ACCESS TO JUSTICE ARRANGEMENTS
SUBMISSION BY THE SUPREME COURT OF VICTORIA
IN RESPONSE TO THE PRODUCTIVITY COMMISSION DRAFT REPORT
JUNE 2014

INTRODUCTION

1. The Supreme Court of Victoria (the Court) is the superior court for the State of Victoria and is established under s 75 of the *Constitution Act 1975* (Vic). It comprises the Judges, Associate Judges and Judicial Registrars of the Court. It deals with in the region of 7,000 civil matters annually (excluding Probate) in the Court of Appeal and the Trial Division. The Court has an inherent as well as statutory power to govern its own procedure which it does in individual cases and through the making of Court Rules by the Council of Judges.
2. The Court's goal is to be an outstanding superior court.
3. Its purpose is to safeguard and maintain the rule of law, and to ensure:
    - equal access to justice
    - fairness, impartiality and independence in decision-making
    - processes that are transparent, timely and certain
    - accountability for the Court's use of public resources
    - the highest standards of competence and personal integrity.
4. This submission is made by the Judges of the Supreme Court of Victoria in response to the Draft Report to assist the Commission in its final deliberations. It does not necessarily reflect the views of individual Judges.

ADR (CHAPTER 8)

5. ADR is used extensively in the Court. Private mediation is the mostly frequently used form of ADR, but other options include early neutral evaluation and judicial mediation. The Court sets out the guidelines for judicial mediation in Practice Note No 2 of 2012.
6. The Court has also been active in supporting the use of arbitration outside the Court with the establishment of a Specialist Arbitration List within the Commercial Court[1] and support for the Melbourne Commercial Arbitration and Mediation Centre at the William Cooper Justice Centre.

[1] Supreme Court of Victoria Practice Note No 2 of 2010

7. The use of ADR is reinforced in Victoria by s 22 of the *Civil Procedure Act 2010* (Vic) which imposes an obligation on participants to use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution unless it is not in the interests of justice to do so or the dispute is of such a nature that only judicial determination is appropriate.

COURT PROCESSES (CHAPTER 11)

8. The Court has been for many years and remains at the forefront of civil procedure reform. This began with reforms within the Court in the 1980s as it introduced active judicial management of cases. The Court has been visited by many overseas and interstate delegations looking at civil procedure reform over the years including Lord Woolf who drew on the Victorian experience in his seminal report on civil justice reforms in the United Kingdom.
9. The Court has actively participated in numerous reviews of civil justice and civil procedure including the most recent review by the Victorian Law Reform Commission. Following the Commission's report the Court participated in the development of the *Civil Procedure Act 2010* (Vic) which commenced operation on 1 January 2011. The Act, and subsequent amendments, have been developed in consultation with the Courts and the profession through the Civil Procedure Advisory Group which is chaired by the Chief Justice.
10. The Act requires courts to give effect to the overarching purpose, in s 7 of the Act, 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.' Section 9 of the Act states that, in making any order or giving any direction in a proceeding, a court is to have regard to the considerations listed in that section in seeking to further the overarching purpose.
11. The great success of the *Civil Procedure Act 2010* (Vic) has been its facilitative approach to court process. It provides the judiciary with the authority required to ensure the just, efficient, timely and cost-effective disposition of cases whilst recognising that it should be left to the courts to use the various tools at their disposal as and when necessary, adapted to the requirements of the individual case.

Case Management

12. The Court adopts a differential case management approach for all civil proceedings before the Court, adapting case management techniques to classes of case and at the individual case level.
13. There are a number of specialist lists within the Court:
    a. Commercial Court Lists
    b. Corporations List
    c. Technology Engineering and Construction List

d. Intellectual Property List
e. Arbitration List
f. Admiralty List
g. Taxation List
h. Major Torts Lists
i. Personal Injury List
j. Valuation Compensation and Planning List
k. Professional Liability
l. Judicial Review and Appeals List
m. Probate List

14. Some lists operate on a docket basis with a single judge managing the proceeding from issue to judgment. Others operate on a modified docket basis under which the case is managed by a single judge up to the point of trial and is then listed for trial before one of a group of judges in a Division according to availability. This maximises the efficient use of judicial resources and promotes trial date certainty, while maintaining consistency in the management of cases towards trial. These are the factors which court users tell us are important in reducing cost and promoting early resolution.

