

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
‘ACCESSING JUSTICE AND DISPENSING IT JUSTLY:
SOME ASSORTED THOUGHTS’
HAIL TO THE CHIEFS! – SALVOS LEGAL LECTURE SERIES
SATURDAY 8 NOVEMBER 2014*

1. Good afternoon. It’s an absolute pleasure to have been invited to speak at such an interesting event which is in aid of an important cause. Before I begin, I’d like to respectfully acknowledge the traditional owners of the land on which we meet and pay my respects to their elders, past and present.

2. Can I also acknowledge Chief Justice Carmody, Justice Price and Judge Henson who you’ve heard from this morning, and Chief Justice Allsop, who will no doubt give a compelling address later this afternoon about case management and the obligations of the profession. I’d also like to thank Luke for inviting me to be a part of today’s event, and (as I’m sure all the speakers before me have done so), to congratulate Salvos Legal for receiving the LawyersWeekly Law Firm of the Year Award for 2014. It’s a testament to the excellent work of Salvos Legal and Salvos Humanitarian in the few years since they were formed, and also to their innovative structure. Innovation and change in the profession are topics that I will return to later.

3. It’s certainly amusing to have been invited to speak under the banner of *Hail to the Chiefs!*, and you might think it wouldn’t be too bad for the ego either. However, one of my staff members sadly told me that the tune ‘Hail to the Chief’ as we know it today had an unfortunate beginning. Apparently, it came to be associated with the President of the United States as a result of James Polk, the 11th President. Supposedly he was a fairly unimpressive

* I express my thanks to my Research Director, Haydn Flack, for his assistance in the preparation of this address.

figure, and Hail to the Chief was played to avoid the embarrassment of no one noticing his arrival in the room.¹ I hope that isn't the case for me today.

4. In that vein, I can't remember if I was allocated or chose this session immediately after the lunch break. There are differing views about whether it's beneficial or a great disadvantage to have a job interview straight after lunch. I've also heard about a study (not in Australia, I might add), which found that parole decisions favourable to the offender increased noticeably after a meal.² Whether this timeslot happens to be good or bad, can I thank you for coming back after lunch and for supporting Salvos Humanitarian.

5. In terms of my topic today, the only suggestion that Luke gave me was something to do with either public interest issues, practice skills, or a pro bono-type matter. I don't mind a challenge and have decided to make an attempt at combining all three under the banner of '*Accessing justice and dispensing it justly*'. I want to set the scene by reading a couple of brief sentences from a report that was released only a few months ago. You can try to guess which jurisdiction it is from. The executive summary begins:

'The legal profession in [X] is entering a period of major change. The combined forces of globalization, technology, and market liberalization are creating new services, new delivery mechanisms, and new forms of competition. Those changes are altering client needs and expanding client expectations. Clients want services to be quicker, cheaper, and smarter...

¹ See Library of Congress, "Hail to the Chief" *Performing Arts Encyclopedia* available at <http://lcweb2.loc.gov/diglib/ihhas/loc.natlib.ihhas.2000000009/default.html>.

² S Danziger, J Levav and L Avnaim-Pesso, "Extraneous factors in judicial decisions" (2011) 108:17 *Proceedings of the National Academy of Sciences of the United States of America* 6889.

At the same time that the demand from existing clients is changing, there are still many individuals and communities in [X] with inadequate access to any type of legal services...³

6. What community and legal profession is the report talking about? The best answer is that it probably doesn't matter much at all. Lon Fuller's famous *Case of the Speluncean Explorers* – the trial of which was set in the fictional Commonwealth of Newgarth – concluded with the words that the case went no further than the fact that the issues it raised were among the permanent problems faced by humankind.⁴ It could equally be said that the challenges in this report's opening passage – a profession undergoing change, shifting client expectations and poor access for many people to legal services – are themes which are common across advanced legal systems.
7. However, there's no need to be vague. The report deals with the future of the profession and the delivery of legal services in Canada, and was prepared by the Canadian Bar. I'll make several references to it this afternoon, and also to a second report by the Canadian Bar concerning equal justice.⁵ Together, they provide an interesting illustration of the fact that challenges confronting the profession here – particularly as to the need for innovation and ongoing difficulties in ensuring access to justice for all members of the community – share commonalities across the hemispheres.
8. In the time I have available, I want to begin by discussing a number of features of the legal system and the profession which inhibit access to justice, and some of the innovative steps being taken to address those challenges. I'll then turn to several consequences that flow from restricting

³ Canadian Bar Association, *Futures: Transforming the delivery of legal services in Canada* (Report, August 2014) at 6. Available at <http://www.cbafutures.org/>.

⁴ L Fuller, "The Case of the Speluncean Explorers" (1949) 62 *Harvard Law Review* 616.

⁵ Canadian Bar Association, *Reaching equal justice: an invitation to envision and act* (Final Report, November 2013). Available at <http://www.cba.org/CBA/equaljustice/main/>.

access to justice, before dealing with the need for broad discretionary principles to enable courts to respond flexibly to the conduct of proceedings.

I ACCESS TO JUSTICE: SOME PROBLEMS

9. But first, access to justice. It goes without saying that access to the courts is an essential feature of the rule of law.⁶ As Lord Diplock forcefully put it in the decision of *Bremer Vulkan v South India Shipping*:

‘Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them.... The means provided are courts of justice to which every citizen has a constitutional right of access...’⁷

10. However, providing the means for resolving disputes between citizens (and between government and citizen I might add), is not just a matter of having well-resourced courts. That, however, is not to say that court funding isn’t a significant issue, and one that I could happily speak about at considerable length. Delays in decision-making have historically been singled out as a substantial impediment in obtaining access to justice, and it remains a key issue for those of us who deal with judicial administration on a daily basis. Putting that aside, an equally important matter is the need for individuals to be sufficiently empowered to approach a court or tribunal in order to seek a remedy for their complaint and to present their case for adjudication. In this respect, access to justice demands an independent judiciary, resources to manage the volume of disputes brought before it, and mechanisms to ensure that all community members have the means to approach the courts.

