australian jurisdiction with which I am most familiar. However, I would not wish to be taken to be parochial. It is important to Australia's international standing that all our superior courts perform well and learn as they do from one another.

At the Victorian Supreme Court, we are doing a lot.

Last year we reformed the Commercial and Equity Division and now have a new invigorated and vibrant Commercial Court based on the Commercial Court in London comprised of judges and associate judges with extensive commercial expertise and experience. Justice Hargrave heads the Commercial Court assisted by Justice Judd. The Corporations List within the Commercial Court has specialist corporations judges: Justices Robson, Sifris and Judd with Associate Justices Efthim, Gardiner and Randall. The new Commercial Court incorporates eight specialised and general managed lists but retains the flexibility for proceedings to be fixed before a range of judges to eliminate delays. The other judges in the Commercial Court are Justices Vickery, Croft, Almond, Digby, Elliot, Sloss and Cameron together with Associate Justices Daly and Derham. Cases in the Commercial Court are actively managed and trial dates are fixed well in advance. There are weekly meetings of Commercial Court judges and staff where new files are individually assessed and triaged. The case management applied is intensive and flexible, crafted to suit the individual case with minimum delay.

I especially highlight some changes in the corporations field, under Justices Sifris (as the judge in charge) and Robson. Extensive and important work is done by the associate judges – who sometimes have up to 40 cases in their corporations list on any given day. One can only marvel at the way the associate judges glide through their lists and deliver prompt decisions – with, I might add, a low appeal rate. Also, the associate judges assist with the oppression cases –

materials are kept to a minimum and mediations are held early on and often in the Court by highly experienced associate judges.

Other recent developments within the new Commercial Court include the recent appointment of a judicial registrar, Judicial Registrar Hetyey, and the creation of a dedicated Commercial Court Registry. In addition to conducting judicial mediations and case management conferences and exercising judicial powers, the judicial registrar also has responsibility for:

- Oversight and efficient management of the registry
- The provision of operational, listings and judicial support to the judges of the Commercial Court
- Driving the implementation and management of various existing and future reform projects.

The dedicated Commercial Court Registry includes many legally qualified staff with substantial experience who are well equipped to assist with the case management of matters and provide specialist knowledge to court users in respect of processes and procedures.

Our Commercial Court is supported by complementary arrangements in the Court of Appeal. Again the case management is flexible with appropriate expedition when warranted for commercial appeals. The rapid disposition of the Timbercorp litigation in 2013 and the Tatts and Tabcorp litigation last year (the trials and appeals all completed in a few months) are examples. And again there is commercial and corporations specialisation on the appellate benches: The President and Justices Tate, Whelan, Santamaria, Ferguson and myself together with additional judges of appeal from the Trial Division.

The Commercial Court has implemented the 'Red Crest' system, an electronic filing and case management system that allows real-time filing and viewing of court documents online. We anticipate that the new system will assist commercial litigants to reduce costs and avoid unnecessary paperwork. Red Crest will be progressively rolled out to other divisions of the Court throughout the year.

I particularly emphasise our dispute resolution infrastructure. We have the William Cooper Justice Centre which includes a state-of-the-art purpose built courtroom technologically equipped to hear large-scale commercial litigation and class actions. Research conducted during the Great Southern and Kilmore East trials found that the effective use of technology in those trials saved about a third of court time.<sup>3</sup> William Cooper is complemented by a break-out and meeting room floor for the litigating parties. We also have Court 15, a modern civil court for multi-party, non-jury commercial trials with modern facilities such as video conferencing, drop-down screens, ample space for court books and transcript providers, extra bar tables, and large expert witness facilities. In these court rooms we podcast trials which provides immediate access to litigants. This was very important in the large class actions such as Great Southern, Kilmore East and Murrindindi.

The Supreme Court has focused strongly on court-assisted ADR. We have a dedicated mediation centre in the Associate Judges' building together with the Melbourne Commercial Arbitration and Mediation Centre in William Cooper. Again we have experienced associate judges and judicial registrars to mediate and intensively case-manage commercial disputes in their early stages.<sup>4</sup> To demonstrate the effectiveness of court provided mediation, I will

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<sup>3</sup> Marilyn Warren, 'The Litigation Contract: The Future Roles of Judges, Counsel and Lawyers in Litigation' (Remarks delivered on the occasion of the Victorian Bar & Law Institute of Victoria Joint Conference on High Stakes Law in Practice and the Courts, 17 October 2014).