15. The Court has a strong focus on the early identification of issues. The Commercial Court Practice Note[2], known as the Green Book, sets out clear expectations of practitioners in this regard. The following section appears in the Green Book:

> 12.1 Pleadings must focus on the real or substantial issues in dispute, supported by proper particulars. Prolix and irrelevant pleadings are likely to cause delays and unnecessary costs. Legal practitioners and parties responsible for the filing of pleadings of this nature are not acting in accordance with the Court Objective and may render themselves liable for costs and other sanctions under the Act.
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> 12.2 Evasive pleading is also at odds with the Court Objective (with the same possible consequences as prolix and irrelevant pleadings) and will not be tolerated. Parties will be expected to join issue promptly in a responsive pleading. Holding defences are not acceptable.
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> 12.3 Pleadings may be dispensed with where the Commercial Court considers that this would assist the Court Objective.

16. The Green Book further provides that, where a case management conference is ordered, parties may be required to seek to obtain agreement on a draft list of issues.

17. This approach is now highlighted as an option in case management by the newly-enacted ss 50 and 50A of the *Civil Procedure Act 2010* (Vic), which provide specifically for the use of a Statement of Issues.

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[2] Supreme Court of Victoria Practice Note No 10 of 2011

18. There is also concern within the Court to minimise the number of pre-trial appearances, in order to contain costs.[3] This is necessarily a balancing exercise. Large and complex cases often require a number of pre-trial appearances in order to resolve preliminary issues, with the ultimate aim of containing costs by facilitating resolution prior to trial, or minimising the length of trial. The Court has found significant scope for maintaining intensive judicial case management of proceedings without requiring large numbers of appearances. Critical to this approach are the staff support structures available to judges undertaking that management to monitor compliance, maintain contact with parties and keep judges informed, while they continue to hear and determine substantive matters.

19. The Judicial College of Victoria (JCV) offers some outstanding programs in relation to case management, with a particular focus on the *Civil Procedure Act 2010* (Vic).

20. Prior to the commencement of the Act, the JCV conducted two practical workshops dedicated to the Act, ensuring that judicial officers were well-prepared for the reforms. These workshops addressed significant areas of reform, including the new overarching purpose and obligations and new case management powers. The workshops had a very practical focus with the opportunity to explore ideas for how to use the enhanced case management powers to effectively manage proceedings.

21. One-off programs are regularly conducted to assist judicial officers' understanding of current topical issues relating to civil proceedings, including discovery, the use of technology in the courtroom, and expert evidence. Further, the JCV regularly conducts programs designed to enhance judicial officers' skills in managing proceedings involving litigants in person. These programs are perennially popular, especially given the increasing rate at which litigants are representing themselves.

22. In May this year the JCV ran a further program on the *Civil Procedure Act 2010* (Vic) to explore the innovative ways in which the Act may be applied in proceedings.

23. The JCV also publishes a Civil Procedure Bench Book, which is a guide to the *Civil Procedure Act 2010* (Vic) and is kept up to date with relevant legislative changes and case law.

24. All JCV publications are edited by an Editorial Committee consisting of current or former judicial officers, giving the publications strong credibility among judicial officers. They are also available to the public via the JCV website, which contributes to a better informed profession, who are better able to conduct proceedings in a competent and efficient manner.

25. Supreme Court judges take a leading role in contributing to these programs and publications.

Discovery

26. The Supreme Court introduced rule amendments narrowing the scope of discovery in civil proceedings generally from 1 January 2011, and in particular using the

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[3] See for example Supreme Court of Victoria Practice Note No.10 of 2011 (The Green Book) 8.8 "The Court will seek to keep the number of directions hearings to a minimum in order to avoid unnecessary costs"

concept of reasonable search.[4] This resulted from feedback from the profession that limiting the cost of discovery required limiting the scope of the search. Beyond this the Court continues a strong case management approach to discovery in order to minimise cost.

27. While discovery is undoubtedly a major contributor to cost in complex proceedings which involve large numbers of documents, the majority of cases either do not proceed to the point where discovery is required, or are of a nature where discovery is not an onerous or costly component of the proceeding. Proceedings in the Supreme Court are more likely to involve large discovery exercises, but those cases that do will invariably be dealt with in specialist lists where the discovery process is managed.