⁶ See eg T Bingham, *The Rule of Law* (Allen Lane, 2010) Ch 8.

⁷ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 977 discussed in eg *Vanmeld Pty Ltd v Fairfield City Council* [1999] NSWCA 6; (1999) 46 NSWLR 78 at [115].

11. Unfortunately, there are regular reminders that give renewed currency to the well-worn adage that ‘In England, justice is open to all, [just] like the Ritz hotel.’ One recent example that comes to mind is a 2012 Australian survey which found that a third of respondents had experienced a legal problem in the previous five years, and just over one in 10 had not sought legal advice because of either financial constraints or a lack of knowledge.⁸ Far more troubling was the fact that more than 80 per cent agreed with the propositions that the legal system is too complicated to understand properly and that only the wealthy can afford to protect their rights, while more than half agreed that courts are no place for an ordinary person.⁹ These responses starkly illustrate community perceptions of access to justice.

12. It is necessary to be mindful of the fact that court procedures and *proportionate* legal costs act as a disincentive to ensure that people don’t attempt to resolve every minor dispute in a court. As former Chief Justice Gleeson noted, despite being an unpopular idea ‘It is rarely acknowledged that cost and delay prevent the civil justice system from being overwhelmed.’¹⁰ A more obvious deterrent are costs orders. While the indemnity is usually only partial, the presumption that costs follow the event – particularly when compared to the default approach in the United States – functions as a deterrent. Whether or not this approach to costs is actually the most appropriate means for promoting access to justice is a separate question. What can be accepted is the need for some disincentive to be built into the justice system, to prevent courts from being overburdened and to indicate the severity of disputes that should be brought before them.

⁸ R Denniss, J Fear and E Millane, The Australia Institute, “Justice for all”, Institute Paper No. 8 (March 2012) at 1-2, 18. See also Law and Justice Foundation of NSW, “Taking no action: unmet legal need in New South Wales?” (Updating Justice No 6, October 2012), which draws on C Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in New South Wales* (Law and Justice Foundation of NSW, 2012).

⁹ *Ibid* at 2, 22.

¹⁰ The Hon M Gleeson AC, “The purpose of litigation” (2009) 83 *Australian Law Journal* 601 at 607.

13. Access to justice should not, however, be based on economic modeling which is aimed at disincentivising people from going to court by increasing fees and charges to make it 'uneconomic' for them to do so. I'm yet to see any modeling that could conceivably input all the integers necessary to attempt this type of calculation. However, any such modeling, no matter how sophisticated it was, could not take into account the importance of persons, regardless of their financial position, from having access to the courts. To in effect attempt to price the courts out of the market ignores the fundamental importance of the courts in a democratic system. The role of government is not, as it were, to structure the system to restrict its reach, no matter how attractive that might seem to certain schools of economic thought. It is the role of government to ensure an adequately resourced judicial system which is available to all litigants at a reasonable cost.
14. Having said that, I would point to three factors which have had an adverse effect on access to justice in a very real sense. The first is complexity. Reference is often made to the exponential growth in the length and intricacy of modern statutes.¹¹ On previous occasions I've pointed to income tax and competition legislation as obvious examples.¹² My view of the latter is reflected in the recent draft report of the review into competition policy which is being chaired by Professor Ian Harper.¹³ Legislation can hardly be described as approachable when you can almost play scrabble with the letters in the section headings;¹⁴ let alone the fact the provisions that are most relevant to consumers are hidden in a schedule to the Act.

¹¹ See eg Lord Neuberger, "Justice in an Age of Austerity", *Justice – Tom Sargant Memorial Lecture 2013* (15 October 2013) at 4-7.

¹² The Hon T F Bathurst AC, Annual dinner occasional address, Univeristy of Western Sydney Law School Alumni Association (Sydney, 8 November 2013) at 7-9.

¹³ *Competition Policy Review* (Draft Report, September 2014) available at <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>. Particular reference is made to the complexity of provisions in the *Competition and Consumer Act 2010* (Cth) which address cartel conduct (at 222) and third line forcing (at 232-233).

¹⁴ Section 44ZZOAAA of the *Competition and Consumer Act 2010* (Cth) is a good example.

15. There are, however, countless examples of undue complexity in legislation which is more likely to directly affect the personal or professional lives of members of the community. Retail tenancy – an issue that is of great significance to many small business owners – is an area where there has been repeated criticism of the legislation being unduly prescriptive in certain respects.¹⁵ The issue of penalty notice offences is also one that affects many members of the community,¹⁶ and where there have been calls to improve clarity and accessibility.¹⁷ A great deal can be done to reduce unnecessary complexity in statutes, just as there is much that courts can continue to do to make judgments clearer and more approachable.

16. In terms of the judicial system, we have seen the introduction of specialist tribunals for certain matters as a response to the perceived complexity, cost and formality of traditional courts. NCAT – like so-called super tribunals in other Australian jurisdictions – was implemented with the goal of providing an accessible and responsive forum,¹⁸ while also consolidating a previously elaborate system of 22 discrete tribunals. Forums like NCAT do provide an informal setting for less complex disputes. However, it would be a mistake to suggest they offer a complete solution to the complexities of the system.