<sup>4</sup> The Court sets out the guidelines for judicial mediation in Practice Note No 2 of 2012.

describe the Murrindindi experience, the case that settled recently for \$300m. Mindful of the difficulties encountered in other large class actions, the trial judge rather than appointing an external mediator, appointed an associate judge. The associate judge adopted a framework of close oversight of the mediation. I will describe it (in bullet form):

***First meeting with all parties present (legal representatives only)***

- Introduction
- Agreement that Quantum needed to be explored and if possible agreed. If not, a range of the quantum was to be calculated.
- Agreed on a statistician – Melbourne University Professor (independent) to calculate a representative sample size.
- Discussed the sample – characteristics ie. double dipping, if some in the sample was part of Kilmore bushfire group et cetera.
- Agreed to appoint a valuer. Parties to discuss and come to agreement as to who was to be the valuer.
- Organised weekly/fortnightly case management conference.

***Case Management Conferences (Approximately 8-10)***

- Agreed on valuer
- Agreed who to pay the cost and in what proportion
- Give information to the statistician, parties discussed how sample should be done
- Meetings with statistician and valuer to discuss sample size, skewing of sample etc
- Discovery issues re valuation solved
- Numerous meetings with value in progress, what was to be valued, e.g. trees, businesses etc

***Mediation commenced fixed for 5 days***

- First 3 days discussion re valuations
- Range of values upper/lower limit discerned as expected
- 2 days mediation offers made (4 party mediation)
- Further 1 day mediation further offer made
- Holiday break. Parties kept in touch with mediator re further offers considerations
- Parties brought back during holiday period for further 2 days' mediation at request of mediator
- Case settled
- Court hearing put back 2 days to allow terms to be signed

All this was provided by the Court at next to no cost.

The role of ADR in the Victorian Supreme Court is now pivotal. The Associate Judges have resolved multiple class actions (the Casey landfill, the Bonsoy and the Hepatitis C cases for instance). Regularly the Associate Judges are taking matters after the parties' openings, and, mostly resolving them. While numbers can be boring, I demonstrate my point this way. In 2013-14 the Associate Judges were referred 219 mediations, 118 settled and 55 were not resolved, the remaining 46 were adjourned or vacated. The success rate is conservatively 68% which is very strong.

The Court has also been active in supporting the use of arbitration (domestic and international) with the establishment of the Specialist Arbitration List within the Commercial Court and



support for the Melbourne Arbitration Centre.<sup>5</sup> Late last year, the Supreme Court took another significant step toward a more ‘arbitration friendly’ environment. On 1 December 2014, we introduced the Supreme Court (Chapter II Arbitration Amendment) Rules and new Commercial Arbitration Practice Note which together provide a clear and comprehensive guide to proceedings issued in the Commercial Court’s Arbitration List.<sup>6</sup> The new rules largely follow the approach of the Federal Court Rules and we anticipate the cross-jurisdictional consistency will go far in making Melbourne’s place on the national arbitration grid.<sup>7</sup>

Of course all of our innovative endeavours are strongly underpinned by the Civil Procedure Act 2010 (Vic) (‘CPA’). This legislation has been used proactively, even quite aggressively, by judges in Victoria which has been at the forefront of civil procedure reform throughout the common law world.<sup>8</sup> All parties to litigation are bound by an overarching purpose to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.<sup>9</sup> Judges now have clear and far-reaching legislative powers to actively case-manage matters in pursuance of this purpose. Anecdotally the CPA has facilitated a cultural change in litigation, and things will

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<sup>5</sup> The Melbourne Arbitration Centre has already hosted multiple arbitrations this year and growth continues. The centre also provides a platform to develop existing international networks and to pursue opportunities in the region by facilitating closer connections with other leading arbitral centres in Asia.

<sup>6</sup> An application was made by the CEO of ASADA for the issuing of subpoenas with respect to non-parties attending and producing documents before the AFL Anti-Doping Tribunal. The Application was made the day after the new rules came into effect. See Clyde Croft, ‘Specialist Arbitration Lists: A Victorian Supreme Court Perspective’ (Paper prepared for the AMINZ and ICC International Arbitration Day, Auckland, 18 February 2015) 15-17.