28. For example, large discovery exercises are common in construction cases. The Court's Technology Engineering and Construction List (the TEC List) has a standard operating procedure for discovery which sets out specific expectations. The Court will not order general discovery as a matter of course, even where a consent direction to that effect is submitted, and will mould any order for discovery to suit the facts of a particular case. The standard operating procedure also encourages the use of technology and the use of a discovery conference to agree protocols for the exchange of documents.

29. Part 4.3 of the *Civil Procedure Act 2010* (Vic) provides extensive powers for the Court to manage discovery and was recently amended to include further facilitative provisions including:

    a. a specific provision regarding orders for the payment of costs of discovery;

    b. providing for discovery by reference to issues set out in the statement of issues agreed by the parties or settled by the Court under the Act (see above);

    c. allowing for a process of providing access to documents without the waiver of privilege;

    d. providing for the filing of affidavits of document management to facilitate the discovery process; and

    e. providing for oral examination to facilitate the discovery process[5]

30. The Act also contains provisions for the early exchange of critical documents.[6]

31. The costs of discovery continue to be a challenge, but the Court is conscious of the importance of containing costs in maintaining access to justice.

Expert Evidence

32. The *Civil Procedure Act 2010* (Vic) provides extensive powers for the Court to manage expert evidence[7]. It requires that directions be sought from the outset

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[4] *Supreme Court (Chapter I Amendment No. 18) Rules 2010* (Vic)
[5] *Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014* (Vic)
[6] *Civil Procedure Act 2010* (Vic) s 26
[7] *Civil Procedure Act 2010* (Vic) Part 4.6

where expert evidence is to be called and sets out the many means by which the use of expert evidence may be confined to that which is reasonably required. It also explicitly provides for orders to be made regarding expert witness conferences, joint reports and concurrent evidence.

33. These powers have been used to great effect, particularly in large and complex cases including the proceedings arising from the Black Saturday Bushfires.

DUTIES (CHAPTER 12)

34. A key component of the *Civil Procedure Act 2010* (Vic) is the overarching obligations which are imposed on all participants in civil proceedings, including parties, lawyers, those exercising control or influence over litigation and, in some instances, expert witnesses.

35. The overarching obligations are contained in Part 2.3 of the Act. They include a paramount duty to the court to further the administration of justice in relation to any civil proceeding, as well as overarching obligations:

    a. to act honestly at all times in relation to a civil proceeding;

    b. to only make claims or responses to claims that have a proper basis;

    c. to only take steps to resolve or determine the dispute;

    d. to cooperate in the conduct of a civil proceeding;

    e. not to engage in conduct that is, or is likely to be, misleading or deceptive;

    f. to use reasonable endeavours to resolve the dispute;

    g. to narrow the issues in dispute;

    h. to ensure costs are reasonable and appropriate;

    i. to minimise delay; and

    j. to disclose the existence of documents critical to the dispute.

36. The Act also provides in Part 2.4 for sanctions for breach of the overarching obligations. A breach may be taken into account by the Court in making orders, including cost orders. There is also a broad power to make appropriate orders in the interests of justice, with a list of options aimed at remedying the breach or compensating those affected by it. These provisions set the Victorian provisions apart from many of the regimes found elsewhere.

37. It is difficult to measure the impact of the overarching obligations in a quantitative sense. It should be observed that the behaviour of many participants in litigation already meets the high standards prescribed. The impact of the obligations is therefore to be measured in its success in correcting poor standards of behaviour.

38. The obligations do not stand as mere aspirational statements in legislation. Almost invariably, reference is made to the Act in the course of the Court's discourse with parties when there is a concern with the behaviour of a participant. A reminder of those obligations from the Court is often sufficient to resolve the issue. Anecdotally, judges and associate judges report that they have noticed a general

decline in the bringing of unnecessary applications since the introduction of the Act.

39. The obligation provisions in the Act have been relied on in numerous decisions of the Court since its introduction at both trial and appellate level, as demonstrated by a simple search of the decisions of the Court on the Austlii website. The Court would urge the Commission to review the developing Victorian case law. Examples are listed by the Court of Appeal in *Yara Australia Pty Ltd & Ors v Oswal.*[8] At the same time the Court of Appeal observed that the sanction provisions appear to have been under-utilised.