17. While tribunals may be informal, with litigants generally not burdened by the rules of evidence,¹⁹ parties cannot avoid grappling with the legislation that governs their dispute. In addition, there is an appellate process which has the potential to add a considerable layer of complexity.²⁰ In fact the system of appeals from tribunals could, in some ways, be said to be more complex

¹⁵ See eg NSW Office of the Small Business Commissioner, 2013 Review of the *Retail Leases Act 1994* (Discussion Paper) at 5, 33-35; Productivity Commission, “The Market for Retail Tenancy Leases in Australia” (Report No 43, March 2008) at xvi, xxvii, 233ff. The Senate Standing Committee on Economics is scheduled to deliver a report in relation to the need for a national approach to retail leasing in March 2015.

¹⁶ R Denniss, J Fear and E Millane, The Australia Institute, “Justice for all”, Institute Paper No. 8 (March 2012) at 20 identified parking and speeding fines as the most common area with unmet legal needs.

¹⁷ New South Wales Law Reform Commission, *Penalty Notices* (Report 132, February 2012) at 35-37. The Report notes that NSW has over 7,000 penalty notice offences under approximately 110 different statutes.

¹⁸ *Civil and Administrative Tribunal Act 2013* (NSW), s 3(c).

¹⁹ *Civil and Administrative Tribunal Act 2013*, s 38(2)-(3).

²⁰ Appeals from NCAT are dealt with in Div 3 of Pt 6 of the *Civil and Administrative Tribunal Act 2013*.

and confusing for litigants that the traditional avenues of appeal from a lower to a superior court. There is no doubt that concepts like error of law and jurisdictional error are not easily explained to self-represented litigants.

18. The second challenge is costs. Costs and access to justice are usually considered through the prism of the price of legal services being prohibitive for many members of the community. There is absolutely no doubt that the cost of legal representation (and, notably, the related issue of the reach of legal aid, which I will address shortly), are significant barriers in gaining access to justice. However, the particular costs that I want to mention are actually those that are associated with running a legal practice today.

19. I think it is probably fair to suggest that for many members of the community a discussion of lawyers evokes images of large marble foyers in even larger city office blocks. That picture is far from reality. It is true that around half of the profession in New South Wales practices within Sydney's CBD.²¹ However, the Law Society's most recent review of the profession reveals that of the 5,300-odd legal practices in the State, nearly 90 per cent are sole practitioner firms, and less than 1 per cent have 11 or more partners.²² I think that for many people – both lawyers and non-lawyers alike – these figures would come as quite a surprise. They are particularly startling when considered alongside the fact that around two thirds of a sole practitioner's gross income is consumed by overhead expenses.²³

20. I am not in any way trying to suggest that lawyers aren't paid enough. I know many practitioners who are paid a great deal at firms which probably match the image that most people have of legal practice today. However, I

²¹ Urbis, "2013 Profile of the Solicitors of NSW", Prepared for the Law Society of New South Wales (Final Report, December 2013) at 10.

²² Urbis, "2013 Profile of the Solicitors of NSW", Prepared for the Law Society of New South Wales (Final Report, December 2013) at 18.

²³ Legal Fees Review Panel, *Legal Costs in New South Wales* (Report, December 2005) at 4-5, discussed in Centre for Innovative Justice, *Affordable Justice* (Report, October 2013) at 20. According to data provided to the Review Panel, overheads consume between 62.8% and 73.3% of a sole practitioner's gross income.

know an equal number who run their practice on the smell of an oily rag. Insurance, practising certificates and other overheads are not at all cheap.

21. But what, you might ask, does this have to do with access to justice? I would suggest that it may well have a considerable effect on the extent of pro bono services offered by many practitioners. The profession does a marvelous job in terms of work provided for free or at a reduced rate. However, it is fairly obvious that the higher the cost of running a practice, the less scope there is for a principal or their employees to provide pro bono assistance. I would say the consequences are twofold. First, there may be a need for practitioners to consider ways in which they could adjust their business. In this respect, I want to discuss innovation in the profession shortly. Second, there must be recognition that for various reasons, pro bono work does not have the capacity to fill gaps that exist in terms of legal need in the broader community. As a consequence, lawyers may need to more actively voice the effect that the level of legal aid funding can have.

22. Legal aid funding is the third issue in relation to access to justice that I want to raise. As you might expect, it is a subject about which I need to choose my words carefully. An uncontroversial place to start is to acknowledge the role of government-funded legal aid in this country: it is a fundamental and indispensable component of an effective justice system founded on the rule of law. Legal aid is not only an essential ingredient in facilitating access to justice; it has also been repeatedly found to deliver value to the community well beyond its direct cost.²⁴ It can prevent further disputes from arising, and it also increases efficiency in the justice system by reducing the number of litigants who would otherwise be appearing without representation.

²⁴ See eg PricewaterhouseCoopers, "Economic value of legal aid", Report prepared for Legal Aid Queensland (2009). See also various reports referred to in Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 619-621.

23. The actual dollar value of legal aid funding in this country and whether it is sufficient to meet legal need is a topic which I will leave for others to debate. It will no doubt be dealt with at length in the Productivity Commission's final report into Access to Justice Arrangements, which was delivered to the federal government in September but is yet to be released to the public. What I will briefly note is that the draft report indicates that funding in real terms has increased over the past decade, while the level of per person funding has declined marginally.²⁵ Against that, in its submission to the inquiry, Legal Aid New South Wales described its means test as '*mean*'.²⁶ The obligation to devote already limited resources to criminal matters has had a significant effect on the extent of legal aid available for civil cases.²⁷
24. In my opinion, there is a need to increase the public value placed on legal aid services. The Canadian report that I referred to earlier notes there is overwhelming community support for legal aid.²⁸ While I'm not aware of any such polling in Australia, I would hazard a guess that the results would be fairly similar.²⁹ Despite this, there often seems to be little public opposition to cuts in legal aid funding when they occur. Perhaps, unsurprisingly, while threatening to lock more people up is seen as a vote winner, providing money to those who are accused of crimes (let alone those with civil grievances) does not generate much political capital. To put it another way, I would think it would be much easier to dismantle some form of 'Legalcare' in Australia than it would be to tamper with Medicare. That is not to devalue

²⁵ Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 601-602.

