Tactical Adversarialism and Protective Adversarialism

Christopher Enright
Tactical Adversarialism and Protective Adversarialism

Christopher Enright

We are all, you and we, trying to produce a procedural system that is a compromise between delivery of perfect justice and delivery of justice at a price which litigants can afford.

Davies, GL (1995) ‘A Modified Adversary System: How Different Is It From Yours?’ This is a paper presented to a seminar of judges, practitioners and scholars at the Max-Planck-Institut, Hamburg, Germany, 12 January 1995.

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for smarter lawyers

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Citation

Author
Christopher Enright is a barrister, solicitor and chartered accountant. He is a writer and the proprietor of Maitland Press. Chris has a Master of Commerce (Management) degree from the University of New England. In an earlier life he lectured in law and management at various universities.
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1. TLR stands for Times Law Reports.
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2. Another citation is R v Sussex Justices; Ex parte McCarthy [1923] All ER 233
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Labels

Introduction
Describing Items
Listing Items
Diagrams
Probability

Introduction
Discussion in this publication refers to items such as a statute or a meaning of an ambiguous provision. Often these are part of a collection, list, range or set of items. Frequently the text puts them in a diagram where they represent a model or a step on the way to explaining a model. The purpose here is to explain the labelling system used to refer to these items.

Describing Items

Labelling Items
There are several aspects to labelling the items in a set, range, list or collection. These are name, number, letter and designating a set of items.

Name
The name of an item commences with a capital letter. Some examples are Element, Statute and Meaning.

Number
Items in a set, range, list or collection are generally numbered. For example, the elements of a legal rule are labelled Element 1, Element 2, Element 3 and so on. These numbers are ways of identifying elements and distinguishing one from another. They are generally not intended to create any list according to preferences or values.

Letter
Items in a set, range, list or collection can be lettered. For example a list of statutes can be Statute A, Statute B and so on.

Designating a Set of Items
It is useful to designate a set of items with a single and simple tag. Here is an outline. The basic proposition is that a simple and obvious tag has two aspects: 1. Description. Use a written label on the items as a tag or description. Put it in plural form. Thus a tag for a set of statutes would be ‘Elements’.
2. Numbers. After the tag add a space then a compound numerical tag consisting of three items:
   2.1 The number of the first item in the set.
   2.2 A hyphen.
   2.3 The number of the last item in the set.
Here are two illustrations:
1. A set of six elements would be Elements 1-6.
2. A set of elements where the number can vary from situation to situation is written as Elements 1-n.

1. Naming the Items
The item has a name, which is usually obvious. For example each statute in a set of statutes would bear the name ‘Statute’, and each elements in a set of elements would be ‘Element’.

2. Numbering the Items
There are two possibilities for the numbering of a set, list or range of items:
1. There can be a fixed number in the set.
2. There can be a variable number in the set.

2.1 Fixed Number in the Set
In a particular instance there may be a specific number of items in a set. For example a particular legal rule might be composed of five elements. In this case the first and last numbers designate the number of items in the set or range. In this example of a set of five elements, one would designate the set as ‘Elements 1-5’.

2.2 Variable Number in the Set
Sometimes the text refers to a set or a list in general terms in cases where the number of items in the set can vary from situation to situation. In this event, the way to go is to number the last item with the symbol ‘n’. To refresh readers, ‘n’ stands for however many there are on a particular occasion. An example would be a general discussion about elements of a legal rule. In this case the possibilities vary from legal rule to legal rule. Thus the designation of this set of items is Elements 1-n.

Null Option
There is a special case with options where one of the options is to do nothing and leave things as they are. This occurs, for example, with the proposed making of a statute where one option is just not to enact a statute. In a case such as this the option is labelled with the symbol for nought, namely ‘0’. Thus the option not to enact a statute is designated as Statute 0. Statute 0 represents the null option – it is the option for a legislature not to enact a statute on a topic
whereas Statutes 1, 2, 3 and so on are options for different versions of a statute on a topic (on the basis that there is no form of a statute that can better present conditions). Given this the full set or range of possible statutes for a legislature to enact consists of Statutes 0-n.

**Corresponding Items**

Sometimes there are sets with corresponding items. This can occur for a number of reasons. Here are two examples:

1. For making and interpreting law, items correspond because of causation. Each version of a statute on a subject and each meaning of an ambiguous provision will cause an effect if a legislature enacts the statute or if a court declares the meaning to be legally correct.
2. In the model for litigation, elements and facts correspond because each element delineates a category of facts so that in a particular case the element is satisfied by a fact that falls within that category. Similarly, facts and evidence correspond because each fact is proved or potentially provable by some evidence.

**Single Relationships**

Corresponding items are labelled with the same number or letter. Here are some illustrations:

1. Statutes, Meanings and their Predicted Effects. Statute 0 is predicted to cause Effect 0, Statute 1 is predicted to cause Effect 1, Statute 2 is predicted to cause Effect 2 and so on. Meaning 1 is predicted to causes Effect 1, Meaning 2 is predicted to cause Effect 2 and so on. Similarly, Statute X (or Meaning X) is predicted to cause Effect X while Statute Y (or Meaning Y) is predicted to cause Effect Y.
2. Facts Satisfying Elements. Fact 1 is the label given to a fact that fits within or satisfies Element 1, Fact 2 is the label given to a fact that fits within or satisfies Element 2 and so on.
3. Evidence Proving Facts. Evidence 1 is the label given to evidence that might prove or has proved Fact 1, Evidence 2 is the label given to evidence that might prove or has proved Fact 2, and so on.

**Collective Relationships**

It is possible to use labels of correspondence to make collective statements. Here are some examples: Statutes 0-n are predicted to cause Effects 0-n, while Evidence 1-n is capable of proving Facts 1-n. To construe these collective statements properly it is necessary to apply the maxim *reddendo singula singulis*. Literally this says that each is rendered on their own. In plainer language, the items are to be taken singularly so the each item in the first list is paired with the corresponding item in the second list. The adverb ‘respectively’ captures this notion.
Two or More Version of an Item

There may be two or more versions of an item. Additional letters or numbers can distinguish the different versions. For example:
1. If Element 2 is ambiguous because it has two meanings, the versions of Element 2 can be designated Element 2A and Element 2B.
2. There can be two versions of a fact. There are two major possibilities:
   2.1 In a case there may be two versions of Fact 2 because the plaintiff propounds one and the defendant propounds the other. These can be designated ‘P’ and ‘D’ to signify the plaintiff and defendant’s version. Thus the two versions are Fact 2P and Fact 2D.
   2.2 After investigating the facts of a case the defendant may find that there is evidence to support two versions of one of the facts in their case. These are facts that the defendant could use to rebut the plaintiff’s satisfying Element 3. The defendant or the court could designate these as Fact 3D.1 and Fact 3D.2.

Subdivisions of Items

It is possible to designate subdivisions of an item with a numbering system that invokes the form but not the meaning of decimal points. Thus if Element 2 has three sub-elements, one can designate them as Element 2.1, Element 2.2, and Element 2.3. If Element 2.2 has three sub-elements we can designate these as Element 2.2.1, Element 2.2.2 and Element 2.2.3. Obviously this form of numbering adapts to any number of levels of subdivision.

Possibilities: ‘X’, ‘Y’, Etc

Sometimes the text needs to refer to any option, that is, to an option in general terms. Conveniently this is labelled with a capital letter. Commonly, this is the letter X, so that a general option for a legislature wishing to pass a statute is Statute X. Naturally, if there is a need to refer to more than one option additional letters may be used. For example, there could be reference to Statute X and Statute Y; in this case Statute X is one possible statute and Statute Y is another possible statute.

Signifying Relationships

Sometimes it is necessary to signify a relationship between two items. This can be done using standard symbols. This table sets out the major possibilities:

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<td>Greater than</td>
<td>X&gt;Y. X is greater than Y.</td>
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<td>Equals</td>
<td>X=Y. X equals Y,</td>
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<td>Not Equals</td>
<td>X≠Y. X does not equal Y.</td>
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<td>Approximately Equals</td>
<td>X≈Y. X is approximately equal to Y.</td>
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<tr>
<td>≅</td>
<td>Isomorphic</td>
<td>X≅Y. X is structurally identical to Y</td>
</tr>
</tbody>
</table>

* Labels Diagram 1. Symbols for Relationships *

**Listing Items**

Where there is a list, for example a list of the meanings of an ambiguous provision, we can set these out in the text as a series – Meaning 1, Meaning 2 ... Meaning n. In the text, as we have noted, the range can be efficiently represented as Meanings 1-n. In a table they are set out as a list in the following way:

<table>
<thead>
<tr>
<th>Meanings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meaning 1</td>
</tr>
<tr>
<td>Meaning 2</td>
</tr>
<tr>
<td>Meaning n</td>
</tr>
</tbody>
</table>

* Labels Diagram 2. List of Meanings *

In this presentation it is not strictly necessary to include Meaning 2. Indeed, it is actually redundant, when n=2. However, it usefully emphasises the sense of a list that sets out the range of options or possibilities.

**Diagrams**

Lists in a table can be connected to become a diagram or figure. This can involve corresponding items. A useful illustration consists of a diagram that has two major columns that match corresponding items. One column sets out the meanings of an ambiguous provision in a statute in Statute X and the other sets out the effect for the whole statute that each meaning is predicted to cause.

Here is the illustration:

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meanings</td>
<td>→</td>
<td>Effects</td>
</tr>
<tr>
<td>Meaning 1</td>
<td>Effect 1</td>
<td>2</td>
</tr>
<tr>
<td>Meaning 2</td>
<td>Effect 2</td>
<td>3</td>
</tr>
<tr>
<td>Meaning n</td>
<td>Effect n</td>
<td>4</td>
</tr>
</tbody>
</table>

* Labels Diagram 3. Meanings and Effects *

This diagram functions in the following way:

* Column 1 shows the meanings of the ambiguous provision, being Meanings 1-n.
* Column 3 shows the effect of the statute that each meaning is predicted to cause if a court chooses them as the legally correct meaning of the ambiguous
provision. Let us flesh this out. Every statute that is enacted causes a number of outcomes. The author refers to the full collection of outcomes that a statute is predicted to cause as an effect. When a court interprets a statute it is faced with the basic options in terms of the range of meanings of the ambiguous provision that gives rise to the need to interpret the statute. The diagram labels these meanings as Meanings 1-n. If a court decides that Meaning 1 is the legally correct meaning of the ambiguous provision that decision is likely to have an impact on the effect that the whole statute will cause. Column 3, as stated, sets out this effect, the effect of the whole statute, for Meaning 1. In a similar way it sets out the effect for each other meaning of the ambiguous provision. This method of identifying the effects of each meaning caters for the constitutional rule in each Australian jurisdiction that requires a court to interpret a statute in the way that will ‘best achieve’ the purpose and object for which the legislature enacted the statute. Now the purpose or object of a statute is to cause some effect or outcome. Hence the term ‘Effect’ aligns directly with purpose and object (which of course is why the table includes it).

* Column 2 contains an arrow pointing from the Column 1 to Column 3, thereby indicating that each meaning in Column 1 is predicted to cause the statute to have the corresponding effect in Column 3.

* Columns 1-3 indicate meanings and their predicted effects. Assume for the purposes of the explanation that a court is interpreting an ambiguous provision in Statute X that has Meanings 1-3:

1. If a court chooses Meaning 1 as the legally correct meaning the prediction is that Statute X will cause Effect 1.
2. If a court chooses Meaning 2 as the legally correct meaning the prediction is that Statute X will cause Effect 2.
3. If a court chooses Meaning 3 as the legally correct meaning the prediction is that Statute X will cause Effect 3.