40. In that case the Court of Appeal initiated an own motion hearing regarding potential breaches of the overarching obligations. The Court ultimately found that the obligations were breached in relation to the voluminous application folders (over 2,700 pages containing unnecessary transcript and submissions from the proceedings below, as well as multiple copies of some documents and overly lengthy affidavits and documents relating to issues that were not directly relevant to the issues before the Court). As a result of this breach, the solicitors for the applicants were required to indemnify their clients for 50% of the respondents' costs incurred as a result of the excessive and unnecessary content of the application books, and were disallowed from recovering 50% of their own costs in this respect.

41. Importantly the judgment of the Court contained the following passage[9]

> The Act prescribes that parties to a civil proceeding are under a strict, positive duty to ensure that they comply with each of the overarching obligations and the court is obliged to enforce these duties. The statutory sanctions provide a valuable tool for improving case management, reducing waste and delay and enhancing the accessibility and proportionality of civil litigation. Judicial officers must actively hold the parties to account.
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> Yet as we have observed, sanctions imposed for a breach of any overarching provisions have been a rarity at first instance. When no party invites the court to determine whether there has been a breach of the Act, there may be a judicial disinclination to embark upon such an own-motion inquiry for fear that inquiry as to a potential breach may be time consuming and may require the introduction of material that was not before the court as part of the proceeding. Such fears cannot relieve judges of their responsibilities. But we would not wish it to be thought that a judicial officer at first instance must undertake a substantial inquiry when considering whether there has been a contravention of the Act. As the sanction for a breach will usually lie in an appropriate costs order, a judge may at the conclusion of the reasons for judgment immediately invite oral submissions as to why there should not be a finding that the Act was contravened. The judge may in a relatively brief way deal with that issue in providing succinct reasons for a finding that there has been a breach of the Act and how that finding affects the orders for costs that are to be pronounced.

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[8] [2013] VSCA 337 [24]

[9] *Ibid* [26]-[27]

42. This pronouncement from the Court of Appeal has heightened general awareness of the obligations, particular amongst lawyers, and is likely to see greater utilisation of the sanction provisions by the courts where there is observed to be a breach of the obligations.

Vexatious Proceedings

43. Vexatious and querulous litigants take up a large amount of court time, which in the context of finite resources inevitably delays genuine cases.

44. The Vexatious Proceedings Bill 2014 is currently before the Victorian Parliament. The legislation follows a Victorian Parliamentary Committee report in 2008[10] which recommended the introduction of a graduated system of orders. In its submission to the Inquiry, the Court suggested that the UK provisions be considered, as they provided a more flexible approach. The provisions will offer a means of early intervention which it is hoped will prevent the escalation of vexatious behaviour by litigants.

45. Importantly the Bill also provides more effective procedures for dealing with applications by vexatious litigants who are subject to a general litigation restraint order.

46. The Prothonotary (and other registrars) may refuse to accept an application for leave to proceed if not satisfied that the application is materially different from previous applications. The Court may likewise dismiss an application on that basis. Applications for leave to proceed may be determined on the basis of written submissions. The intended defendant is not served unless the court directs that there be service or the court considers there is a basis for the application to proceed, in which case the party is notified and provided with an opportunity to make submissions.

SELF-REPRESENTED LITIGANTS (CHAPTER 14)

47. The number of litigants who are self-represented poses a significant challenge for the Court. Between 60 and 80 active matters involving a self-represented litigant are before the Court at any given time. The Court established a dedicated position of Self-represented Litigants Co-ordinator in 2006. The position receives over 200 contacts a month. For the past three years self-represented litigants accounted for between 20 and 25 per cent of initiations in the Court of Appeal.