²⁶ Legal Aid NSW submission to the Productivity Commission's Inquiry into Access to Justice arrangements (October 2013) at 86, referred to in Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 645.

²⁷ See eg Legal Aid NSW submission to the Productivity Commission's Inquiry into Access to Justice arrangements (October 2013) at 102; Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 584, 626-630.

²⁸ Canadian Bar Association, *Reaching equal justice: an invitation to envision and act* (Final Report, November 2013) at 14.

²⁹ R Denniss, J Fear and E Millane, The Australia Institute, "Justice for all", Institute Paper No. 8 (March 2012) at 23 did ask respondents which groups the government should fund legal aid for. The responses were 'everyone, regardless of wealth' (19%), 'everyone except the rich' (44%), 'only the very poor' (26%), and 'everyone should have to pay for their own lawyer if they need one' (4%).

the importance of public health, but rather to point out what seems to be a deficiency in public support – or rather vocal support – for access to justice.

25. So what can be done to improve access to justice, particularly in relation to these three issues? First, there is plenty that legislatures as well as the judiciary can continue to do to reduce complexity. To a degree, judgments can be made more approachable, and as many of you will know, the Supreme Court is now producing judgment summaries for decisions that are of significance or general interest. Parliaments could also consider the merits of a light touch, or less-is-more, approach to drafting. Second, and very simply, the legal profession must actively promote the importance of access to justice and the value of government-funded legal aid. This requires each member of the profession to raise these issues with people in the community who might not fully appreciate the significance of our legal system and the difficulties that many people face in accessing it. In this respect, I'm probably not doing well today by talking with a group who I assume are already members of the choir of the converted.

26. Finally, there is considerable scope for further innovation in the profession. This naturally leads me back to Salvos Legal and Salvos Humanitarian, which is a perfect example of the innovation that is already occurring. The Salvos structure is especially innovative in terms of its funding model, but also the way in which it takes a holistic approach to the needs of its pro bono clients by making use of the other non-legal services that are provided by the Salvation Army. Having said that, it is obvious that innovation in the profession will not simply be driven by a desire to improve access to justice. Just as other industries evolve to address changes in the marketplace and the shifting expectations of clients, so too does the legal profession. However, in doing so, there is considerable scope for improving access, even if change is often motivated by business interests.

27. There are, for instance, undoubtedly further opportunities for innovation in terms of how the profession harnesses technology. Take, for example, the growing number of so-called virtual legal practices, which are able to offer lower fees by reducing or eliminating some of their traditional fixed costs. These firms can avoid the considerable expense of office space by largely delivering their services online, with meetings taking place in hired offices, or perhaps even by simple video conferencing technology such as Skype.³⁰ There also appear to be a range of other opportunities in the online space for services that link people experiencing legal problems with appropriate practitioners.³¹ Even at a very basic level, technology can be used to better inform the community. I am thinking here of developments like New South Wales Legal Aid's recently launched app, which allows people to easily access a great deal of the resources available on the Legal Aid website.
28. There are more substantive structural changes that could be made to the regulation of legal practice which have the potential to improve access to justice. I would suggest it is worth considering whether there are regulatory changes that might further encourage not-for-profit structures like Salvos Humanitarian. Of the many and varied proposals regarding reform in the profession, one that is often discussed is the implementation of clearer regulations to enable practitioners to offer limited representation to clients; for instance by providing preliminary advice or preparing court documents.³² A practitioner assisting a client with only discrete aspects of a larger dispute is obviously not ideal, and it will always be preferable for individuals to have comprehensive legal representation. However, proposals like this are worth

³⁰ Discussed in Centre for Innovative Justice, *Affordable Justice* (Report, October 2013) at 20-21.

³¹ See eg the discussion of online legal marketplaces in Centre for Innovative Justice, *Affordable Justice* (Report, October 2013) at 22-23.

³² Discussed in eg Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 553-560 and Centre for Innovative Justice, *Affordable Justice* (Report, October 2013) at 27-31.

closely considering to determine if – with appropriate safeguards in place – they might provide an overall benefit for those seeking legal assistance.³³

29. An area where I think there is considerable scope for further innovation concerns solicitors and barristers who are retiring from the profession, and what they might be able to offer in terms of pro bono advice and work in community legal centres.³⁴ Practitioners who have been a part of the profession for many years have a great deal of accumulated knowledge and skills. There would be, I imagine, further steps that could be taken to encourage and assist those who are leaving the profession to further contribute to our community in a voluntary capacity. This would of course require the assistance of the Law Society and the Bar Association in terms of providing concessional practising certificates and insurance. However, I believe that volunteer practising certificates are made available at least in Victoria and Queensland, and it is an idea that we should consider further.
30. Ultimately, the evolution of legal practice must be guided by the values which rest at the core of the profession. While innovation will inevitably be driven in good measure by commercial objectives, as it was pithily put in the Canadian Bar's report, 'The future for lawyers is as much about ethics and values as it is about economics and value.'³⁵ Despite this, what we must keep in mind is that no amount of innovation will address the degree of legal need which exists. Practitioners who undertake countless hours of pro bono assistance each year – along with organisations like Salvos Humanitarian – provide a very effective and much-needed Band-Aid. However, it is not a tenable solution to rely solely on the efforts of the profession. It is essential that practitioners continue to contribute to projects like these, and also to

³³ Limited scope representation or unbundled legal services are already offered by private practitioners and community legal centres. See eg A de Smidt and K Dodgson, "Unbundling our way to outcomes: QPILCH's Self Representation Service and QCAT, two years on" (2012) 21 *Journal of Judicial Administration* 246.