**Probability**

A number of symbols are used for probability. This diagram shows the common symbols and their meanings:

<table>
<thead>
<tr>
<th>Symbol</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>P(A)</td>
<td>probability that event A occurs</td>
</tr>
<tr>
<td>P(B)</td>
<td>probability that event B occurs</td>
</tr>
<tr>
<td>P(A ∪ B)</td>
<td>probability that event A or event B occurs (A union B)</td>
</tr>
<tr>
<td>P(A ∩ B)</td>
<td>probability that event A and event B both occur (A intersection B)</td>
</tr>
<tr>
<td>P(A')</td>
<td>probability that event A does not occur</td>
</tr>
<tr>
<td>P(A</td>
<td>B)</td>
</tr>
<tr>
<td>P(B</td>
<td>A)</td>
</tr>
<tr>
<td>Label</td>
<td>Description</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
</tr>
<tr>
<td>already (conditional probability)</td>
<td>P(B</td>
</tr>
<tr>
<td>φ</td>
<td>the empty set = an impossible event</td>
</tr>
<tr>
<td>S</td>
<td>the sample space = an event that is certain to occur</td>
</tr>
</tbody>
</table>

*Labels Diagram 4. Symbols Used for Probability*
Abstract

Courts in common law jurisdictions operate according to a system that is described as adversarial. By contrast, courts in civil law systems tend to use procedures in court that are substantially inquisitorial. In fact most systems contain a mixture of the two forms, although the adversarial form of litigation tends to be a dominant part of common law systems.

Under the adversarial system the running of the case is largely in the hands of the parties. Many lawyers are culturally attached to, if not addicted to, the notion of adversarialism. Adversarialism, however is but a means to an end and if it is to be retained, and the extent to which it is to be retained, depend not on the attraction it has for lawyers but on functional adequacy. Does it deliver the goals of courts in the legal system in a way that is both effective and efficient?

The answer lies in classifying adversarialism into two types, protective and tactical. Protective adversarialism, is a corner stone of justice. It nourishes justice. By contrast tactical adversarialism is a fountain of injustice. It poisons justice.

The article explains the problems that tactical adversarialism causes. It then examines ways of eliminating the problems. Some of these methods are suggested reforms, while some have already been introduced. In fact the ones that have been introduced in at least three jurisdictions – the Commonwealth, New South Wales and Victoria – almost completely outlaw the practices that constitute tactical adversarialism. That said, there may still be other reforms that would improve the quality of civil justice.

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Section 1. Introduction

A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge’s role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies on either side.1

**Adversarialism and Inquisitorialism**

The general public and lawyers differ about whether justice means truth or justice means process.2 Jurists commonly draw a distinction between two contrasting systems of justice, adversarial and inquisitorial systems.3 Common law legal systems tend to use procedures in court that are substantially adversarial while civil law systems tend to use procedures in court that are substantially inquisitorial.4

Like many terms creating commonly used distinctions these terms are not totally precise, although the broad distinction between the two concepts is clear. The essence of adversarialism is that the dispute is largely in the hands of the parties so that the court is merely a referee of the contest. Two or more adversaries fight the contest while the court is a passive referee of the contest, as distinct from being actively involved. Adversarialism is a ‘prove it’ system because the court ultimately decides which party has proved their case according to the required standard. In the adversarial system justice means process as in following the process.5

By contrast, in a full blown inquisitorial system the conduct of the case is largely under the control of the court. The court itself inquires into the facts of the case to determine the truth in order to make its decision.6 The inquisitorial

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1. Queen v Whithom (1983) 152 CLR 657, 682 per Dawson J
6. In fact, the two systems also use two different styles of legal reasoning – the common law style and the civil law style. Sometimes these styles of reasoning are incorporated within the respective terms adversarial and inquisitorial even though they are connected by association rather than by logic. Since this extension is not relevant to our purposes we do not pursue it.
system is not a ‘prove it system’ but a ‘what really happened system’. In the inquisitorial system, justice means truth.\(^7\)

These simple descriptions capture the essence of each system. To explain the systems in more detail it will assist to continue in this vein by describing each system in pure form. This is why this there now follows a simplified and stereotypical analysis of the two systems. This provides a simple framework to start with. This provides a basis for an analysis of the two systems by highlighting their key features.

**Nature of the Inquisitorial System**

In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.\(^8\)

In the most extreme view of an inquisitorial system there would be no legal representation and no submissions by the parties. The court would call witnesses, ask them questions, then make up its own mind on the outcome of the case. In practice this does not happen because such a system puts too much power in the hands of the court and leaves the rights of parties unprotected.

A fairer system would be to allow legal representation and to allow representatives to play a residual role. This could constitute some or all of the following:
1. Calling additional witnesses or requesting the court to call a witness.
2. Questioning witnesses called by the court or requesting the court to question the witness about some specific matters.
3. Putting submissions to the court as to how it exercises its power in any regard.

**Nature of the Adversarial System**

The *Macquarie Concise Dictionary* (2nd ed) defines ‘adversary’ in the following way: ‘unfriendly opponent; an opponent in a contest; a contestant’. Two prepositions capture the idea. It is in military mode one foe ‘against’ another foe or in sporting terms one side ‘versus’ another side. Conflict is the keynote. Not surprisingly critics of the system deplore the extent to which games and tactics determine the outcome.

Reason indicates that the best way to form a legal system is first to determine its goals and then to devise the best means of securing those goals. History, however, got the call because one of the early means of determining a dispute

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8. *Jones v National Coal Board* [1957] 2 QB 55, 63 per Denning LJ
was trial by battle. It is the historical forerunner to the adversarial system. The idea is that it is a contest between two sides. It was a fight to the death where the winner was the last man standing.

In the extreme form of the system, conduct of the dispute is entirely in the hands of the parties, typically through their hired guns, namely their counsel. Parties determine whom they call as witnesses, the order in which they call them and the questions that they ask them. Parties make submissions to the court on how it should reach its decision. All that the court does is listen and decide. As Lord Denning put it: ‘In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries’.

In common law jurisdictions many lawyers are culturally attached to, if not addicted to, the notion of adversarialism. If wigs and gowns robe the bodies of barristers, a fervent commitment to adversarialism often garbs their souls. This commitment tends to feature in discussions about reforming aspects of court procedure by their propounding the notion that any lessening of adversarialism diminishes justice.

Problems in the Analysis
This article analyses the adversarialism system and seeks to see if defects in the administration of justice arise from the use or excessive use of this system. In the process it makes some comparison with the position under the inquisitorial system.

There are, however, problems in analysing and comparing the two systems. The existence of these problems does not necessarily mean that some of the benefits or defects of a system do not arise from its adversarial or inquisitorial nature. It means that one must proceed with great causation. These major problems are lack of a formal definition of each system, the lack of a pure version of each system, allocation of causation (the problem of knowing whether elements of a system cause a problem as distinct from something else causing the problem) and the possibility of there being extraneous causes of the problem.

Lack of Formal Definition
There is no formal definition of either system. Yet it is common for lawyers and scholars to argue that various merits or defects in the system are the result of the system being adversarial or inquisitorial. This type of argument involves

10. Jones v National Coal Board [1957] 2 QB 55, 63 per Denning LJ
attributing problems or benefits in a legal system to the fact that it is or is not adversarial or inquisitorial. In other words the system or some part of the system is the problem. Moreover, some participants in debates on the merits of each system sometimes compare the perceived shortcomings of one actual system with an idealised version of the other system.\(^\text{11}\)

**Questions of Degree**

In practice there is probably no pure version of either system. It is generally the case that a court system is a mixture of the adversarial and inquisitorial styles even though one predominates. Thus, adversarialism is in fact a matter of degree. It exists on a continuum. At one extreme on this continuum a legal system or a part of a legal system can be extremely adversarial, while at the other extreme adversarialism is highly constrained. In fact, some systems that are labelled adversarial have a significant component that is not adversarial

**Allocation of Causation**

There is a problem in allocating a causal role to one or other system, or to some feature of it, as reformers, including the author, are prone to do. Reformers may argue, for example, that particular shortcoming or a particular benefit is the product of one system or another. The difficulty here is the age-old problem of identifying causal relationships in complex situations. In practice there may be a number of variables in play and complex inter-relationships between the components of a system. In these circumstances, it may be difficult to prove a causal connection between any benefits or problems in the system and the adversarial or inquisitorial components in the system. This means that arguing along the axis of adversarial versus inquisitorial systems is not necessarily conclusive. A major reason for this is that there may be other factors at work that cause problems and that are not the creation of either the adversarial or the inquisitorial components of the system in question.

**Conclusion**

There is an obvious conclusion. Urging that a system become more or less adversarial or inquisitorial is not necessarily a productive way of proceeding. Instead it is better to identify specific problems (even if they appear to arise from the adversarial or inquisitorial features of the system), make specific proposals for reform and appraise these proposals, regardless of how they might be classified on this axis. Then consider how these reforms might or might not advance the cause of justice.\(^\text{12}\)

\(^{11}\) ALRC report [1.116]

\(^{12}\) For some of the criticisms and problems of the system see – Pizzi and Marafioti (1992) pp 22-3, Eggleston (1975) p 430; Parker (1997); Whitton (1994); Whitton (1998).
**Benefits of the Adversarial System**

Supporters allege that the adversarial system brings a number of benefits. First, a major benefit is judicial impartiality, which has the benefit of being highly visible. Impartiality is protected by constitutionally bestowed independence. Second, on one line of thinking the adversarial system possesses a democratic character. This is so, supporters say, because the adversarial nature of litigation allows the parties to define and control the dispute. It also allows them to participate in the proceedings by submitting evidence and arguments to the court. Third, adversarialism is, like economic activity, founded on incentives derived from self interest. This has the consequences that in furious pursuit of their self interest parties may uncover and produce facts, evidence and arguments that an inquisitorial system, hampered by dispassion, might have overlooked.

**Problems in the Adversarial System**

*We can’t avoid the fact that the adversary system does make justice a game.*

Some allege that the adversary system has two major problems that appear to be linked. It promotes cost and delay and lawyers can too easily use it in their own self-interest. There is also an array of other alleged problems.

**Cost and Delay**

*Like sharks smell blood, lawyers smell money.*

The problems of cost and delay are endemic to common law adversarial systems. Costs and delay are frequently paired as problems. The likely reasoning for the pairing is that delay is a significant cause of cost although it is not the only cause. Charles Dickens wrote that the ‘one great principle of the English law is to make business for itself.’

There are frequent expressions of concern about the major problems of cost and delay in litigation, much of it expressed by the judges themselves. These judges include three successive Chief Justices of the High Court of Australia. In 1994 Sir Anthony Mason (1987-1995), declared that the ‘justice system’ was ‘costly, inaccessible and beset with delays.’ In 1997, Sir Gerard Brennan (1995-1998), similarly declared that the Australian ‘system of administering

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13. The operative maxim is that ‘that justice should not only be done, but should manifestly and undoubtedly be seen to be done’ see *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259; [1923] All ER 233, 234 peer Lord Hewart CJ.
14. Frank (1949) p 80
15. Frank (1949) p 80
16. Geoffrey Robertson QC
17. John Banzhaf
18. Charles Dickens *Bleak House* Chapter 39
Tactical Adversarialism and Protective Adversarialism

justice [was] in crisis’ due to costs and delays.\(^{20}\) The Honourable Murray Gleeson (1998-2008) has echoed his predecessors’ views, pointing out that ‘[c]ost and delay’ are problems endemic to all legal systems.’\(^{21}\) These distinguished jurists, however, are just some of the voices who have spoken out on the twin problems of cost and delay.\(^{22}\)

Justice that is overpriced and overdue is not justice at all. This is a problem because adjudicating cases is not some luxury good that consumers can do without. Rather, it ‘is a special kind of service provided by the government’\(^{23}\) because it is a citizen’s constitutional right to have access to justice in the courts.\(^{24}\) Justice, therefore, should be affordable and prompt, not exorbitantly expensive and inordinately delayed. Clause 40 of Magna Charta, formulated in 1215, succinctly frames this constitutional obligation owed by the state to its citizenry as it boldly proclaims: ‘To no one will we sell, to no one will we refuse or delay, right or justice.’

While the problems of cost and delay are major and longstanding, the question arises as to their cause. Are they a product in whole or in part of the adversarial characteristics of the system? There is good reason to think that adversarialism plays a major part. As long as the case is in the hands of the parties and their lawyers there is no control on the time it takes for a case to come to trial and the time it takes to hear the case. Lawyers commonly charge by the hour for their work so there is no incentive to finish quickly and there is positive incentive, that may operate consciously or unconsciously, to spin out a case. This practice is made possible because the nature of legal business in the sphere of litigation makes it difficult to implement quality control.