48. In addition to providing information about the litigation process, procedural information and referrals to potential sources of legal advice, the Co-ordinator has developed plain language guides for self-represented litigants in relation to the following topics:

    a. Judicial Review

    b. Appealing a VCAT Decision

[10] Parliament of Victoria Law Reform Committee, *Inquiry into Vexatious Litigants* (2008)

c. Appealing a Decision From a Magistrates' Court
d. Appealing a Decision From an Associate Judge of the Supreme Court
e. Commencing or Defending a Writ or Motion
f. Bail
g. Affidavits
h. Notice of Appearance Guide
i. Notice of Appeal Guide
j. Notice of Discontinuance Guide
k. Summons for Taxation of Costs Guide
l. Summons to have Default Judgment Set Aside Guide

49. The Judicial College of Victoria has conducted a number of programs to assist judges in dealing with self-represented litigants in court.

50. The Court co-ordinates with *pro bono* providers in order to ensure appropriate referrals are made. In addition to the *pro bono* schemes co-ordinated through JusticeConnect (formerly PILCH), the Victorian Bar has established a Duty Barrister scheme which accepts referrals in relation to Supreme Court matters (including the Court of Appeal) on a discrete task basis.

51. The Court also has an internal Committee to examine further means of improving how the Court deals with self-represented litigants.

COURT FEES (CHAPTER 16)

52. The draft report adopts the position that full cost recovery should be the default principle in setting court fees. The Commission's approach to this issue is wholly erroneous.

53. The Commission overlooks the fundamental public value of the courts as an institution and the constitutional obligation of Governments to provide an accessible justice system. The courts are not merely "another public service". They are the third arm of government. Public funding of courts is not a subsidy for court users. It is meeting the basic obligation to maintain the institutions of our constitutional democracy.

54. The civil justice system is not simply about private disputes between parties, but the vindication of rights, the enforcement of legislation and upholding the rule of law. The courts exist for the benefit not just of those who bring proceedings, but for the whole community whose laws they uphold. Even in cases of no precedential value, the community derives a benefit.

55. It is in the interests of all members of society that a party who has been wronged contrary to law can achieve redress and enforce the legal obligations of another. For, if they cannot, there is little reason for anyone else to adhere to the law. If the party who committed the wrong is recalcitrant, the party forced to go to court to achieve justice should not bear, even in the first instance, the entirety of the cost as

if seeking a private commercial service. In practice they already bear significant costs, much of which is never recovered.

56. That disputes can be resolved through agreement, and that commercial services are available to assist in that resolution, does not justify an analysis that treats the courts as merely another dispute resolution service. Courts resolve disputes through the application of the laws established by the legislature to govern the relationships between individuals and between the individual and the State. Unless litigants have the means to enforce them, such laws are worthless and all dispute resolution becomes a contest of means and power. Agreed resolutions are not necessarily just resolutions.

57. The Commission asserts that increases in court fees may ultimately enhance access to justice by providing greater resources to reduce non-financial barriers to justice, such as delay. Such an assertion assumes that increased fee revenues would be applied to fund the courts and that there would not be a corresponding withdrawal of ordinary government funding. This is a direct contradiction of the logic of full cost recovery, which postulates that fee revenue will replace government funding, rather than adding to it.

58. At present courts seek to manage demand by reference only to the interests of justice. It would fundamentally compromise the independence of the courts to create a system in which courts were encouraged to manipulate, for financial reasons, the demand for their services. While the integrity of judicial officers would prevent such an outcome, the hypothecated model of Court funding would undermine the independence of the courts in the minds of community undermining their confidence in the civil justice system.

59. Increasing court fees to full cost recovery would inevitably impede access to justice. Current fee levels may represent a small proportion of overall costs at present, but full fee recovery on a model which reflects the full cost of the service provided could lead to fee levels well in excess of the costs charged by the party's legal representative.

60. Many parties at present are reliant on conditional fee agreements in order to obtain legal representation. They pay a premium as a result. Significant increases in fees would most likely present an obstacle to these individuals if they were not eligible for a waiver. The Commission may wish to consider the extent to which those individuals are at present reliant on disbursement funding arrangements, and whether significant fee increases would diminish the availability of such schemes.

61. Access to justice is not a binary question of whether a proceeding is or is not filed in a court. Access to justice is impeded where a party is forced to settle for an amount well below that to which they would be legally entitled because of the high costs associated with litigation. It is appropriate that there be incentives within the civil justice system for parties to settle their disputes without recourse to the courts. Such incentives should not be so great that they force parties to settle on unjust terms.