³⁴ The National Pro Bono Resource Centre prepared a report in 2010 that dealt with the issue. See "Engaging Retired and Career Break Lawyers in Pro Bono" (Report, February 2010).

³⁵ Canadian Bar Association, *Futures: Transforming the delivery of legal services in Canada* (Report, August 2014) at 3.

actively pursue initiatives that are aimed at improving access to justice. But this should not be allowed to distract from an essential feature of the rule of law: that citizens must be sufficiently empowered to access the courts.

II LIMITING ACCESS: SOME CONSEQUENCES

31. I now want to turn briefly to discuss several consequences that follow where members of the community are either unable to access legal representation, or where their level of representation is limited. The first concerns litigants in person, and the challenges which are presented by self-representation.
32. I appreciate that self-represented litigants are an issue that judges regularly speak about. They are also a subject which must be couched in a good number of caveats. Chief is the fact that there are real difficulties in talking about self-represented litigants as if they fall into a homogenous group. As I've said before, in some forums self-representation is encouraged, and while many people have no choice but to appear in person, some freely elect to do so.³⁶ The ability to exercise that choice is a fundamental right.³⁷
33. Despite this, it is probably fair to say that as a general rule – in superior courts at least – self-representation is often detrimental to the litigant, a significant complicating feature for other parties to the proceedings and their representatives (unless they too are unrepresented), and a considerable burden on the court's resources, not least the work of the judiciary. While it is limited, evidence suggests there is a link between self-representation and adverse outcomes.³⁸ Anecdotally, I would suggest that is very much the case. What is perhaps clearer is that appearing in person has the capacity

³⁶ The Hon TF Bathurst AC, "Duties of Bar and Bench: some reflections on case management and judicial bias", *New South Wales Bar Association CPD Conference* (29 March 2014) at 19-21.

³⁷ See eg *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403 at 415.

³⁸ See eg Canadian Bar Association, *Reaching equal justice: an invitation to envision and act* (Final Report, November 2013) at 43; E Richardson, T Sourdin and N Wallace, "Self-Represented Litigants: Gathering Useful Information", *Australian Centre for Court and Justice System Innovation* (Report, June 2012) at 11.

to lead to health, financial and social difficulties for the litigant, along with skepticism and a loss of faith about the workings of the justice system.³⁹

34. For the courts, self-represented litigants can present challenges in terms of the documents that are handed up and the time taken in hearing matters. However, I would suggest the greatest difficulty is the task involved in ensuring that a person does not suffer any added disadvantage from having elected to appear for themselves⁴⁰ (to the extent it involves a choice). It goes without saying that this is extraordinarily challenging. Perhaps the most accurate guide are statements emphasising the near impossibility of the task. As Justice Beazley noted in *Hamod v State of New South Wales*:

*'The position can be stated no more clearly than reiterating that the judge must remain at all times the impartial adjudicator...measured against the touchstone of fairness.'*⁴¹

35. In *Neil v Nott*, the High Court said that a 'consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties',⁴² while in *Rajski v Scitec Corp*, Justice Samuels described the court's duty as requiring it to 'diminish, so far as this is possible, the disadvantage' the party will suffer.⁴³ In my view it is essential to stress the words 'so far as this is possible', because in many ways there is real artificiality in the idea that the disadvantage can be ameliorated. It may be, as has occurred recently, that the duty requires a self-represented litigant to be told that they must give formal evidence rather than speak from the bar table if the court is to rely on it,⁴⁴ or that they must be warned of the risk of

³⁹ See eg J Macfarlane, "The National Self--Represented Litigants Project: Identifying and Meeting the Needs of Self--Represented Litigants" (Final Report, May 2013) at 14, 108-112.

⁴⁰ *R v Zorad* (1990) 19 NSWLR 91 at 94-95, cited in *Hamod v State of New South Wales* [2011] NSWCA 375 at [309].

⁴¹ *Hamod v State of New South Wales* [2011] NSWCA 375 at [316].

⁴² *Neil v Nott* [1994] HCA 23; (1994) 68 ALJR 509 at [5].

⁴³ *Rajski v Scitec Corp Pty Ltd* (New South Wales Court of Appeal, unreported, 16 June 1986).

⁴⁴ *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; (2013) 216 FCR 445. For a recent discussion of the duty to self-represented litigants, including of the decision in *SZRUR*, see Judge S

an adverse finding as a result of not having given evidence.⁴⁵ This, however, cannot cure what is in many respects an inherent disadvantage. As was said many years ago in *Hunter v Webb*, while the court endeavours to make up for this, 'it cannot redress the balance completely'.⁴⁶

36. As some of you may know, there are significant challenges in determining exactly how many people are representing themselves, let alone their reasons for doing so and what can be done to improve the assistance that is available.⁴⁷ In the Supreme Court it is extremely difficult to measure self-representation. Some parties file documents themselves but have been assisted by a lawyer, some are represented for a portion of the proceedings, and some are represented only at the final hearing or in a subsequent appeal. Having said that, it is worth noting that in 2013, around 10 per cent of hearings in the Court of Appeal involved a self-represented litigant.
37. There is always more that can be done to assist litigants in person. That obligation is shared – although not in equal parts – by the government, the courts and the broader legal community. In relation to steps that courts can take, there are two developments in other jurisdictions that I want to note. The first is the relatively simple step of creating a dedicated contact person for dealing with self-represented litigants. While there are many useful written resources put together by legal aid commissions, community legal centres and courts, there is great merit in having a human face to deal with non-legal questions, and to actively refer people to providers that may be able to assist. At present, I think it is still fair to say that the help available is sometimes disconnected in terms of how easy it is for people in need to

Scarlett, "Litigants in person: guidelines for the Federal Circuit Court", (2014) 24 *Journal of Judicial Administration* 4.