There are two further factors at work. First, legal education and training tends to neglect skills for working with law. One aspect of this is that lawyers do not seem adept at organising the material in a case, a problem that often shines through in the pleadings. This can prolong a case. And given the practice of charging by the hour, there is no incentive to acquire proper skills.

Second, the current system of pleading notoriously does not always identify the issues in a case clearly, precisely and quickly. Not surprisingly, these defects have been widely recognised. As the Australian Law Reform Commission put it, pleadings are ‘too often general in scope and inadequately particularised so

\(^{20}\) Brennan (1997) p 139
\(^{21}\) Gleeson (2002) p 24
\(^{22}\) See also Street (1987), Haynes (1983)
\(^{23}\) Langbroek and Okkerman (2000) p 80
\(^{24}\) Ison (1985-86), Guest (1980), Mendelsohn (1961)
that there is no narrowing of issues.\textsuperscript{25} In a similar vein Justice John Perry says that ‘too often the process [of pleading] becomes a meaningless and wordy ritual, the result tending to obscure rather than illuminate the issues.’\textsuperscript{26} Indeed so well recognised is the problem that it ‘is rare for there to be a discussion of civil litigation without criticism of the rules and practices of pleadings.’\textsuperscript{27} To put it bluntly and shortly, neither the rules nor the practice of pleading display much indication of intelligent design.\textsuperscript{28}

\textbf{Self Interest}
Zuckerman reviewed both adversarial and inquisitorial systems. He found a common problem in all systems ‘when the process of litigation is left to the parties and their lawyers’. Generally this is more the case in an adversarial system than an inquisitorial system.

This problem that Zuckerman found is that the progress of the case ‘is impeded by narrow self-interest. Such self-interest may be that of recalcitrant defendants bent on exhausting and tormenting their plaintiffs or that of self-interest of lawyers determined to enhance their own incomes.’\textsuperscript{29} Consequently ‘[w]aste of time on irrelevancies and repetition – whether flowing from incompetent advocacy or deliberate tactical manoeuvring – is by no means uncommon.’\textsuperscript{30}

There is more. ‘Causing delay and cost has become an art form for many large defendants that would prefer to try to exhaust their opponent rather than deal with the merits of the claim.’ (This is one reason why ‘courts must be more vigilant to protect claimants through active judicial management’).\textsuperscript{31}

This abuses of court processes that cause injustice to two sets of parties. The obvious victim is the party ‘inside the door of the courtroom’.\textsuperscript{32} There is also injustice ‘to those would be litigants waiting in the wings’,\textsuperscript{33} who are queuing outside the door of the courtroom\textsuperscript{34} waiting their turn for justice.

\begin{itemize}
\item \textsuperscript{25} Australian Law Reform Commission (2000) para [7.166]. A similar point is made by Mahoney (2003) in Sheard 2003 p 106 who says that with narrative pleadings at least, the task of defining issues of fact is ‘sometimes’ achieved, but ‘not often.’
\item \textsuperscript{26} Dunstone (1997) p vii
\item \textsuperscript{27} Australian Law Reform Commission (2000) para [7.165]
\item \textsuperscript{28} The author has made proposals for fixing the problems with pleadings – Christopher Enright (2012) Reforming Civil Litigation, Maitland Press, Newcastle (forthcoming)
\item \textsuperscript{30} Ipp (1995) 69 ALJ 365, 368
\item \textsuperscript{31} ALRC Report Submission ED2 19 Maurice Blackburn
\item \textsuperscript{32} ALRC Report p 248
\item \textsuperscript{33} Sage; Wright; Morris (2002) pp16-17
\item \textsuperscript{34} ALRC Report p 248
\end{itemize}
Underlying this concern about misuse of court time is ‘an economic reality’ in that ‘court resources are limited’. This reality has now permeated case management with a ‘novel aspect’ because judges may ‘take court resources into account’.

**Epistemological Problem**

In discussion of reforming civil procedure there is commonly references to the benefits of each system. For example Justice McClennan asserts that there ‘can be little doubt that the common law model, which endorses the adversarial method for the resolution of disputes, has proved effective’. In a similar vein lawyers applaud and indorse the much cited assertion by Wigmore that adversary cross examination, which is one of the mainstays of the adversary system, ‘is the greatest legal engine ever invented for the discovery of truth’. The problem with claims to effectiveness such as these is that they are difficult and probably impossible to prove or disprove in a reliable fashion. As discussed elsewhere, there is no generally effective means of assessing how accurately a court has found the facts of the case.

**Array of Problems**

There are allegations of an array of other problems. Some of these are initial problems that cause other problems, some are real problems and some a symptoms of problems. Some examples are as follows. Lawyers use games and tactics, they want to win at all costs, they exacerbate conflict, they are unaccountable, they engage in tactical manoeuvring, they go for the jugular, they just want to score points, they worsen or encourage disputes, they enjoy winning as a personal contest against other lawyers, and they are overly motivated by profit.

Two further problems are that adversarialism tends to make witnesses, including expert witnesses, take sides so that they become partisan and

35. ALRC Report p 248
36. ALRC Report p 248
40. ALRC Report par [1.119]
41. ALRC Report par [3.30]
42. ALRC Report par [3.30]
43. ALRC Report par [3.31]
44. Eggleston (1975) p 430; Parker (1997); Whitton (1994); Whitton (1998)
45. ALRC Report par [3.31]
46. ALRC Report par [3.31]
47. ALRC Report par [3.31]
48. ALRC Report par [3.31]
49. ALRC Report par [3.31]
unreliable,\textsuperscript{50} and adversarialism can obscure the focus of hearings\textsuperscript{51} (which may arise at least in part due to severe defects in the system of pleading).\textsuperscript{52}

Finally, there is a problem that in some ways is inherent in adversarialism. It provides a fair trial on the basis that each party can properly fight their own battle. However, this assumption is likely to be ill founded when there is inequality of resources that leads to inequality of legal representation because one party has a better lawyer than the other, because one party is represented and the other party is unrepresented or because one party cannot afford expert advice.\textsuperscript{53} In short, the system victimises the poor and less powerful.

**Steps for Solving the Problems**

Preceding discussion suggests that some problems with the legal system arise from adversarialism while some arise from other causes. To the extent that problems with litigation arise from its adversarialism the solution lies in a four-step process, which occupies the remainder of this article:

- Section 2. Creating a Rational Framework.
- Section 3. Distinguishing Tactical and Protective Adversarialism
- Section 4. Identifying Problems with Tactical Adversarialism
- Section 5. Restraining Tactical Adversarialism

### Section 2. Creating a Rational Framework

**Introduction**

Creating a rational framework involves recognising that adversarialism has no inherent value. It is only a means to an end. There are four key aspects:

<table>
<thead>
<tr>
<th>Avoiding the Error of the False Dichotomy</th>
<th>Avoiding the Error of Limited Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avoiding the Error of Confusing Means and Ends</td>
<td>Searching for the Best</td>
</tr>
</tbody>
</table>

**Avoiding the Error of the False Dichotomy**

What would be the best procedural system? Would it be adversarial, would it be inquisitorial or would it be a mixture? Putting the question in this way involves the error of the false dichotomy. This error involves an ‘either X or Y’ approach to a question. A famous example occurred in 1968 in the United States presidential campaign. Elridge Cleaver uttered the famous phrase: ‘You are either part of the solution or part of the problem.’

\textsuperscript{50} As Jerome Frank put it ‘the partisan nature of trials tends to make partisans of the witnesses’ – see Frank (1949) p 86.  
\textsuperscript{51} Jolowicz (1996) par [208]  
\textsuperscript{52} Christopher Enright (2012) Reforming Civil Litigation, Maitland Press, Newcastle (forthcoming)  
\textsuperscript{53} Dietrich v R (1992) 177 CLR 292, 335 per Deane J; Giannarelli v Wraith (1988) 165 CLR 543, 556 per Mason CJ
What is the alternative? The rational way is to design a system that best achieves the desired purposes of the justice system. This is in contrast to approaching the question with some ideologically predetermined or fixed notion as to the answer. In this spirit that the author proposes a system here based on two key propositions that concern minimalising adversarialism and revising procedures to assist a fair and efficient and timely resolution of disputes.

**Avoiding the Error of Limited Options**

As just explained, it is not a correct approach to assume that the way to achieve the best system is to choose between an adversarial and an inquisitorial system. It is also an error to assume that the best solution comes only from the ingredients of these systems. It may be that some improvement can be made by some measure that is not inherently connected to one or other system.

Thus there is some middle ground between the two competing systems, namely that procedural rules also contribute to justice. Presently one of the major flaws of the Australian system (and it is likely that it exists in other systems) is insufficient or inadequate management of information. Yet the right type of information management stems largely from enacting the right type of procedural rules. These might require judicial supervision but only to ensure that some key tasks are performed properly at the outset. If these tasks are not properly performed, the flaw with information will disrupt later proceedings where the earlier task constitutes a platform on which litigants or the court perform later task. An example of a possible reform, which is discussed below, is to reform the system of pleadings.

**Avoiding the Error of Confusing Means and Ends**

Adversarialism has no inherent value. It is only a means to an end. The end it seeks is justice. Logically, this consideration alone should determine its use. To illustrate means and ends, in the great debate between capitalism and socialism (or communism) the only correct approach is to measure and compare the outcomes of each system. As the biblical phrase reminds us, by their fruits you will know them. It is logically incorrect to proceed in any other way. The basic reason for this rests on the distinction between means and ends. Each of these systems is not an end in itself, it is a means to an end. It is a means of answering the two major economic questions of production and distribution.

Since adversarialism is only a means to and end, having no inherent value, its value lies in what it produces. What it seeks to produce is justice, which has three components – a just result, minimum cost and minimum delay. Thus any assessment of the adversarial system rests on its performance in these three categories of endeavour.
Searching for the Best

The notion that adversarialism is only a means to an end, as distinct from being an end in itself, has an obvious implication on how to proceed. If adversarialism is to be retained, and the extent to which it is to be retained, depends not on the attraction it has for lawyers but on functional adequacy. This asks a simple question. Does adversarialism help courts to deliver their goals of in a way that is both effective and efficient? To answer this question it is helpful if not necessary to divide adversarialism into two parts, tactical adversarialism and protective adversarialism. This occupies the next section of this article, to which we now proceed.

Section 3. Tactical and Protective Adversarialism

Introduction

It is possible to draw a very workable distinction between two classes of adversarialism. These classes consist of protective adversarialism and tactical adversarialism. This provides a basis for determining what type of adversarialism a legal system needs and the parts of that adversarialism that the system needs.

Protective Adversarialism

My noble and leaned friend Lord Brougham, whose words are the words of wisdom, said an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction; that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his client - per fas but not per nefas. It is his duty to the utmost of his power, to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice.

Protective adversarialism is the level of adversarialism that is needed so that an independent lawyer can properly protect the rights of their client and so help ensure that they receive a fair trial. It furnishes basic fairness to each party. At the same time it assists greatly the task making of effective decision by ensuring that the case of each party is properly put to the court. Because the court is then possessed of each party’s case it has the full range of information and arguments before it.

A party has a right to be represented. In order to ensure that their client obtains a fair trial, a party’s representative must have the right to perform three functions for their client:

54. Per fas means by right means; per nefas means by wrong means.
55. Lord Chief Justice Cockburn, cited in Parry (1923) pp 18-19
1. They can call a witness or request the court to do so.
2. They can question any witness or request the court to do so.
3. They can put submissions to the court as to how it exercises its power in any regard.
This part of adversarialism is so vital for achieving justice that it is a cornerstone. It is indispensable.

**Tactical Adversarialism**

Any power for an advocate to conduct proceedings that goes beyond the amount needed to protect each party performs a separate function. This entails advancing a party’s case in a tactical way.

One illustration of the nefarious practices of tactical adversarialism comes from the practice of cross-examination in relation two fundamental guidelines of note developed by lawyers. One of them, stated in simple terms, is that the cross examiner should not ask a question where the questioner does not know the answer. A more refined formulation says the counsel should not ask a question if any possible answer will disadvantage their own case. The second guideline says that a cross examiner should not allow a witness to explain themselves.