<sup>7</sup> Maintaining consistency with the Federal Court accords with the approach recommended by both the Supreme Court of Victoria’s Arbitration List Users Group and that of the Australian Centre for International Commercial Arbitration Judicial Liaison Committee (chaired by the Hon. Murray Gleeson AC QC, and comprised of arbitration judges from Australian Supreme and Federal Courts).

<sup>8</sup> Clyde Croft, ‘Changing the Culture of Civil Litigation: A Practitioner’s Duties under the Civil Procedure Act’ (Paper presented at the Law Institute of Victoria Costs Conference, Melbourne, 14 February 2014).

<sup>9</sup> *Civil Procedure Act 2010* (Vic) s 7(1).

continue to improve over time as judges and practitioners alike become more comfortable with its concepts.<sup>10</sup>

### **What can we do better?**

There is still much room for improvement in commercial litigation and arbitration in this state. If Australia is to remain competitive and become the forum of choice in the Asia-Pacific region, and to remain at the forefront of innovation in this area, we must continue to ask ourselves what we can do better. The Productivity Commission's recommendations are a good place to start. In Victoria we have already adopted many of them.

Judges, like practitioners, must continue to embrace the spirit of the CPA. It is one thing to be granted wide-ranging case-management and sanctioning powers; it is another to use them. Recent authority in Victoria has emphasised the need for courts to be proactive.<sup>11</sup> Justice Croft's management of *Great Southern* and Justice Judd in *Timbercorp* have been described to me as exemplars in case management. Justice J Forrest's management of the Kilmore East Bushfire trial exemplifies proactive case-management. For example, his Honour banned trolleys and folders and effectively ran a paper-free trial – An extraordinary achievement given the sheer scale of that litigation. The Commission has recommended that bodies like the Judicial College of Victoria develop and deliver ongoing training to judges on effective case-management.<sup>12</sup> As Chair of the College I alert the Bar and the profession that three of the main

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<sup>10</sup> See generally Clyde Croft, 'Changing the Culture of Civil Litigation: A Practitioner's Duties under the Civil Procedure Act' (Paper presented at the Law Institute of Victoria Costs Conference, Melbourne, 14 February 2014).

<sup>11</sup> Peter Vickery, 'Recent Developments in Discovery in Commercial Litigation' (Paper presented at a Victorian Bar CPD Seminar, 5 February 2015). See also: *Thomas v Powercor Australia Ltd (No 1)* [2010] VSC 489 [41] (Forrest J); *Crowe v Trevor Roller Shutter Services Pty Ltd* [2010] VSC 536 [19]-[20] (Beach J) and on appeal *Trevor Roller Shutter Services Pty Ltd v Crowe* [2011] VSCA 16 (Warren CJ, Nettle and Ashley JJA).

<sup>12</sup> Recommendation 11.2.

judicial teachers are Justices J Forrest and Zammit (from the Kilmore East Case) and Justice Croft (from the Great Southern case). So, as they say, “watch this space”.

However we must also critically evaluate case management. Indeed, early judicial intervention in cases may result in ‘front loading’ of costs by bringing forward expenditure that may not have otherwise occurred had the case settled (as many do).<sup>13</sup> The Productivity Commission has recommended a number of ways in which we might minimise costs in the early stages, for example by requiring more strict observance of time limits, more tightly controlled number of pre-trial appearances<sup>14</sup> or making better use of telephone and online technologies for procedural or uncontentious hearings.<sup>15</sup> We must also remain alive to the individual circumstances of each case, rather than apply universal approaches,<sup>16</sup> as excessive judicial intervention and ADR may in fact be counter-productive in some instances.

If lawyers want to minimise costs for their clients, they should be getting to the real issues in dispute and focusing interlocutory work on those key issues. Indeed they are obliged to do so under the CPA.<sup>17</sup> Judges in turn should use their powers under the CPA to enforce these obligations. I would also encourage judges to make the most of the new discovery provisions in the CPA and consider alternatives to traditional full scale discovery.<sup>18</sup> One alternative we might think about is Computer Assisted Review (‘CAR’), a new discovery technology which

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<sup>13</sup> James Allsop, ‘Judicial Case Management and the Problem of Costs’ (Paper presented at the Lord Dyson Lecture on The Jackson Reforms to Civil Justice in the UK, University of New South Wales, 9 September 2014) citing James Spigelman, ‘Opening of Law Term Dinner’ (Address to the Law Society of New South Wales, Sydney, 2 February 2014).