⁴⁵ *Downes v Maxwell Richar Rhys & Co Lty Ltd* [2014] VSCA 193.

⁴⁶ *Hunter v Webb* (Federal Court, unreported, 19 July 1996). Referred to in eg *Jarrett v Westpac Banking Corp* [1999] FCA 425 at [80].

⁴⁷ Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 424-425 notes that there is limited data in relation to the extent of self-representation. Some evidence in relation to the reasons for self-representation are dealt with at 426-430.

locate help, and the extent that services communicate with one another. There is a lot to be said for a dedicated point of contact in the court system to triage enquiries. The Self-Represented Litigant Coordinator in the Victorian Supreme Court is an excellent example.⁴⁸ It provides a guide for other jurisdictions, although introducing such a position remains a matter of resourcing.

38. A recent development is the introduction of a specific practice direction for self-represented litigants, which was implemented in the Queensland Supreme Court by former Chief Justice de Jersey in February.⁴⁹ Among other things, the direction creates a supervised case list for proceedings involving a litigant in person, with the goal of dealing with matters as efficiently as possible. Self-represented litigants are sent a kit of materials with information about community legal centres that may be able to provide assistance. In addition, they also have to complete a questionnaire which asks things like ‘*what are the key issues to be determined?*’ and ‘*have the parties considered making settlement offers?*’. I assume the idea is that it will provide the judge with a short summary of the nature and status of the proceedings. Generally, I am not in favour of imposing additional (and different) requirements for self-represented litigants, particularly where specific questions could be asked at a directions hearing. Having said that, I will be following the implementation of the practice direction with interest.
39. The second consequence of limiting access to legal representation is undoubtedly more serious, and far more immediate in terms of its repercussions. In this country, *Dietrich v The Queen* remains the law in relation to criminal proceedings: while the common law doesn’t recognise a

⁴⁸ Supreme Court of Victoria, *Annual Report 2012-13* at 54 indicates that in 2012-13 the Coordinator had nearly 1,600 contacts with self-represented litigants. Self-represented litigants are given 15 minute appointments with the Coordinator. The Hon Justice M McMurdo AC, “The self-represented litigant in the Court of Appeal, Supreme Court of Queensland” (2014) 24 *Journal of Judicial Administration* 13 at 14 notes that appeals registry staff in Queensland have identified the desirability of reinstating such a position.

⁴⁹ Practice Direction 10 of 2014.

right for an accused person to be legally represented, the court has the power to stay criminal proceedings which will result in an unfair trial.⁵⁰ The effect of *Dietrich* played out in a number of proceedings in Victoria last year,⁵¹ which are an unmistakable reminder of the essential importance of appropriate representation for an accused charged with a serious offence.

40. The decisions arose from an amendment to Victoria Legal Aid's guidelines under which, subject to exceptions, an instructing solicitor would only be funded for two half days of a trial. Unsurprisingly, the trials in these particular proceedings were expected to last far longer. In one, the accused was charged with murder. It was anticipated the prosecution case would rely almost entirely on circumstantial evidence, that the trial would last for between 8 and 10 weeks and involve somewhere in the order of 40 to 78 witnesses. The prosecution was represented by experienced counsel and would have the benefit of an instructing solicitor throughout the trial.⁵²
41. In both cases, the Court, applying *Dietrich*, found that the accused would not be sufficiently represented, and that the trial was likely to be unfair in the sense that it carried a risk of an improper conviction.⁵³ Both trial judges addressed the important role of an instructing solicitor and the disadvantage that the accused would suffer by being predominately represented by counsel alone. In *MK v Victorian Legal Aid*, the trial judge endorsed a submission made by counsel for the accused that, should the application for a stay fail, he may be ethically obliged to withdraw as he would be unable to do justice to his client.⁵⁴ Temporary stays were granted in both cases.

⁵⁰ *Dietrich v The Queen* (1992) 177 CLR 292 at 297-298, 311.

⁵¹ *The Queen v Chaouk* [2013] VSCA 99; *The Queen v Chaouk* [2013] VSC 48; (2013) 227 A Crim R 36; *MK v Victorian Legal Aid* [2013] VSC 49; (2013) 227 A Crim R 58.

⁵² *MK v Victorian Legal Aid* [2013] VSC 49; (2013) 227 A Crim R 58 at [31]-[37].

⁵³ *The Queen v Chaouk* [2013] VSC 48; (2013) 227 A Crim R 36 at [46]-[47]; *MK v Victorian Legal Aid* [2013] VSC 49; (2013) 227 A Crim R 58 at [46].

⁵⁴ *MK v Victorian Legal Aid* [2013] VSC 49; (2013) 227 A Crim R 58 at [46].

42. In one of the proceedings, an application for leave to appeal was refused. The Court of Appeal agreed that the lack of an instructing solicitor would produce a real and substantial risk of an improper conviction.⁵⁵ I should mention that in the present financial climate, issues about the adequacy of representation and applications for stays have arisen in other countries.⁵⁶
43. Ultimately, as was made clear by several members of the High Court in *Dietrich*, it is not for the courts to determine whether and to what extent public funds should be allocated for people charged with criminal offences.⁵⁷ That task is for governments alone. The courts' role is not to evaluate the appropriate level of funding or the way in which those funds should be distributed. These are extremely complex questions, both for governments and particularly for legal aid commissions which are charged with allocating a fixed pool of available resources. The function of the courts in this respect is simply to determine whether an accused person will be unable to receive a fair trial. Both sets of proceedings in Victoria illustrate the circumstances in which a fair trial can be encroached upon, and the need to be mindful of the level of representation that is necessary to ensure that justice is done.