What is the purpose to these guidelines? It is to ensure that the witness does not blurt out something that is not favourable to the cross examining party’s case. Nevertheless lawyers claim, in the much cited assertion by Wigmore, that adversary cross examination ‘is the greatest legal engine ever invented for the discovery of truth’.

Yet these fundamental guidelines are manifestly and unashamedly designed to suppress or conceal rather than reveal the truth. They prevent a witness from telling what they know, notwithstanding that the witness has taken an oath in which they swear to God and the court to tell the ‘whole truth’.

This is just one aspect of the broader problem of tactical adversarialism. It constitutes an attempt to win a case by trickery instead of the inherent strength of the case. It is not vital for achieving justice. In fact it may deprive a party of justice when they lose only because the other party’s lawyer had better tricks than their lawyer. In addition, it quite probably increases cost and delay while at the same time enhancing the income of any lawyer who charges by the hour (and many of them do so).

Traditionally battles of tactics are part of the common law court system. However, it is difficult to reconcile allowing tactics instead of justice to

determine who wins a case. There is little or no case to be made for it. It is a fountain of injustice. This is why there is a strong case against tactical adversarialism.\textsuperscript{57}

\textbf{Section 4. Problems with Tactical Adversarialism}

\textbf{Introduction}

During the Middle Ages one of the methods of resolving a legal dispute was a trial but a trial of a special sort. It was trial by battle. It involved an armed conflict between the two opponents or their hired fighters. Nowadays there is still a fight due to the prevalence of adversarialism, especially tactical adversarialism, but the weapons are words not swords and spears. That said, though, there are problems with trials in their present forms as methods of resolving disputes. In a thoughtful article Edward Rubin juxtaposes the two practices – trial by battle and trial in court – to illuminate several serious problems with contemporary trials: their inherent inaccuracy, their reliance on professional champions to represent the parties, and their conscious antiquarianism. The aim of considering these shortcomings is an attempt ‘to devise a distinctly new mode of resolving legal disputes that is appropriate to our own society, and that functions effectively for the next several hundred years’.\textsuperscript{58}

The point is that some critics blame the adversary system for some or even all of the defects in the current justice system. For example in his major report on the justice system in England and Wales Lord Woolf argued that many of the problems in the legal system arose to a significant degree from the unrestrained adversarial culture of their legal system.\textsuperscript{59}

\textbf{Truth}

\textit{Justice means fairness, fairness means truth, and truth means reality.}\textsuperscript{60}

\textbf{Truth and Justice}

Most of us regard finding the truth as an ideal aim in many spheres of activity. This notion has friends in the justice system. A former judge, Russell Fox, put it this way: ‘[J]ustice marches with the truth. Only in this way does the concept present a moral face’.\textsuperscript{61} The alternative is the situation where ‘the winner is the person with the greatest resources and best advocacy’.\textsuperscript{62} To many this is

\textsuperscript{57} In consequence there are moves to lessen the adversarial component of a trial – see, for example Ipp (1999) p 84; and Olsson (1999) pp 2, 6-8.
\textsuperscript{58} Rubin (2003) p 261
\textsuperscript{59} Woolf (1995) p 7
\textsuperscript{60} Fox (2000)
\textsuperscript{61} Fox (2000)
\textsuperscript{62} Fox (2000)
abhorrent because fairness and justice, delivered as they should be, must rest on truth. In short, justice marches with truth or it does not march at all.

**Three Views on Truth and the Adversarial System**

There are three views on the relationship between the adversarial system and truth – that justice is not about truth because truth is irrelevant, that the adversarial system is a device for discovering truth or that the adversarial system promotes lying.

**Adversarial System: Irrelevance of Truth**

The main reason for this formal lack of search for the truth under adversarial proceedings is that ‘[w]ithin the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties’. In other words the issue is which party has the stronger case as distinct from a more objective standard of determining where the truth lies. As Lord Denning put the position: ‘when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened.’

These problems of truth that weigh down the standing of the adversarial system are in sharp contrast with the common picture give on the inquisitorial system as practised in Europe. As Sir Anthony Mason described it: ‘The principal reason why the European system has attractions for some critics of the adversarial system is that control lies more in the hands of the judges and because the European courts are said to have as their object the investigation of the truth’.

**Adversarial System: Engine of Truth**

Lord Chancellor Eldon put forward the view that the adversarial system is an engine of truth. He said: ‘Truth is best discovered by powerful statements on both sides of the question.’ In other words the roar of the lions will determine who is the king of the jungle. One device is cross examination. In this regard many lawyers applaud and indorse the much cited assertion by Wigmore that adversary cross examination, which is one of the mainstays of the adversary system, ‘is the greatest legal engine ever invented for the discovery of truth’. This much touted view comes with a problem. There is no certain knowledge

63. For example in *Ex parte Lloyd* (1822) Mont. 70, 72
64. Mason (1999) p 4
65. *Air Canada v Secretary of State for Trade [No 2]* [1983] 2 AC 394, 411, per Lord Denning MR
67. *Ex parte Lloyd* (1822) Mont. 70, 72. Lord Justice Denning quoted this with approval in *Jones v National Coal Board* [1957] 2 QB 55, 63.
68. Wigmore (1940) p 3. See also Downes (1997).
about the truth of the facts in a case so there is no yardstick to determine whether the truth always comes out. For this reason it is difficult to evaluate any system by reference to its capacity to elicit truth.69

Some critics, however, dispute this view. Thus Justice Geoffrey Davies expressed the view that: ‘to invest our system with the virtues of ascertaining the truth or of achieving fairness between the parties does not stand up to close examination. In truth it achieves neither’.70 Justice Davie Ipp also blows the trumpet about lack of truth: ‘Underlying public dissatisfaction is the perception that a search for the truth plays little part in our adversarial process’; one major reason for this is that there are rules of evidence that ‘exclude testimony that on a commonsense basis is highly relevant’.71

**Adversarial System: Bastion of Liars**
The extreme version of the thesis that the adversarial system does not seek the truth is that it is a breeding ground for lies. Charles P Curtis, for example stated: ‘I do not see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client’.72 In a similar vein, Justice Richard Posner has described the ‘adversarial procedure’ as a ‘contest of liars’.73

**Justice**
Considerations of justice are closely tied to considerations of truth, so the preceding discussion on truth is relevant to this discussion. Just as there is a problem with truth there is a problem with justice. Justice Geoff Davies was blunt in his assessment of the typical trial as a mechanism for justice. It ‘still seems to be generally accepted that our system is effective at achieving justice between the parties. I think that that also is a misapprehension. Between parties of equal bargaining power that might be so, but that is rarely, if ever, the case. And between parties of unequal bargaining power our system is unfair.’74

**Delay**
Inevitably there will be some delay because litigation takes time. Consequently legitimate concern is directed only towards improper delay, which consists of ‘delay beyond that necessary for the process involved.’75 Delay is possible in any stage of a case from the time when the claim arises by action of the

69. Eggleston (1975) p 433
70. Davies (2002)
71. Ipp (2000)
72. Curtis (1951) p 12
74. Davies (2002)
75. Mahoney (1983) p 33
Tactical Adversarialism and Protective Adversarialism

defendant to the conclusion of the case when the court hands down its judgment.\textsuperscript{76} In fact, once a case is commenced, delay can and does occur in each of the three stages of a case:
1. Delay from initiation of proceedings to commencement of the trial.
2. Delay from the commencement of a trial to its conclusion. Indeed the tendency nowadays is for the hearing of matters to take longer than was previously the case.\textsuperscript{77} In 2008 the Victorian Director of Public Protections commented publicly that that the length (and cost) of trials had increased exponentially in the past decade.\textsuperscript{78}
3. Delay from the conclusion of the trial to the handing down by the court of its judgment.\textsuperscript{79}

Due to these delays courts are ‘overburdened,’\textsuperscript{80} so that cases pile up in a backlog.\textsuperscript{81} In consequence the ‘litigation process is, par excellence, a process of bottlenecks.’\textsuperscript{82} Delay, as Dennis Mahoney QC put it so well and so succinctly, ‘stinks in the nose of the community’ which the courts serve.\textsuperscript{83} No one, for example ‘is able to justify a twelve to eighteen month delay between setting the case down for trial and the trial of it.’\textsuperscript{84} Justice delayed, as the saying goes, is justice denied, while justice dragged out is justice dragged down.

Delay occurs because the available resources are not capable of processing cases quickly enough. Thus there are two sides to the problem, the demand for cases to be processed and heard, and the supply of resources to meet this demand:
1. Demand for litigation is increasing and the increase is manifest in two ways. There is an increase in the number of cases,\textsuperscript{85} which is out of proportion to the growth of population;\textsuperscript{86} possibly this has happened because to an increasing extent people are regarding law as the solvent of most or even all social

\textsuperscript{76} Mahoney (1983) pp 30, 33  
\textsuperscript{77} Langbroek and Okkerman (2000) p 87  
\textsuperscript{78} Merritt (2008)  
\textsuperscript{79} Goose v Wilson Sandford (1998) (Court of Appeal, UK) Times Law Report 19 February where the court said in relation to delay in receiving a judgment: ‘Compelling parties to await judgment for an indefinitely extended period prolonged, and probably increased, the stress and anxiety inevitably caused by litigation, and weakened public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law.’  
\textsuperscript{80} Brennan (1997) p 139  
\textsuperscript{81} Langbroek and Okkerman (2000) p 82  
\textsuperscript{82} Mahoney (1983) p 40  
\textsuperscript{83} Mahoney (1983) p 33  
\textsuperscript{84} Mahoney (1983) p 30  
\textsuperscript{85} Langbroek and Okkerman (2000) p 78  
\textsuperscript{86} Mahoney (1983) p 36
problems. Litigated cases are increasingly more complex and so take increasingly more time to try.

2. Supply is limited because ‘justice is not an infinite commodity.’ There ‘is a limit to the amount of time that can be given to each case,’ just as there are limited economic resources that can be devoted to the judicial system. Supply of resources depends in the first instance on the budget allocated to a court to fund its activities. When that has been done, the question must then be asked as to how efficiently the allocated resources are used. This depends on a number of factors such as the skill and motivation of judges and court officials and the competence and diligence of solicitors and barristers. A most significant factor in this regard is whether the practices and procedure of the court are conducive to efficient disposal of cases. Not surprisingly, this attracts much of the attention in the literature. It is also the focus of discussion here.

In the year 2000 Justice David Ipp wrote of the growing problem of delay in criminal cases in the higher courts: ‘We have reached a watershed in criminal litigation. According to the Australian Bureau of Statistics, in 1997-98 there was a 9 per cent increase over 1996-97 in criminal cases initiated in the higher courts. Throughout the country, there was a significant increase in the number of defendants with cases pending at 30 June 1998. These phenomena have been a characteristic of the administration of criminal justice over the last several years. The overall trend is unmistakable. Courts are not equipped to deal as effectively as in former times with the mass of criminal cases. The result is increased cost and delay with self-evident injustice to individuals. Additionally, as there is a limited sum of government money available for the administration of justice, there are fewer resources for each individual case. This results in greater delay and, in turn, with the disease feeding on itself, in more injustice.’

87. Mahoney (1983) p 36
88. Langbroek and Okkerman (2000) p 87
89. Doyle (1999) p 740
90. Doyle (1999) p 740
92. Mahoney (1983) p 31. Clients have some difficulty in judging how efficient a lawyer is because of information asymmetry as the economists call it. Ordinarily the law person knows little of the substance of the work of a trained person such as a lawyer and so is in no position to judge if the service they provides is prompt and competent.
93. Doyle (1999) at p 737, who refers to ‘the efficiency’ with which judges ‘conduct hearings.’
Costs

In England, justice is open to all, like the Ritz Hotel.\footnote{Justice Sir James Mathew (1830-1908)}

Problem of High Costs

Litigation costs money for the parties, principally in fees for solicitors and barristers, but also for things such as filing fees, travel to and from court, out of town accommodation if the case is heard away from home, and loss of income by the parties from their not attending to work because of the demands of a case.

