

## **TEN YEARS OF THE CIVIL PROCEDURE ACT 2005 (NSW): A DECADE OF INSIGHTS AND GUIDE TO FUTURE LITIGATION**

*Ten Years of the Civil Procedure Act 2005 (NSW): A Decade of Insights and Guide to Future Litigation*, by Miiko Kumar, Michael Legg (eds), Thomson Reuters, Australia, 2015, 273 pages: ISBN 9780455236858. Softcover \$137.01.

This book collects the papers delivered at a conference, organised by the editors, to celebrate the 10th anniversary of the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW). The general theme of the Act and the Uniform Rules, as emphasised by the contributors, is the seemingly intractable issues of high cost and excessive delay.

Despite pessimism about cost and delay, Chief Justice Bathurst thought that the civil justice system is capable of adapting to new conditions. The challenges “are not necessarily bigger, larger or worse than ever before. They are probably just different”. That is not to say, though, that the system has “arrived”. In the era of case management there must be proportionality in the competing considerations of justice, efficiency and economy.

Justice Lindsay traced the development of the *Civil Procedure Act* and the accompanying *Uniform Civil Procedure Rules*. The overriding purpose in s 56 of the Act was to facilitate the just, quick and cheap resolution of the real issues. Not only was the court enjoined to give effect to the overriding purpose, the Act directly bound the parties to assist the court in that endeavour. Novel features of the new scene included preliminary discovery and discovery from a non-party, electronic case management, simplified originating process and the court’s power to control the conduct of a proceeding. Justice Basten looked to the detail of the overriding purpose. The overriding purpose includes a just determination, efficient disposal of the court’s business, efficient use of judicial and administrative resources and the timely disposal of proceedings at a cost affordable to the parties. As well the overriding purpose extended to litigation funders, insurers, and anyone else with financial control over the proceeding. More pessimistically, Justice Sackville observed there was insufficient empirical evidence to establish whether the overriding purpose was being achieved in practice. The Productivity Commission confronted the same problem in conducting its inquiry into access to justice. Unfortunately, in the absence of empirical evidence, opinion and belief, often of judges and senior practitioners, must suffice in evaluating the effectiveness of reforms. But Peter Cashman proffered the observation that no reform would occur if each reform had to be evaluated empirically first.

Carol Webster SC discussed the High Court's decision in *Expense Reduction Analysis Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303. The defendant inadvertently disclosed documents that were subject to legal professional privilege. The plaintiff refused the defendant's request to return them. Relying on equitable principles, the New South Wales Court of Appeal upheld the plaintiff's refusal. The High Court disagreed. The Court had sufficient powers under the *Civil Procedure Act* to permit a party to correct a mistake. Although the respondent emphasised the fundamentals of legal professional privilege, the judges were mindful, during the argument, of the practical effect of the Court's statutory powers of management.

On a different note, Peter Cashman lamented that notwithstanding entrenching the overriding purpose, civil litigation is still unaffordable to most people. Part of the problem with costs, he asserted, is formal procedural requirements and the increasingly "mercantile" practices of the legal profession. In his view, the deregulation of legal fees, time costing and the divided legal profession serve to inflate costs. Nor is legal readily available. Class actions may level this playing field. He thought contingent fees may be the only way to guarantee legal fees are proportional to the amount in dispute. A holistic approach was necessary to overcome the hurdles that increase cost, delay and complexity. The intractable question, according to Professor Cashman, is how to proceed. His proposals for reform include pre-action protocols, reforming the culture of adversarial litigation, pre-action discovery of documents and evidence, introducing percentage contingent fees, fixed costs and judicial oversight of cost budgeting and better case management to eliminate cost escalation and strategic delay as tactical weapons.

Michael Legg compared discovery in New South Wales with discovery in the Federal Court, United Kingdom and the United States. In New South Wales, the court makes an order identifying the documents or classes of document that are subject to discovery. The issue is whether discovery in New South Wales is still too wide and the cost not necessarily proportionate to the benefit. Much of the discussion of discovery is about controlling the cost and time associated with it. An interesting counter-point, as Peter Cashman suggested, is that the greater restrictions placed on discovery, the less information available, especially to private plaintiffs proceeding against commercial and institutional defendants. In this respect, the author does make an argument for introducing pre-trial oral depositions.

Gary Edmond presented a provocative discussion about the reliability of expert evidence. Much expert evidence is untested empirically, experts are not necessarily tested for expertise in the substance of their evidence as opposed to expertise in giving evidence, as a result there are insufficient safeguards against bias.

As to representative proceedings, Michael Legg and James Metzger point out that amendments to the *Civil Procedure Act* introduce into New South Wales substantially the same form of representative proceeding as in the Federal Court. The authors do point out, though, that the original equitable representative action survives in the equitable jurisdiction where the necessary common interest is established.

Given that the *Civil Procedure Act* was the theme of the conference, the contribution of Miiko Kumar about freezing orders was interesting. It was a reminder that the inherent jurisdiction is still significant. Along with the other Australian jurisdictions, New South Wales has adopted common rules of court and practice directions to prevent assets being removed from the jurisdiction to frustrate legal proceedings or enforcing a judgment. This jurisdiction is an innovation of the court's inherent jurisdiction.

Tania Sourdin notes that the association between the courts and alternative dispute resolution can be uneasy. Some courts and judges have questioned whether alternative dispute resolution can deliver justice. This has resulted in differing reforms in the Australian jurisdictions. Unresolved is the issue whether alternative dispute resolution processes compete with the court or supplement court processes. Much depends on how lawyers engage in alternative dispute resolution, especially in light compulsory referral. For pre-action protocols, the author makes the case that they are capable of reducing cost, delay and the scope of the dispute. However, before the advent of alternative dispute resolution, the respective parties' solicitors negotiated settlement of most civil cases. If pre-action protocols are

Book reviews

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eventually imposed, solicitors will have a significant role in this respect. Of interest is whether solicitors will themselves directly negotiate settlements or refer all or most disputes to alternative dispute resolution.

The editors, as the conveners of the conference, are to be congratulated for arranging and a comprehensive program with such insightful presentations.

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