III DISPENSING JUSTICE: SOME PROPOSALS

44. So far I've dealt with some current challenges in delivering access to justice and several consequences that can follow where representation is limited. In the time that I have remaining, I want to say a few words about the job of dispensing justice, and the importance of flexibility in carrying out that task.
45. What I want to emphasise is that rules and procedures are intended to be used as tools in achieving a just and appropriate outcome. They should not be deployed in a way that perpetuates delay, or worse still, used as a basis for satellite disputes which have the effect of driving up costs. Chief Justice

⁵⁵ *The Queen v Chaouk* [2013] VSCA 99.

⁵⁶ See eg *The Queen v Crawley* [2014] EWCA Crim 1028.

⁵⁷ See *Dietrich v The Queen* (1992) 177 CLR 292, 357 (Toohey J); 365 (Gaudron J).

Allsop recently set down several fundamental principles that should guide the profession and the judiciary in relation to case management.⁵⁸ I agree with his comments and will add nothing further, as I assume he may expand on the topic this afternoon. All I will say is that case management is an area of dual responsibilities: first, a duty on practitioners to advise their clients, to work with other professionals and to conduct proceedings in a way that deals with disputes as efficiently and economically as possible; and second, a duty on the judiciary to oversee proceedings in an individualised fashion, which makes proper use of the broad powers that courts have the benefit of.

46. The importance of flexibility is not a new subject. It has been recognised since the 19th century that rules must be restricted to their proper role as mechanisms assisting access to justice and the just, quick and cheap disposal of proceedings, rather than as procedures which rigidly govern how all cases are to be conducted. As I said, this has been acknowledged since the early 19th century, albeit expressed by reference to analogies of master/servant and handmaid/ mistress which today seem dated and unfortunate.⁵⁹
47. Having said that, while the analogies themselves might be inappropriate, the underlying principle remains sound. It is essential that a flexible approach is taken in relation to court rules and procedure. The Harper Review into competition policy which I referred to earlier provides an excellent example. The draft report describes section 47 of the *Competition and Consumer Act* – which covers exclusive dealing – as being needlessly complex and hard to understand.⁶⁰ It illustrates how an attempt to exhaustively define a field of behaviour can result in drafting which is almost impossible for a lay person

⁵⁸ The Hon. J Allsop AO, “Judicial Case Management and the Problem of Costs”, *Lord Dyson lecture on ‘The Jackson Reforms to Civil Justice in the UK’* (9 September 2014) at 19.

⁵⁹ *Clune v Watson* (1882) 75 TLR 75 – rules ‘must be the servant not the master of the Court’ – cited in eg *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 714 and *Re Coles and Ravenshear* [1907] 1 KB 1, 4 – the relationship between rules and the work of justice ‘is intended to be that of handmaid rather than mistress’ – cited in eg *Australian Securities and Investment Commission v Rich* [2009] NSWSC 1229; (2009) 75 ASCR 1, 50 and adapted in *Bomanite Pty Ltd v Slatex Corp Australia Pty Ltd* (1991) 32 FCR 379, 391.

⁶⁰ *Competition Policy Review* (Draft Report, September 2014) at 232.

to decipher, let alone someone with legal training. As the report suggests, the complex structure of the provision might be tolerable if it provided a complete code of prohibited conduct. However, section 47 does not do that. Of course while this particular deficiency relates to a substantive provision, the analysis applies equally to matters of practice and procedure.

48. It is important that practitioners keep in mind – and members of the judiciary make use of – the court’s general power in civil proceedings to dispense with rules where it is appropriate to do so.⁶¹ The court is also able to give directions as it thinks fit, and to give specific directions in relation to the conduct of hearings.⁶² These general powers arm the court with a great deal of flexibility in terms of how it manages proceedings. They also enable the court to adjust its procedures to suit the circumstances of each individual case. The way that rules are dispensed with or directions given will be guided by the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings.⁶³ However, in my opinion what will almost always work against the mantra of ‘just, quick and cheap’ is the inflexible application of prescriptive rules of procedure.
49. In the Supreme Court, one recent development that is aimed at reinforcing the importance of flexibility is the updated practice note in relation to class actions.⁶⁴ The goal of the practice note is to provide as much scope for individualised proceedings in order to promptly bring each matter to hearing. At commencement, each case is assigned to one of the judges from the class action panel. A variety of other practice notes are dispensed with and are instead replaced by a simple structure of case conferences, which will be more informal than a directions hearing and are designed to promote discussion between the parties. Importantly, the practice note runs to only

⁶¹ *Civil Procedure Act 2005* (NSW) s 14.

⁶² *Civil Procedure Act 2005* ss 61-62.

⁶³ *Civil Procedure Act 2005* s 56.

⁶⁴ Practice Note – Supreme Court General 17 available at http://www.supremecourt.justice.nsw.gov.au/supremecourt/sco2_class_action.html,c=y.

six pages. The intention is for it to place the management of proceedings firmly in the hands of experienced judges, aided by capable and professional practitioners. In my view, unnecessarily rigid procedures don't aid the resolution of proceedings and are, as a general rule, best avoided.