Costs have now reached the stage, according to Sir Gerard Brennan, where ‘litigation is beyond the reach of practically everyone but the affluent, the corporate or the legally aided litigant.’\footnote{Brennan (1997) p 139} One consequence of this is that there is an increasing trend for litigants to represent themselves. So great is this trend that there is now, according to Richard Ackland, an ‘avalanche’ of unrepresented litigants.\footnote{Ackland (2002)}

Reasons for High Costs

Costs in litigation are high because litigation is labour intensive. There are two reasons for this. One is the quest for perfect justice, which involves diminishing marginal returns and increasing marginal costs as the question continues. One casualty is that the desire to try the case and win obscures the advantages of and opportunities for resolution by non-litigious means with an agreed solution. Yet an agreed solution has several advantages – it is flexible in that it can deal with a range of matters that a court order cannot touch, the parties devise it and thus control it, parties can mould an agreed solution to meet their needs and it is much less costly than litigation. Now in fact a large proportion of cases actually settle. But the problem is that the bulk of cases that settle do not settle until the eve of the trial. This means that parties have already suffered and incurred significant amounts of delay and expense.

Desire for Full Account of a Case

One factor that impedes settlement is that lawyers feel more comfortable seeking settlement when they have fully researched and prepared their case. This is a significant if not a major factor in delaying attempts to settle the case.

Control of Facts by Parties

Under the adversarial system parties are in charge of gathering facts and informing the other party of their version of the facts. This leads to problems. First, the traditional system of pleading allows lawyers to conceal rather than to
reveal and particularise the facts of their case. Frequently lawyer avail themselves of the opportunity because a skilful lawyer can, if they so choose, conceal rather than reveal their client’s real claim. So, ‘[e]ncouraged by the adversarial ethic, litigation lawyers frequently take these opportunities.’

Second, the adversarial culture causes lawyers to suppress unfavourable evidence.

Is there an answer to these problems? One possibility is to ‘compel mutual disclosure of relevant information, favourable and unfavourable, and to require the parties to particularise the real issues between them’ something that can be achieved ‘by modifying the existing system.’

## Culture

As cultures go, lawyers have a strong culture. And trial lawyers, especially barristers, have a very strong culture. Culture is based on shared values and shared beliefs about how the world actually operates and should operate. Inevitably culture will favour some types of behaviour and disfavour others. Generally the culture of litigation lawyers favours rampant adversarialism. It is the fountain of justice, and to ensure that no one is deterred from drinking at the fountain, it enhances the remuneration of trial lawyers.

In 2008 the Victorian Director of Public Protections commented publicly that that the length (and cost) of trials had increased exponentially in the past decade. His response to this was to urge a change of the culture that allowed enormous amounts of time spent on actions, such as prolonged cross-examination, that did little for justice but contributed a lot towards increasing both delay and costs.

In a similar vein the Victorian Law Reform Commission wants to bring about cultural change to accompany a realignment of duty to the justice process. It noted with approval the following submission by the Victorian Bar: ‘The success of the Woolf reforms owed much to the success of the cultural shifts made by the judiciary and the legal profession. For example, barristers and solicitors had to learn that it is no longer acceptable to expect to use civil processes to gain tactical advantages in litigation. This type of change represented a fundamental shift in deeply ingrained mindsets. We suggest that a similar willingness to make radical changes to philosophies and practices will also be required to successfully embed Victorian reform efforts.’

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98. Davies (1995) p 4
100. Merritt (2008)
101. VLRC Report p 204, citing Submission CP 62 (Victorian Bar)
Cultural change is undoubtedly beneficial but there is a problem. As Justice Ipp pointed out, the ‘culture of the system’ is ‘fiercely resistant to change’.102

**Independence**

The motto of the New South Wales Bar Association (the barristers’ professional organisation) is ‘Servants of all yet of none’. This is the independence of the Bar stated succinctly and eloquently. Barristers help anyone regardless but in doing so they are beholden to no one.

**Erskine’s Defence of Independence**

In his book *Advocacy with Honour* John Phillips recites a telling story about independence.103 It involves Thomas Erskine, 1st Baron Erskine KT PC KC (10 January 1750–17 November 1823) who was a British lawyer and politician.

This story starts in 1786 when Erskine was appointed as Attorney General to the Prince of Wales. This position involved a handsome retainer and the prospect of high judicial appointment. Six years later on a November evening in 1792, Thomas Erskine, then a barrister of Lincoln’s Inn, was walking home after a day in court. His route took him across Hampstead Heath. The action that generated this story commenced three days prior. Erskine had accepted a brief to defend the famous pamphleteer and agitator, Thomas Paine, who had been charged with treason following his publication of the second part of his book, *The Rights of Man*. (In fact, Erskine personally disapproved of Paine’s work.) As he was walking Erskine was accosted by Lord Loughborough who was a friend. Loughborough said to Erskine: ‘Erskine, I have a message from the Prince of Wales himself. Your conduct is highly displeasing to the King. You must not take Paine’s brief.’ Erskine replied immediately: ‘But I have been retained and I will take it, by God!’ He consequently later lost his position as attorney general. In his defence of Paine, Erskine addressed the jury on the independence of the English Bar. In doing this he spoke some famous words upholding the independence of the Bar, words which would not have looked out of place in the writing of Thomas Paine: ‘I will forever, at all hazards, assert the dignity and independence of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge and of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; puts the heavy influence of perhaps

mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law makes all presumptions, and which commands the very judge to be his counsel.’ In terms of upholding the independence of the Bar, this statement was surely the Sermon on the Mount.

Rules Promoting Independence
Along side the bar’s commitment to independence is a commitment to taking a case. Under the long-standing cab rank rule, a barrister (but not a solicitor) must accept a brief provided certain basic requirements are satisfied. It is in their area of practice. It is within their level of competence. There is a reasonable fee marked on the brief. There is no legitimate reason for not accepting the brief. The reason for this rule is based on the fact that barristers are the main source of advocates for clients. This right generates a corresponding obligation to ensure that they are available to help those who require representation in court. In 1999, the Lord Chancellor, Lord Irvine, said: ‘The ‘cab rank’ rule is one of the glories of the Bar. It underscores that every member of the Bar is obliged, without fear or favour, to represent clients who offer themselves, regardless of how unpopular they may be in the community or elsewhere.’

Once a barrister is hired, their duty continues. They must argue and advance their client’s case. In doing this it is their duty ‘fearlessly to raise every issue, advance every argument and ask every question however distasteful’ which will help their client’s case.

Threats to Independence
There are, however, threats to the independence of barristers. These include the desire to win, the hired gun syndrome and low professional standards come enforcement time.

Desire to Win
Most humans have some natural or inbuilt desire to win. Moreover, in the case of a barrister a victory, especially a victory against the odds, enhances the status and future income of the victor. It is, however, possible that the desire to win overtakes the independence of judgment that a true professional requires.

104. Macmillan (1937) p179
105. Giannarelli v Wraith (1988) 165 CLR 543, 580, per Brennan CJ
106. Parliamentary Debates, House of Lords, 28 January 1999, column 1150, (Lord Irvine, Lord Chancellor
Desire to Please
It is notorious among lawyers that expert witnesses often respond like a hired gun. They shoot in the direction that their master wants by giving them the expert opinion that best advances their case. There are two historic occurrences of this involving the United States’ holding and treatment of prisoners at Guantanamo Bay. Richard Ackland describes these occurrences in an article appropriately entitled ‘Pay enough and you’ll always get the advice that you want to hear’. First, lawyers for the administration of President George Bush advised that Guantanamo Bay was a legally sound way of removing people from the protections of United States law. In fact when case came before the courts judges granted habeas corpus. Second, lawyers advising President Bush ‘also redefined torture in such a way that allowed water boarding, sleep deprivation and other “enhanced interrogation techniques”’.109

In his book Decision Points, George W Bush gives his account of these matters. He wrote: ‘Once the threat seemed less urgent and the political winds had shifted, many lawmakers became fierce critics. They charged that Americans had committed unlawful torture. That was not true. I had asked the most senior legal officers in the United States government to review the interrogation methods, and they had assured me that they did not constitute torture. To suggest that our intelligence personnel violated the law by following the legal guidance they received is insulting and wrong.’ In other words, he found solace in the legal advice that he received. This puts a strange twist on the biblical phrase ‘ask and you shall receive’.

Desire Not to Enforce Professional Standards
John Yoo and Judge Jay Bybee wrote the memos holding that the torture planned for Guantanamo Bay was legal. Subsequently, the Department of Justice investigated and reported on the professional conduct of John Yoo and Judge Jay Bybee in writing the torture memos, along with previous versions of the Office of Professional Responsibility report and responses by Yoo and Bybee. ‘Upon reviewing the report and recommendations of the Office of Professional Responsibility, Associate Deputy Attorney General David Margolis concluded in a 69 page memo that the Department of Justice should release the Office of Professional Responsibility report for public review but that the Justice Department would not refer a finding of misconduct to state and local bar committees where Yoo and Bybee are members. In deciding not to refer charges to state bar committees, Margolis does not tell us that Yoo and Bybee behaved admirably or according to the high standards that we should expect from Justice Department lawyers. Indeed, he says the opposite. Yoo and Bybee exercised poor judgment and let the Justice Department down. But

108. Ackland (2011)
109. Ackland (2011)
Margolis argues that the Office of Professional Responsibility chose too high a standard to judge the professional responsibility of Yoo and Bybee. The OPR argued that Yoo and Bybee had “a duty to exercise independent legal judgment and to render thorough, objective, and candid legal advice.” This standard, Margolis explained, is much too high a requirement and not one that Yoo and Bybee were previously warned was the standard to which they would be held.\textsuperscript{110}

This brings to mind the famous statement of Cardinal Wolsey who served King Henry VIII (1509-1547) faithfully as an adviser. When he was dying, and now in the King’s disfavour, he uttered the words: ‘Had I served my God as well as my King, he would not have left me in old age naked to my enemies’.

**Ethics**

\textit{One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success that could not be enforced either by legal fiat or through the discipline of the market.}\textsuperscript{111}

There are at least two ethical concerns with tactical adversarialism. First, it is difficult to defend tactical adversarialism from the charge that it is an inherently unethical way to proceed. It puts an emphasis on winning almost at all costs as distinct from winning on the merits. In other words, the gloves are off for the fight. Second, since the culture of win at all costs has no relevance to the justice of a case, it may lure advocates into other unethical behaviour.

**Submissions on Questions of Law**

One contributor to confusion in the law and unreadability of judgments may be that adversarialism inhibits that quiet refection that is needed to analyse a legal issue properly and deeply so that one truly understands the issue and its causes before seeking to put arguments on how to resolve it. It may be one contributing reason for judgments not being as readable as one would hope. The point is that the ensuing judgment may reflect any lack of depth or perspicacity in the arguments of counsel.

\begin{center} **Section 5. Restraining Tactical Adversarialism** \end{center}

\textit{We will not at present inquire ... whether it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire; whether it be right that, not merely believing but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn...}

\textsuperscript{110} Balkin (2010)

\textsuperscript{111} Shapiro v Kentucky Bar Association (1988) 486 US 466, 488-489, per O’Connor J
asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false.¹¹²

### 5.1 Introduction

Protective adversarialism enables a lawyer to wield a sword of honour in pursuit of justice. Tactical adversarialism occurs where the rules and practices allow a lawyer to attempt to win the case by means of tricks and stratagems that have no connection with the merits of the case. It is an inherent denial of justice and should be limited as far as is humanly possible.

This section describes several means that could reduce and restrain tactical adversarialism. In some cases these mechanisms have been introduced or have been introduced in some jurisdictions. In other cases they are proposals for reform that the proponents believe will alleviate the problem.

One such proposal is worth a preview prior to its more detailed treatment below. This is to reform the system of pleading so that it forces parties to identify the issues in a case precisely and early in the pleadings. This is potentially a huge advantage for rational litigation management. Much of the ambush, camouflage, stalling and manoeuvring that tactical adversarialism engenders can take place because there is uncertainty about the issues in the case and the evidence that will be used. This is why the remedy is to fix both of these uncertainties, and to do so early. There needs to be an effective and efficient system of pleading that makes clear what are the issues in the case and the evidence that will be used. This point to this is that it considerably lessens scope for lawyers who may be inclined towards the seedy practices of tactical adversarialism.

Sometimes proposals are unorthodox but can reflect a lot of common sense. One such idea (which is not otherwise covered in the discussion below) is that each side in a trial could present their case by an edited video.