<sup>14</sup> See Recommendation 11.1.

<sup>15</sup> See Recommendation 17.1.

<sup>16</sup> These sentiments are echoed in Recommendation 8.1.

<sup>17</sup> *Civil Procedure Act 2010* (Vic) s 23.

<sup>18</sup> The *Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014* (Vic) introduced a suite of new discovery provisions in to *Civil Procedure Act 2010* (Vic) (see sections 50, 50A, 55, 55A, 55B, 56) which provide judges with greater case-management powers in relation to discovery and disclosure.

uses predictive coding to review and predict the relevance of documents to particular issues.<sup>19</sup> In any event, both courts and law firms should have robust document management systems in place.

In the arbitration space, we continue to work towards more consistent processes and the development of a more consistent body of jurisprudence across the federation, to make Australia a more attractive arbitral seat for cross-border disputes.<sup>20</sup>

A number of the Productivity Commission's recommendations relating to litigation funding and costs are also worth noting. For example, the Commission has recommended that restrictions on contingency fees be removed (subject to certain conditions).<sup>21</sup> Such a move might make our jurisdiction more attractive to some, but some corporate clients may be deterred by the prospect of more litigation against them. The Commission has also made recommendations regarding the calculation of court fees, such as charging fees at discrete stages in litigation and on a differential basis having regard to the amount in dispute, the length of proceedings and the nature of the litigants.<sup>22</sup>

It has also recommended that judges be given the power to require parties to submit and agree upon costs budgets at the outset of litigation so as to 'cap' the amount of costs that the successful party can claim.<sup>23</sup> Such measures have recently been introduced in England and Wales (where they are mandatory) as part of the Jackson Reforms. In a recent case, the

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<sup>19</sup> Peter Vickery, 'Recent Developments in Discovery in Commercial Litigation' (Paper presented at a Victorian Bar CPD Seminar, 5 February 2015) 20.

<sup>20</sup> Clyde Croft, 'Specialist Arbitration Lists: A Victorian Supreme Court Perspective' (Paper prepared for the AMINZ and ICC International Arbitration Day, Auckland, 18 February 2015).

<sup>21</sup> See Recommendations 18.1 – 18.3.

<sup>22</sup> See Recommendation 16.1.

<sup>23</sup> See Recommendation 13.3.

Commercial Court Judicial Registrar conducted a case management conference where costs budgets featured heavily. Not only do costs budgets provide parties with greater certainty as to their own costs, they also enable parties to accurately predict their exposure to an adverse costs order. This information may in turn help facilitate productive negotiations. It also enables the managing judge to consider the estimated costs of proposed steps with a view to ensuring they are proportionate to the value of the matter itself.

These benefits must however be balanced against the risk that cost-budgets may lead to additional costs being incurred by the parties in preparing costs-budgets. It may also be very difficult to accurately predict the costs of a trial from the outset, so some flexibility would need to be maintained.

### **Concluding remarks**

The key to success will be collaboration. For the legal system in this country (and state) to operate at its best, to attract foreign investment and to grow Australia's economy, all moving parts must operate together. Australia (and Victoria) must work to maintain the competitive edge. What is needed is a dialogue between judges, lawyers and clients to identify firstly court-user expectations in litigation and arbitration and secondly the best ways in which to meet them. Courts simply cannot do this alone.

In the meantime, let us all – judges, lawyers, barristers and clients – continue to embrace technology and the spirit of the Civil Procedure Act (and equivalent Acts and Rules) and work co-operatively, collaboratively and consistently for the benefit of clients. This will be vital to Australia's reputation and development as a regional commercial hub.

To compete as a national and regional hub Australia (and Victoria) needs to promote itself as having:

1. An outstanding legal profession and Bar, acknowledged as leaders and who are sought after.
2. An excellent bench of judges that provides impartial and leading jurisprudence but manages litigation in a practical, facilitative and innovative way.
3. First-class infrastructure and technology to support dispute resolution.

A leading member of the corporate sector recently said to me “what we want is an expeditious hearing and a prompt decision”. It is not always that simple but sometimes as judges and lawyers the statement bears reflection.

The governments of Singapore and Hong Kong have invested strongly in their litigation centres – think of the Singapore Supreme Court and Maxwell Chambers and the Hong Kong International Arbitration Centre. Australia (and Victoria) may overcome the international disincentive of distance through the undeniable quality of what we do.