50. Of course there is always more that can be done to adjust practice rules to better facilitate the just, quick and cheap resolution of cases. A more significant change that I am in favour of considering is the way in which the court receives evidence. The general rule is in proceedings commenced by statement of claim or where a statement of claim is filed, that evidence is to be given orally.⁶⁵ However, it is fair to say that in civil proceedings in the Supreme Court, the vast majority of evidence is filed in advance, either by affidavit or witness statement. There are drawbacks to this. It tends to lump a significant portion of the cost of proceedings in a fairly narrow timeframe. It can also result in wasted costs; for instance where a statement is prepared and filed, but a forensic decision is later made that there is no need to rely on it. This is not to mention the problem of written evidence being primarily prepared by lawyers, rather than the witnesses themselves.
51. I am not discounting the view that written evidence in chief can save time and expense by shortening the length of hearings, while also ensuring that the parties are not ambushed with unexpected oral evidence. Nor am I suggesting – as was put forward by the Bar Council of England and Wales last year⁶⁶ – that written evidence should be largely abolished. What I am saying is that written evidence may not be appropriate in all cases. In my view, judges – particularly in superior courts where it is not commonly the case – should be more willing in simple matters for evidence in chief to be given orally, perhaps with a list of witnesses and a brief summary of their

⁶⁵ Uniform Civil Procedure Rules 2005 (NSW) r 31.1(1)-(2).

⁶⁶ M Todd QC et al, "Reforming civil litigation", *Bar Council of England and Wales* (discussion document, March 2013) at 16-22, available at http://www.barcouncil.org.uk/media/203269/130325_reforming_civil_litigation.pdf

evidence filed in advance. This is the type of flexibility I'm referring to – the ability to modify court procedures to better fit the proceedings in question.

52. As I've said, in civil proceedings, any direction made by the court or decision to dispense with the rules must be guided by the overriding purpose. Without wanting to complicate the discussion, I will note that there has been ongoing debate regarding the implementation of what are known as the Jackson reforms to civil litigation in England and Wales.⁶⁷ Lord Dyson, the Master of the Rolls, has recently questioned the relevance of how rules were characterised in the 19th century cases I referred to earlier.⁶⁸ In a similar vein, in a paper delivered last year, Lord Neuberger, the President of the Supreme Court, noted that 'in many cases, quick and dirty would do better justice than the full majesty of a traditional common law trial.'⁶⁹
53. It will always be the case that rules and procedure can be refined to better facilitate the just, quick and cheap resolution of matters. In some respects that may involve significant restrictions on pre-trial activities like discovery, as well as curbing the scope of hearings. It is also true that Part 6 of the *Civil Procedure Act* requires the balancing of various factors; and as the plurality noted in *Aon*, the notion of 'just resolution' encapsulates minimum delay and expense.⁷⁰ Despite this, and with respect, I would caution against too readily accepting a move toward 'quick and dirty justice'. The court's function of doing justice between the parties is something that should not be lost sight of in the process of seeking to reduce cost and delay. The objects of case management expressly include the 'just determination of the

⁶⁷ The Jackson reforms, as they are known colloquially, follow the inquiry into civil litigation costs by Lord Justice Jackson. See Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009).

⁶⁸ Lord Dyson, "The application of the amendments to the Civil Procedure Rules", *18th Lecture in the Implementation Programme* (District Judges' Annual Seminar, 22 March 2013) at 7-8, where he notes that the passage in *Re Coles and Ravenshear* [1907] 1 KB 1, 4, set out in footnote 59, 'must be viewed with great caution in the 21st century' because justice is now subject to wider policy considerations and doing justice in a specific case 'can only be achieved through a fair procedure operated in a way that is fair to all'.

⁶⁹ Lord Neuberger, "Justice in an Age of Austerity", *Justice – Tom Sargant Memorial Lecture 2013* (15 October 2013) at 16.

⁷⁰ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [98]. See also at [30].

proceedings'; and this factor must be carefully balanced alongside other goals that will include the efficient use of court time and litigant resources.⁷¹

IV CONCLUSION

54. I should probably draw things to a close to make way for Chief Justice Allsop. I hope that among what I've said this afternoon, I've left you with some food for thought in relation to both accessing and dispensing justice. I'd like to conclude by referring to a speech given by Sir Ninian Stephen just over 15 years ago regarding the rule of law.⁷² In the course of his address, Sir Ninian referred to many features of accessing the courts including legal aid funding, pro bono work, contingency fees and the role of class actions. These are issues which are still being discussed and debated today. Importantly, he described access to the courts as one of the most difficult components of the rule of law. This is because, as he said, it

'...involves substantial government funding which is neither productive of obviously praiseworthy public works nor, necessarily, of any very grateful public reaction.'

Sir Ninian concluded his discussion of accessing justice with a hopeful tone, saying:

'The way to a more perfect system lies in the future but that one is needed seems to me to be clear.'

55. It is disappointing many of the issues which were seen as relevant to accessing the courts 15 years ago remain with us today. However, that only makes Sir Ninian's optimistic conclusion all the more relevant. We must be

⁷¹ *Civil Procedure Act 2005* s 57(1). See *Hans Pet Constructions Pty Ltd v Cassar* [2009] NSWCA 230 at [36]-[48]; *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 101; (2010) 187 FCR 261 at [45], [67]-[68].

⁷² Sir N Stephen, "The Rule of Law", St James Ethics Centre Lawyers' Lecture (August 1999) at 6-7.

conscious of the consequences that can flow from limiting access to justice. However, there is much that can be done to address these challenges. Certainly, innovation in the legal profession – both in terms of pioneering structures like Salvos Humanitarian, and broader regulatory changes to improve access to justice – will play an important role in the years ahead.

56. Can I again thank Luke for inviting me to be a part of today's program and each of you for attending and supporting the work of Salvos Humanitarian.