### 5.2 Mechanisms

This section explains mechanisms that have or might restrain tactical adversarialism. These are not necessarily an exhaustive list of possibilities even though they are wide ranging. They are set out in the following table:

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¹¹² Macaulay (1897) vol 6, 135, 163.
These modifications arguably bring the following consequences:

1. Lessening Adversarialism. They make the system less adversarial.
2. Reduction of Cost and Delay. They reduce cost and delay.
3. Making the Contest More Even. They make for a more even contest. The adversary system ‘assumes equality of financial resources and quality of representation’. Experience often proves this assumption wrong. The ‘richest litigants can generally command the services of the most skilful lawyers; and in a system which leaves so much to the combatants, the amount of work and the skill with which it is done, on one side or the other, can have an important bearing on the result of the case.’

There is another way of referring to an ‘even contest’. It is called justice.

## Natural Justice

The rules of natural justice apply when a decision maker is authorised to make a decision that has serious consequences for a party. The relevant rule here is the fair hearing rule. It is encapsulated in a Latin maxim *audi alteram partem*. Literally, this means ‘hear the other side’, but it is a contraction of ‘hear one side and then the other side’. In other words, a decision maker must make a proper inquiry and in the process should give all parties who are affected by the decision an opportunity to be heard.

This proposition was forcefully asserted and applied in the European Court of Human Rights, in the *Dombo Beheer Case*. There the court found that a Netherlands court had violated the due-process rights of a corporation under Article 6 of the European Convention on Human Rights. This violation involved allowing a one sided proceeding that excluded the evidence of one side but allowed the evidence of the other. The key point was that in ‘litigation involving opposing private interests . . . each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent’.

A significant amount of the case law on natural justice arose from cases that involved a unilateral decision, where a decision maker was exercising a decision with respect to one person. In these cases the fair hearing rule imposed a duty on the decision maker to furnish natural justice to the party who was

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before them. As far as this goes it is correct because much of the responsibility for a fair hearing rests with the judge or other decision maker and the duty is intended to benefit the person who is affected by the decision.

However, where the decision is bilateral – involving a decision maker and two contending parties – the requirements of a fair hearing logically extend beyond these items, even if they are still of major importance. First, the duty to disclose information and evidence is not confined to the decision maker but also applies to the parties to the case. Second, natural justice also seeks to assist the court as well as the parties. To state the obvious, a court can make a proper decision only if it has all of the relevant evidence and information before it.

This part of natural justice potentially affects any part of a case. This obviously includes pre-trial procedures. It means, therefore, that the rules of natural justice apply to tasks such as pre-litigation steps to settle a case, pleadings and the mechanisms for disclosing information and evidence such as interrogatories and discovery. Natural justice also potentially applies beyond any statutory provisions for these mechanisms. So, to the extent that the mechanism is inadequate natural justice will offset the deficit. Specifically, the common law rules of natural justice impose obligations on each party to disclose relevant information, facts and evidence to the other party in the interests of justice and a fair trial.\(^\text{115}\)

**Ethical Duties**

**Duty of Cooperation**

Justice Allsop eloquently explained the reason for imposing duties on lawyers with regard to justice: ‘A free civil society has a basal social need for skilled, honest, articulate lawyers who recognise that their advice must be fearless and based in learning and skill. That recognition must also be that their place is to assist in the vindication and protection of the rights of their clients under the rule of law by the administration of justice to which administration, ultimately, they owe their paramount duty’.\(^\text{116}\)

These rules and the behavioural demands that they make on lawyers run directly contrary to the apparent immediate interests of the client. This is the case because the purpose of the rules is to promote justice overall. These rules impose duties arising from social need. Society must provide a justice system and in doing so it must make the best use of scarce public resources as it makes these benefits available to all in society. Moreover, there is a special need for

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115. There is fuller discussion of the application of natural justice to litigation in Christopher Enright (2011) *Early Steps for Organising and Settling a Case: Commonwealth, New South Wales and Victoria.*

rules such as these with litigation because litigation is generally expensive, time consuming and stressful. This is why the court system and the judges in it are becoming increasingly demanding and assertive in their directions for the efficient and co-operative conduct of litigation.

**General Duty**

There is a general duty on lawyers to cooperate with the court in seeking to make the trial effective, efficient and expeditious. Along with this comes a duty on the profession to assist in minimising the expense, delay and stress that so frequently accompany litigation. The need to perform these duties is heightened in long, complex or difficult cases. As the Victorian Court of Appeal framed the duty: ‘Let it be understood henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed; if the present adversary system of litigation is to survive, it demands no less.’

**Specific Duties**

Lawyers have a duty assist the court in doing justice according to law. This duty embraces a range of specific duties:

1. **Diligence and Efficiency.** Lawyers must act diligently and expeditiously so as to bring trials to a conclusion. This duty requires advocates ‘to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed.’

2. **Brevity.** Lawyers must not be prolix. Advocates have a duty not to ‘prolong cases unnecessarily’ by wasting the court’s time ‘in any way.’ They should not make submissions that have no substance (by such things as objecting to evidence without cause). They should not unduly prolong addresses or cross examination. They must not unnecessarily put parties to the proof of allegations known to be true. They must select their witnesses wisely. They must make sure that the topics to be covered in address and the points of law to be raised are relevant. They must address only substantive issues in dispute. Conversely they should not take hopeless or unnecessary points.

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121. Ipp (2000)
3. Frankness. A lawyer has a duty of full disclosure of the relevant law. Therefore, an advocate must not misstate the law to a court by misrepresentation or omission.122

4. Honesty. A lawyer has a duty of honesty and candour. An advocate’s duty is to be honest to all – the court, an opponent, a witness and an instructing solicitor.123 They must not mislead the court as to facts or evidence, nor knowingly permit a client to do so. An advocate must not make allegations to a witness in cross examination for which there is no foundation. Prosecutors in a criminal trial have an additional duty. In the interest of a fair trial, they must disclose and call all evidence bearing on the guilt of the accused.124 They must do this regardless of whether the evidence helps or hinders their case.125

5. Competence. A lawyer has a duty to prepare the case properly and to know the relevant law.

6. Fairness. A lawyer has a duty to refuse to permit the commencement or continuance of baseless proceedings or proceedings brought for an ulterior purpose, such as malice, or to exploit the advantage of court delay. An advocate’s duty to the client is to uphold ‘the right of the client’ and ‘the right only.’126

7. Care. A lawyer has a duty to exercise care, by testing any instructions, before making allegations of misconduct against anyone.

8. Propriety. A lawyer has a duty not to assist improper conduct, whether illegal or dishonest or otherwise improper.127

9. Compliance. There is an ‘ethical obligation on advocates to assist in the administration of justice by maintaining the dignity of the court and its proceedings.’128 An advocate breaches this duty if they are guilty of ‘arrogance, lack of punctuality, inappropriate forms of address, and discourtesy towards the court, witnesses, or the opponent.’129

Sanctions

What if a lawyer does not carry out this duty? There are sanctions. ‘Counsel in future faced with a long a complex trial, criminal or civil, will cooperate with their utmost exertion to avoid a mockery of the system of justice. If not, they must expect to receive, with the sanction of this Court, appropriate

122. Clyne v New South Wales Bar Association (1962) 104 CLR 186, 199
123. As Parry puts it, Parry (1923) p 16, an advocate cannot have ‘recourse to any artifice of subterfuge which may beguile the judge.’
126. Parry (1923) p 16
128. Hampel and Brimer (2001) p10
129. Hampel and Brimer (2001) p11
regimentation by the judge – perhaps of a kind not hitherto experienced – designed to avoid the unhappy result that befell this trial.  

**Model Litigation Rules**

Some jurisdictions have formulated model litigation rules to guide or control the way the government and government agencies conduct litigation. The idea is that governments should set an example as to how lawyers should conduct litigation. This means that these model rules are some guide as to what constitutes fair play in litigation. For this reason they may infuse the rules of ethics and the rules of natural justice that imbue the task of litigation and so apply to all lawyers in all cases.

So, the model litigation rules represent a guide to good practice. However, as the proverb reminds us, fine words butter no parsnips. In practice, there have been breaches and there have been a cover up of the breaches. The Rule of Law Institute has exposed these breaches. Here are some examples:

1. A man was jailed after the Commonwealth Director of Public Prosecutions and the Australian Federal Police failed to produce documents that later led to his exoneration.
2. In 2010 the NSW Court of Appeal criticised the Australian Securities and Investments Commission for failing to call a witness who could have assisted the court arrive at the truth. In *Morley v ASIC* the Court said: ‘[F]ailure to call a witness can constitute a breach of the obligation of fairness.’
3. In the 2009 criminal case *R v Martens*, the Queensland Court of Appeal criticised the Commonwealth Director of Public Prosecutions and the Australian Federal Police for failing to provide documents that could help the defence in a criminal case.

The background to the cover up is that in earlier times breaches of the model litigant rules would once have been disclosed by the government in the annual report of the Attorney-General's Department. This is no longer the case. Yet one of the obvious purposes of an annual report is to highlight failures and problems that require public discussion and remedial action.

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131. The model litigation rules for the Commonwealth and Victoria are set out in Appendixes 1 and 2.
132. Merritt (2011)
Reforming Pleadings

Introduction

Litigation typically commences with pleadings. Problems with managing information are grounded in current pleading practices, which fail in two connected ways – they do not properly satisfy the stated aims of pleading, nor do they properly organise the information which a case generates. The purpose of this part of the article is to explain the proposed system of pleadings and to explain how this system can resolve problems that now infest current pleading practices. By pleading issues in the manner proposed here, parties make it so much easier and quicker for a court to resolve the issues in a case. At the same time they lessen uncertainty, which in turn should lessen the opportunity for tactical adversarialism.

Purpose of Pleadings

As conventionally understood, the purpose of pleadings consists of a principal aim and three subsidiary aims.

Principal Aim: Presentation of the Case

The principal aim of pleadings is presentation of the case. That is, pleadings inform the parties and the court what the case is about. This general aim, however, incorporates performance of a specific task that is of vital importance: pleadings should precisely define the issues of law and fact which the court has to try.

Subsidiary Aims

By performing the principal aim pleadings achieve three subsidiary aims:

# Subsidiary Aim 1: Natural Justice. Pleadings constitute a partial discharge of the obligations imposed on parties by the rules of natural justice – these obligations require each party to inform their opponent with ‘fair and proper

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133. In fact, there are variations with pleading between jurisdictions so the terms ‘current pleading practice’ portrays the standard means of pleading a case as detailed in the textbooks - see, for example, Dunstone (1997) and Young and Selby (1997). It is freely conceded that it is a loose term and not perfectly accurate. Consequently there may be and is modification to it in some jurisdictions. Nevertheless the term is useful to distinguish the system proposed here from the gist of systems now operating, while conceding two things – that there is variation among these systems and that some of these systems incorporate some of the provisions that are proposed here.

134. Gould v Mount Oxide Mines (1916) 22 CLR 490 per Isaacs and Rich JJ

notice’ of the case they have to meet.136 In consequence, parties can prepare and conduct their case properly.137

# Subsidiary Aim 2: Supervision of Trial. Both by informing parties of the case they have to meet and by defining the issues, pleadings enable a court to better supervise trial of the case.138

# Subsidiary Aim 3: Issue Estoppel and Res Judicata. By identifying the issues for trial, subsequent courts will be in a position to implement the doctrine of issue estoppel (which prohibits re-litigation of an issue that has already been decided)139 and res judicata (which prohibits re-litigation of a case that has already been decided). Only if a later court knows what was decided in the first case can they properly apply these legal prohibitions on re-litigating an issue or an entire claim.140

Problems with Pleadings

Introduction
As presently practised, there are two major problems with pleadings. First, they do not satisfy the aims of pleadings, and second, they do not properly organise the information that a case generates. In fact these problems are closely connected so that the one solution will fix both of them.