62. The Commission asserts that the appropriate approach to recognising the public benefit is to target fee relief to those who would otherwise be deterred by cost-

reflective fees. Cost reflective fees in the higher courts would result in fees at a level which would deter all but the most wealthy and those assured of recovery of those costs with the means carry the initial outlay. As noted later in the paper, there are significant administrative costs associated with assessing and processing waivers. If courts are having to process fee waiver applications in the majority of cases, the whole exercise becomes counterproductive. Further, the revenue base would become unpredictable and unstable which will impact negatively on courts' ability to function and plan for the future.

63. Reference is made in the draft report to higher cost recovery levels in overseas jurisdictions, particularly the United Kingdom. It should be noted that the Judiciary of England and Wales has consistently made it clear that it does not support government policy to render the justice system self-financing, on much the same basis as set out above.[11]

64. There may be some scope to review fee structures, but an analysis that begins with a default position of full cost recovery is fundamentally flawed.

COURTS- TECHNOLOGY, SPECIALISATION AND GOVERNANCE (CHAPTER 17)

Technology

65. The Court has taken an active approach to using technology to drive efficiency. The draft report notes the RedCrest case management system which was developed by the Court to meet its own needs, initially on a pilot basis. With the support of an innovation grant from the Minister for Technology, the Court is further developing its RedCrest Electronic Case Management System. The fully developed system will be progressively deployed across the Court, starting with the Commercial Court in early 2014/15.

66. The Great Southern e-trial is mentioned in the draft report as a successful example of the use of technology in large matters. The SCV has similarly employed technology in the East Kilmore-Kinglake Bushfire Class Action proceedings in which there are three concurrent cases, five principal parties and 26 counsel appearing.

67. The trial is to conclude shortly and will have run for over 200 days. The electronic court book contains over 22,000 documents taking up over 92,000 megabytes. It is accessible online and is managed by a company engaged by the parties pursuant to a management protocol developed by Court in consultation with the parties and the company managing the court book. Real-time transcript is made available. This is able to be annotated and contains hyperlinks to tendered documents in the court book. The courtroom for the trial was specially constructed to accommodate the trial paying particular attention to the needs of an electronic trial. RedCrest has been used for the filing of documents and as an access point for practitioners to orders and rulings.

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[11] See for example *The Response of the Senior Judiciary to the Ministry of Justice Consultation Paper Court Fees: Proposals for Reform* (Cm 8751) available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/senior-judiciary-response-court-fees-proposals-for-reform.pdf)

68. The Court has had international interest in how it has used technology in both of these matters. Without the use of these technologies, managing cases of this scale would be impossible.

Court Governance

69. The *Court Services Victoria Act 2014* (Vic) will commence on 1 July 2014. This will be a historic point in the history of courts in Victoria. It has come about following many years of development in court administration in Victoria. It will establish Court Services Victoria as an independent entity, with a governing board of the Heads of Jurisdiction and additional members recruited for their expertise and experience. In addition the Act has a strong emphasis on administration at the individual court level. Each jurisdiction will retain its own CEO with direct responsibility to the head of jurisdiction, and remain responsible for its own administration. This arrangement allows for a central support structure for the courts, providing certain services and achieving economies of scale, whilst maintaining the benefits of strong leadership of each jurisdiction, and administrative structures adapted to meet the needs of the different jurisdictions.

70. While the principles of judicial independence and the separation of powers underlie the reform, it is equally supported by the results of improvements which have been achieved through stronger connections between the judiciary and the administration of the courts. The Court has had considerable success in developing new models to improve the efficient handling of cases and timeliness through new administrative support structures.

71. The Court is in the process of introducing reforms to procedures for managing civil appeals in the Court of Appeal. The reforms are modelled on successful reforms in relation to criminal appeals, which saw the number of pending criminal appeals reduced from a peak of over 650 cases (prior to the reforms) down to a low of 148 during the current year. A key part of those reforms was restructuring the support provided by court administration. This was able to be achieved with support from successive State Governments which have been happy to trust in the Court's judgment in relation to managing its own administrative arrangements.

72. A combination of a judiciary committed to innovation and improvement and an administration focused on supporting the judiciary has brought about successful outcomes for court users and the community at large. With the establishment of Court Services Victoria, the opportunities for courts to change processes and put in place the administrative support they require will provide even greater scope for reform and innovation.