Failure to Fulfill Aims
Current practices with pleading do not fulfil either the aims of pleading.141 The main reason for this is that current practices are not squarely based on the axis that underlies a case. This axis is based on the three constituents of litigation – law, facts and evidence – and the relationship between them. For a plaintiff to win there are two requirements that reveal the link between these constituents:

1. Satisfying Elements. Each element of a cause of action defines a category of facts. To win a case the plaintiff must satisfy each element of the cause of action that underlies the case. A plaintiff does this in the first instance by

137. Thorp v Holdsworth (1876) 3 ChD 637, 639
139. Blair v Curran (1939) 62 CLR 464, Parking v James (1905) 2 CLR 315
140. Duchess of Kingston’s Case (1776) 2 Smith’s Leading Cases 13th ed 644, Outram v Morewood (1803) 3 East 346, Hoystead v Commissioner of Taxation [1926] AC 155 (PC)
141. An old lament of the problem is in Gould v Mount Oxide Mines (1916) 22 CLR 490 per Isaacs and Rich JJ. A more recent lament is in a newspaper article, Merritt (11 February 2011). There Chief Justice John Doyle of the South Australian Supreme Court remarked as he lamented the costs of litigation: ‘Judges routinely remark that the pleadings did not assist the judge, and do not appear to have assisted the parties to present the case as clearly and efficiently as it can be presented.’
asserting the appropriate material facts. Appropriate material facts are the facts that fall within the categories of facts defined by the elements of the cause of action.

2. Proving Facts. A plaintiff must produce evidence to prove any material facts that are in dispute between the parties.¹⁴²

This means that any proper system of pleading must rest properly on this axis if it is to describe the case and identify the issues in a proper manner. How to do this can best be described in two phases.

First, pleadings must refer to the three constituents of litigation and the relationships between them:

1. Elements and Consequences. Pleadings must state the elements and consequences of the cause of action.
2. Facts. Pleadings must state the facts alleged by the parties and within these facts identify the material facts (which are the facts that satisfy the elements of the cause of action).
3. Evidence. Pleadings must state the evidence that might prove or disprove these facts, with special emphasis on the evidence that might prove or disprove the material facts. That said, early in the proceedings it may be sufficient to state the evidence just in summary form. Moreover, the evidence may not all be available at the commencement of the case so parties may not be able to comply with this requirement fully in their initial version of the pleadings.

Second, need to define the specific issues of law, fact and discretion logically and precisely. To plead an issue of fact, which is the concern here, the pleadings need to state the following:

1. Elements. The element of the cause of action to which the disputed material fact relates. The plaintiff’s version of this material fact relates to the element in that it satisfies the element; in contrast to this the defendant’s version of the fact does not satisfy the element.
2. Facts. The versions of the material fact which the parties allege to be the true version.
3. Evidence. The evidence that is capable of proving each version of the disputed fact.

Current pleading practices fall a long way short of these requirements. In consequence they scarcely satisfy the aims of pleading. They fail to give a good description of the case. They fail to define the issues accurately and precisely. Since they fail in these principal aims of pleading, they fail in the subsidiary aims that depend on the principal aims being achieved. Current

¹⁴² While this relationship is simple and clear, it is amplified and illustrated in Enright (2011) ‘Model for Litigation’. 
pleading practices do not adequately inform a party of the case that they have to meet, they do not assist supervision of the case to any substantial extent and they do not greatly assist the operation of the doctrines of issue estoppel and res judicata.

Not surprisingly, these defects have been widely recognised. As the Australian Law Reform Commission put it, pleadings are ‘too often general in scope and inadequately particularised so that there is no narrowing of issues.’\footnote{143} In a similar vein Justice John Perry says that ‘too often the process [of pleading] becomes a meaningless and wordy ritual, the result tending to obscure rather than illuminate the issues.’\footnote{144} Indeed so well recognised is the problem that it ‘is rare for there to be a discussion of civil litigation without criticism of the rules and practices of pleadings.’\footnote{145}

**Failure to Organise Information**

There is a further problem with pleading that has so far has seemed to escape notice from critics. Pleadings do not even set out to perform, nor do they in fact perform, another important task for litigation, management of information. It is as if the concept comes from a foreign language.

**Reasons for Problems**

To a substantial extent the problems with pleadings arise because the rules are just not adequate to introduce a competent system. Specifically, pleading practices are not guided by the model for litigation, which is the natural framework for portraying litigation.\footnote{146}

However, the problems are made worse, and a culture is created that militates against change, by some common practices and attitudes. (i) Parties to a case ‘commence proceedings too early, without sufficient preparation or attempts at negotiation.’\footnote{147} (ii) Notions ‘of narrowing issues and not taking ones opponents by surprise’ are ‘anathema to the adversarial culture’ of litigation.\footnote{148} Consequently, lawyers ‘frequently use pleadings tactically and, for example, fail to admit matters pleaded that they know to be true or make allegations that

\footnote{143} Australian Law Reform Commission (2000) para [7.166]. A similar point is made by Mahoney (2003) in Sheard 2003 p 106 who says that with narrative pleadings at least, the task of defining issues of fact is ‘sometimes’ achieved, but ‘not often.’

\footnote{144} Dunstone (1997) p vii


\footnote{147} Australian Law Reform Commission (2000) para [7.166]

\footnote{148} Beaton-Wells (1998) p 44
they cannot prove at a hearing.' They might be considered as a fun game of hide and seek with information, but it mocks any claim to natural justice by informing a party of the case that they have to answer; it is also a gross misuse of public resources. Yet behaving in this way in an adversary system is regarded as ‘inevitable.’ (iii) Lawyers as a class, by lack of proper training, and possibly by culture as well, are not properly versed in managing and organising information. A quick illustration is the frequent practice of judgments giving incomplete citation of secondary sources. Performance of lawyers in this regard makes sharp contrast with other professions such as historians, accountants, social scientists and statisticians who are fastidious about organising information. (iv) Inexact pleading ‘is rarely the subject of sanction.’ (v) Courts allow ‘frequent amendment of pleading.’

**Solving the Problems**

Given all these problems with pleadings, the way forward is to devise a system of pleading that comprehensively and effectively performs two tasks. This system must satisfy the aims of pleading, which are to present the case fully to the court and to the parties, and in so doing it must define precisely the issues of law and fact between the parties. It must also provide a framework for managing the documented information that a case generates.

The requirements for a good system of pleading are as follows. They are clear. They are simple. They incorporate everything of relevance (including the elements of the cause of action). They make a clear statement of the factual issues for trial by indicating the element of the cause of action where each issue is located, the two (or more) versions of the facts that parties are alleging and (even if this is deferred to a later stage of the case) an outline of the evidence that parties will use to prove the disputed facts.

The plaintiff pleads their case in a basic way but with enough detail, as they judge it, to achieve two things. It enables the parties to understand the case that the other party is putting. It enables the parties to identify the issue prior to any settlement conference.

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Plaintiff’s Pleadings

Setting Out the Case
A plaintiff’s suggested pleadings consist of three items:
1. Statement of Elements. They set out the elements of the cause of action.
2. Statement of Facts. They set out a statement of the key facts. This statement has numbered paragraphs.
3. Statement of Evidence. The plaintiff sets out a brief statement of the evidence that they possess to prove the material facts. The plaintiff can amplify this statement when it becomes relevant, for example in mediation proceedings or in the process of preparing for trial.
4. Statement of Case. In their statement of case the plaintiff lists the elements of the cause of action. They then indicate the fact or facts that satisfy each element. They note the number or numbers of the paragraph(s) in the statement of facts where the pleadings state each material fact.

Request to the Defendant
At the end of the statement of their case the plaintiff makes a request of the defendant:
1. Defendant’s Case. State your case using the same framework.
2. Agreement or Disagreement. Indicate if you agree or disagree with the statement of the elements, the statement of facts and the statement of case.

Defendant’s Pleadings
The defendant’s pleadings at this stage consist of three items:
1. Statement of Elements. The defendant indicates if they agree or disagree with the plaintiff’s formulation of the elements. If they disagree they need to indicate their version of the elements.
2. Statement of Facts. The defendant give their statement of facts, which must cover the same ground as the plaintiff’s statement of facts, even if it goes beyond that. As with the plaintiff’s facts, the defendant’s statement is based on their preliminary investigation (as distinct from a full investigation).
3. Statement of Evidence. The defendant sets out a brief statement of the evidence that they possess to prove the material facts. The defendant can amplify this statement when it becomes relevant, for example in mediation proceedings or in the process of preparing for trial.
4. Statement of Case. In their statement of case the defendant lists the elements of the cause of action. They then respond to the plaintiff’s case in the following way.
   4.1 Agreement. They indicate the elements in relation to which they agree with the plaintiff’s case.
   4.2 Disagreement. They indicate the elements in relation to which they disagree with the plaintiff’s case. For these elements they describe briefly their
version of the facts and cite the place in their statement of facts where those facts are set out in more detail.

**Reforming Disclosure**

Disclosure is used here as a generic term to include all of the mechanisms for one party’s revealing information and facts to the other party and granting them access to documents, property and objects. Reform of the rules of disclosure takes the following path:

1. Parties are obliged to define the issues clearly and at the commencement of the case. This comes from reforming the rules and practice of pleading.
2. Put parties under a duty of mutual and reciprocal disclosure of all types of matter relevant to the case, most obviously facts, information and the evidence. This duty applies regardless of whether the material disclosed is favourable or unfavourable to their case.\(^{153}\) This duty commences once the case has commenced and continues right throughout the term of the case.
3. Parties come together for an evidence conference that is presided over by a court officer. Each party outlines the evidence they will use to prove their case. This is also the opportunity for each party to check with the other party as to any evidence, fact and information they have not yet disclosed. If needs be one party can examine the other party on oath as to the existence and location of evidence, documents, facts and information. Parties can ascertain whether there are facts that should be admitted. They can also discuss ways of facilitating proof. The function of the presiding officer is to ensure that there is no obvious evidence missing, the parties play fair and that parties use their best endeavours to take any action that will facilitate the subsequent trial of the case.
4. Once disclosure is completed each party files a statement of evidence. They indicate in that statement in outline the evidence that they plan to adduce to prove each disputed material fact. This can guide the parties and the court in managing any trial.

**Statement of Purpose**

**Introduction**

Some jurisdictions have enacted provisions that state the purpose of the primary and delegated legislation that regulate civil proceedings. The broad thrust of these provisions is similar from jurisdiction to jurisdiction. The aim is twofold:

1. To control the way that the court interprets the provisions and exercises any discretion that the provisions confer.
2. To provide a benchmark for the behaviour of litigants and lawyers.\(^ {154}\)

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154. For a fuller discussion see Christopher Enright (2011) *Early Steps for Organising and Settling a Case: Commonwealth, New South Wales and Victoria.*
Definition of Overarching Purpose
Section 37M of the *Federal Court of Australia Act 1976* is a good illustration of a statement of purpose. It sets out the overarching purpose of the civil practice and procedure provisions. Section 37M(1) puts forward a general statement of purpose. Section 37M(2) supplements this with specific objectives that explain the general statement but without limiting it.

**General Statement**
Section 37M(1) provides that the overarching purpose of the civil practice and procedure provisions is to facilitate the resolution of disputes according to three criteria that really amount to a simple statement that courts should, as far as circumstances allow, resolve disputes legally, fairly, quickly and inexpensively:

- **Criterion (1).** The resolution must be ‘just’. 155
- **Criterion (2).** The resolution must be done ‘according to law’. 156 This is in fact a limiting provision that reduces the scope of Criterion 1 that seeks a just resolution.
- **Criterion (3).** The resolution must be carried out ‘as quickly, inexpensively and efficiently’ as possible. 157

**Specific Objectives**
Section 37M(2) supplements this general statement with specific objectives that explain the general statement but the supplements operate ‘[w]ithout limiting the generality’ of s37M(1). Section 37M(2) provides that the overarching purpose includes the objectives set out in s37M(1)(a)-(e). These are as follows (with front end labels inserted by the author):

(a) **Justice.** The just determination of all proceedings before the Court.
(b) **Efficiency: Court’s Resources.** The efficient use of the judicial and administrative resources available for the purposes of the Court.
(c) **Efficiency: Court’s Caseload.** The efficient disposal of the Court’s overall caseload.
(d) **Timeliness.** The disposal of all proceedings in a timely manner.
(e) **Proportionate Cost.** The resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

**Function of Overarching Purpose**
Provisions defining the overarching purpose perform at least three functions:
1. **Interpretation of the Legislation.** Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides that a statute must be interpreted so as to further its purpose and object. Section 15AA indicates two possibilities about the purpose

155. *Federal Court of Australia Act 1976* s37M(1)
156. *Federal Court of Australia Act 1976* s37M(1)(a)
157. *Federal Court of Australia Act 1976* s37M(1)(b)
or object of the Act – it may be stated or unstated. In this case regarding overarching purpose it is stated. It is written bold and juridically in statute. This means that a court has to interpret these civil procedure provisions in a manner that best promotes this purpose.

2. Exercise of Discretions in the Legislation. The statement of overarching purpose must guide the exercise of any discretions conferred on the court. Section 37M(3) confirms and reinforces this. It provides that the civil practice and procedure provisions (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

3. Behaviour of Parties and Lawyers. Section 37N imposes duties on parties and lawyer in effect to implement the overarching purpose. It requires them to act in a way that is consistent with the overarching purpose.

**Case Management**

Case management is the anti-venom that is intended to offset directly the poison that tactical adversarialism injects into the justice system. Case management provisions authorise the court to make a wide range of orders in the interests of justice. Courts can use appropriate case management according to need and circumstances to move a case along.

**Powers of Case Management**

Section 37P(2) of the *Federal Court of Australia Act 1976* confers power on the Court or a Judge to give directions. It does so in wide and general terms. The Court or a Judge may give direction about the practice and procedure to be followed in relation to civil proceeding, or any part of the proceeding. This power is supplemented by powers to make specific orders. Section 37P(3) indicates some specific powers that the Court or a judge may exercise and does so on the basis that conferral of these specific powers does not limit the generality of s37(2). Section 37(3)(a)-(g) sets out these powers, which are that a direction may do any of the following:

(a) Require things to be done.
(b) Set time limits for the doing of anything, or the completion of any part of the proceeding.
(c) Limit the number of witnesses who may be called to give evidence, or the number of documents that may be tendered in evidence.
(d) Provide for submissions to be made in writing.
(e) Limit the length of submissions (whether written or oral).
(f) Waive or vary any provision of the Rules of Court in their application to the proceeding.
(g) Revoke or vary an earlier direction.
Use of Powers
It is up to the court to determine the extent to which it uses its case management powers. These may involve merely ‘hurrying up’ the parties. Or they may involve quite extensive intervention in the running of the case. For example, faced with crushing burdens of work the Victorian Director of Public Prosecutions, Jeremy Rapke QC, has argued that judges should gag lawyers who are long winded.\footnote{158}{Kissane (2008)}

Early Steps Provisions
The Commonwealth and New South Wales have provisions that require parties and their lawyers to take steps early in the life of a case to seek to settle the case.\footnote{159}{Civil Disputes Resolution Act 2011 (Cth), Civil Procedure Act 2005 (NSW) Part 2A. See Christopher Enright (2011) Early Steps for Organising and Settling a Case: Commonwealth, New South Wales and Victoria.}

Mediation Within the Court System
There are practical and symbolic advantages in having mediation as part of the court system. That said, there are actual or perceived problems if the trial judge performs the mediation. For this reason mediation is best offered within the system but by someone other than the trial judge.

Case Appraisal
The trigger for a case appraisal could be the consent of both parties or the consent of one party and the judge. Case appraisal refers to a non-binding form of adjudication. The case is sent to an experienced litigation lawyer. One option is to scrutinise the case based on documents and written submissions (or with brief oral submissions) to cut time and costs. The appointed appraiser reviews the evidence in the light of the claims and gives their decision. Parties can accept or reject the decision, or use it as a starting point for negotiations for settlement. If they reject it the case can go to trial (unless otherwise disposed of). At trial the judge can take into account the results of the case appraisal in determining costs; in this way there can be a cost penalty for a party who persists against the judgment of the person who appraised the case.

Adjudication of Specific Issues
An option is for a court to hear one or more specific issues as distinct from the whole case. There is value in this if these issues are crucial and such that a losing party is likely to be willing to settle the case.
Modifying the Rules of Evidence

The law of evidence contains a number of technical rules that make relevant evidence otherwise inadmissible or admissible only under certain conditions. These may protect an accused in a criminal trial before a jury. In civil cases there are two useful reforms. First, in a trial by judge alone, there is a strong case that ‘evidence should be a question of weight rather than admissibility’. Second, there is the case where ‘the exclusion of evidence causes unnecessary expense or delay’. A way to counter this is to institute a ‘proposed a rule which will allow a judge to dispense with compliance with them where compliance might occasion or involve unnecessary or unreasonable expense or delay’.

5.3. Sanctions

There are some sanctions the threat of which might deter excessive adversarial behaviour that was not directed towards seeking a just, timely and efficient resolution of the dispute. These concern the following:

- Award of Costs
- Directions and Orders
- Compensation
- Disciplinary Proceedings

Award of Costs

Generally courts have wide powers with regard to costs. Conventionally and commonly a court order a losing party to pay the costs of the winning party and directs that the costs be assessed on a party-party basis. However the statutory provisions for civil procedure also authorise a court to award costs against a winning party or against a lawyer and to award costs not just on a party-party basis but also on an indemnity basis. The broad rationale for these awards is that the party in question behaved in a way that contributed to the incurring of unnecessary costs by the other side.

161. In Smith v Buller (1875) 19 Eq 473, 475 Malins VC explained party/party costs as the costs ‘that are necessary to enable the adverse party to conduct the litigation and no more’. He added that ‘[a]ny charges merely for conducting the litigation more conveniently…must be paid by the party incurring them.’
162. Where costs are awarded on an indemnity basis the payee can recover all their actual costs except those that were ‘unreasonably incurred’ or were ‘unreasonable in amount’ (Four v Le Roux [2007] UKHL 1 per Lord Scott). This formula is commonly enacted in court rules.
163. To illustrate, see the powers of Federal Court to award costs, which are conferred by the Federal Court of Australia Act 1976 s43, read with s37N and s37P, and with Federal Court Rules Part 40 which contains rule 40.01-40.08.
Directions and Orders
Generally courts have very wide powers give directions or make orders, prompting the comment that they have power to do anything except turn day into night. The constraint on these powers is that they must be exercised to further the interests of justice.\textsuperscript{164}

To illustrate, the major general powers of the Federal Court to give directions are found in s37P of the \textit{Federal Court of Australia Act 1976} and rule 5.04 of the \textit{Federal Court Rules}. These general powers are supplemented or reinforces by numerous specific powers. See, for example, the \textit{Federal Court of Australia Act 1976} s37P and s53A and rule 5.04 of the \textit{Federal Court Rules}.

Compensation
There is a possibility that a party or a lawyer who has suffered loss or damage because of excessive adversarial behaviour may have an action for damages. The basis of such an action would be the provisions in the statutes regulating some courts that impose duties on the parties. An obvious example, discussed above, consists of the provisions imposing a duty on lawyers and parties to conduct themselves in a way that furthers the purpose of the provisions of the statute regulating the court.

There are three possible sources of remedy. First, there may be a statutory provision that directly authorises compensation. An example is s29(1)(c) of the \textit{Civil Procedure Act 2010 (Vic)} provides for an award of compensation. The prerequisite is that the court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation. The court is then authorised to make any order it considers appropriate in the interests of justice. These orders include but are not limited to the orders designated in s29(1)(a)-(f). Section 29(1)(c) authorises the court to make ‘an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation’. This order can include, as per s29(1)(9)(c) (i) and (ii), either of the following orders:
1. An order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding.
2. An order for no interest or reduced interest.

\textsuperscript{164.} See, for example, the \textit{Federal Court of Australia Act 1976} s43, read with s37N and s37P, and with \textit{Federal Court Rules} Part 40 which contains rule 40.01-40.08.
The other two sources may be no more than arguable but are mentioned for the sake of completeness. It is possible that the inherent power of the court authorises it to award damages by way of compensation. The conduct may found an action at common law for breach of statutory duty.

**Disciplinary Proceedings**

There is now an array of statutory provisions for early steps for settling a case, laying down the fundamental purpose of civil litigation and obliging practitioners to act accordingly, and for case management. Consequently there is now little scope for behaviour that could constitute tactical adversarialism. These provisions mean that a lawyer who engaged in the conduct is in all probability breaching their professional obligations. In this case they may be liable to disciplinary proceedings by the appropriate regulatory body.

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**Appendix 1 Model Litigant Requirements: Commonwealth**

**Legal Services Directions 2005**

This direction is set out as amended. This direction is made under section 55ZF of the *Judiciary Act 1903*.

**Commonwealth’s Obligation to Act as a Model Litigant**

**The Obligation**

1. Consistently with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

**Nature of the Obligation**

2. The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:
   (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
   (aa) making an early assessment of:
      (i) the Commonwealth’s prospects of success in legal proceedings that may be brought against the Commonwealth; and
      (ii) the Commonwealth’s potential liability in claims against the Commonwealth
   (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
   (c) acting consistently in the handling of claims and litigation
   (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative
dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
   (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true
   (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
   (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and
   (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
(g) not relying on technical defences unless the Commonwealth’s or the agency’s interests would be prejudiced by the failure to comply with a particular requirement
(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Note 1
The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

Note 2
In essence being a model litigant requires that the Commonwealth and its agencies as parties to litigation act with complete propriety fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See for example *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.
The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances it will be appropriate for the Commonwealth to pay costs (for example for a test case in the public interest.)

The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

 Appendix 2 Model Litigant Requirements: Victoria

Guidelines on the State of Victoria’s Obligation To Act As a Model Litigant

1. In order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation.

2. The obligation requires that the State of Victoria, its Departments and agencies:
   (a) act fairly in handling claims and litigation brought by or against the State or an agency,
   (b) act consistently in the handling of claims and litigation,
   (c) avoid litigation, wherever possible,
   (d) pay legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount paid,
   (e) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:
      (i) not requiring the other party to prove a matter which the State or the agency knows to be true, and
      (ii) not contesting liability if the State or the agency knows that the dispute is really about quantum,
   (f) do not rely on technical defences unless the State’s or the agency’s interests would be prejudiced by the failure to comply with a particular requirement,
   (g) do not take advantage of a claimant who lacks the resources to litigate a
legitimate claim, and
(h) do not undertake and pursue appeals unless the State or the agency believes
that it has reasonable prospects for success or the appeal is otherwise justified
in the public interest.

Notes
1. The State of Victoria acknowledges the assistance of the Commonwealth in developing
these Guidelines. The Guidelines are based on the Directions on the Commonwealth’s
Obligation to Act as a Model Litigant, which were issued by the Commonwealth Attorney
General pursuant to section 55ZF of the Judiciary Act 1903.

2. The obligation applies to litigation (including before courts, tribunals, inquiries, and in
arbitration and other alternative dispute resolution processes) involving State Departments
and agencies, as well as Ministers and officers where the State provides a full indemnity in
respect of an action for damages brought against them personally. Ensuring compliance
with the obligation is primarily the responsibility of the agency which has responsibility for
the litigation. In addition, lawyers engaged in such litigation, whether Victorian
Government Solicitor, in-house or private, will need to act in accordance with the
obligation to assist their client agency to do so.

3. In essence, being a model litigant requires that the State and its agencies, as parties to
litigation, act with complete propriety, fairly and in accordance with the highest
professional standards. The expectation that the State and its agencies will act as a model
litigant has been recognised by the Courts. See, for example, Melbourne Steamship Limited
v Moorhead (1912) 15 CLR 133, 342; Kenny v State of South Australia (1987) 46 SASR
268, 273; Yong Jun Qin v The Minister for Immigration and Ethnic Affairs (1997) 75 FCR
155.

4. The obligation to act as a model litigant may require more than merely acting honestly
and in accordance with the law and court rules. It also goes beyond the requirement for
lawyers to act in accordance with their ethical obligations.

5. The obligation does not prevent the State and its agencies from acting firmly and
properly to protect their interests. It does not therefore preclude all legitimate steps being
taken to pursue claims by the State and its agencies and testing or defending claims against
them. The commencement of an appeal may be justified in the public interest where it is
necessary to avoid prejudice to the interests of the State or an agency pending the receipt or
proper consideration of legal advice, provided that a decision whether to continue the
appeal is made as soon as practicable. The obligation does not prevent the State from
enforcing costs orders or seeking to recover its costs.

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