Review Essay

The Role of Judges in Managing Complex Civil Litigation

Justice and Efficiency in Mega-Litigation
by Anna Olijnyk (2019), Hart Publishing, 240 pp,
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Abstract

Delay and cost have bedevilled civil litigation in most if not all jurisdictions for some time. Such problems have been the subject of numerous inquiries by law reform bodies and judicial officers. A concern to ameliorate such problems has precipitated major changes to the judicial management of cases by various courts, aided by jurisprudence developed by higher courts and 'overriding' objectives incorporated in civil procedure rules and statutes. The problems of costs and delay have also spawned the creation of a variety of alternative approaches to dispute resolution. In *Justice and Efficiency in Mega-Litigation*, Australian academic Anna Olijnyk examines these issues in some detail, with particular reference to large, complex cases, based largely on interviews with senior judges in Australia and England. This review examines the methodology used, the findings derived and a number of strengths and limitations of both the research and the reliance on proactive judicial management to achieve more expeditious and economical resolution of civil disputes.

I Introduction

Seeking to provide access to justice in an efficient (and cost-effective) manner is one of the paramount goals of most civil justice systems. How to achieve this is a complex matter, causing considerable controversy. In her book *Justice and Efficiency in Mega-Litigation*,[1] University of Adelaide academic Anna Olijnyk provides valuable insights into how judicial officers seek to reconcile and achieve these goals in 'mega-litigation' in Australia and England and Wales.

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[1] Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019).

The book is based on interviews with 28 senior judges in Australia and England. Sixteen Australian judges were interviewed in the period 2011–12. They comprised present or former members of the Federal Court and the Supreme Courts of New South Wales ('NSW'), Victoria, South Australia and Western Australia.[2] Twelve English judges, who were present or former members of the High Court of Justice, were interviewed in 2017. Only 6 of the 28 interviewees were women. The methodology is discussed further in Part II below.

The 'mega-litigation' that is the main focus of the book encompasses mainly commercial litigation between commercial parties. Such litigation is said to be characterised by 'high stakes, multiple parties, lengthy hearing time, legal and factual complexity, and a large volume of documentation'.[3] It is the combination of these factors that is said to be the hallmark of mega-litigation. As Olijnyk observes:

> The proliferation of issues, backed by virtually limitless resources, in turn leads to the production of massive piles of documents. Add to this a party not inclined to concede any ground in a fight, with a purse large enough to ensure that they never have to do so, and you have mega-litigation.[4]

Part I of *Justice and Efficiency in Mega-Litigation* examines justice and efficiency as aims of civil procedure. The nature of mega-litigation and its burdens and benefits are discussed and evaluated. Part II analyses different approaches to the problem of mega-litigation with reference to various theoretical perspectives, the historical process of civil procedure reform, current procedural rules and the doctrines and jurisprudence developed by trial and appellate courts.

Part III of the book examines the characteristics of judicial officers handling mega-litigation, the procedural techniques for managing such litigation and methods used by judges to reconcile the aims of justice and efficiency. In the chapter, Olijnyk sets out a number of conclusions concerning the differences and similarities between the approaches of Australian and English judges. Important practical consequences, with respect to case allocation, judicial education and recruitment, follow from her finding that the management of mega-litigation is heavily dependent on the skill, personality and commitment of the individual judge. The question of procedural reform is also considered.

Each of the book's three parts is discussed in more detail below. Before doing so, I examine some of the strengths and limitations of the methodology employed.

II The Methodology Used

One of the major strengths of *Justice and Efficiency in Mega-Litigation* is that it is based on qualitative data derived from the views of numerous senior judges with detailed knowledge and experience based on their direct involvement in the conduct and management of mega-litigation. All too often, the conduct of civil litigation and the issue of procedural reform are discussed in an empirical vacuum. In the

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2 This formed part of the author's doctoral research: Anna Olijnyk, 'Justice and Efficiency in Mega-Litigation' (PhD Thesis, University of Adelaide, 2015).

3 Olijnyk (n 1) 19.

4 Ibid 36.

Australian context, this has been ameliorated in recent years by the pioneering empirical research on class actions carried out by Professor Vince Morabito at Monash University.[5]

The views of the judges interviewed by Olijnyk do not purport to be representative of the views of judicial officers generally, unlike some other studies where attempts have been made to survey all judicial officers.[6] As she notes: 'The aim of my study was not to obtain a statistically representative data set from which generalizations could be drawn with confidence; instead it was to develop deep insights into the world of the mega-litigation judge.'[7]

There was a marked difference in the response rate of judges approached in Australia and England. Seventeen of the 19 Australian judges who were approached agreed to be interviewed; 16 of these 17 were interviewed. Of the 27 English judges approached, only 8 agreed to participate. An additional four English judges were then approached and agreed to be interviewed.

The participants had the option of remaining anonymous. Eleven of the 12 English judges chose to remain anonymous. This was no doubt due to the fact that it was a condition of the approval of the research by the Judicial Office that the English High Court judges remain anonymous. Although Olijnyk states that nine of the 16 Australian judges elected to remain anonymous,[8] it would appear that, in fact, nine chose not to remain anonymous[9].

The interview topics were based on an initial literature review on civil procedure and an analysis of judgments and publications on mega-litigation. This was modified in the course of the study based on Olijnyk's experience in interviews. The result was a focused but open-ended series of topics and questions that sought

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5 Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments* (January 2019) <https://ssrn.com/abstract=3326303>; Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Closed Class Actions, Open Class Actions and Access to Justice* (October 2018) <https://ssrn.com/abstract=3272089>; Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia* (July 2018) <https://ssrn.com/abstract=3212527>; Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) <http://ssrn.com/abstract=3005901>; Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (July 2016) <http://ssrn.com/abstract=2815777>; Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Third Report: Class Action Facts and Figures — Five Years Later* (November 2014) <http://ssrn.com/abstract=2523275>; Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (September 2010); Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, First Report: Class Action Facts and Figures* (December 2009).

6 See, eg, the study conducted by the author of this review essay for the Australian Law Reform Commission ('ALRC') in connection with its reference on sentencing: Peter Cashman, 'A National Survey of Judges and Magistrates Preliminary Report' in ALRC, *Sentencing of Federal Offenders* (Interim Report, ALRC Report 15, 1980) appendix B.

7 Olijnyk (n 1) 199.

8 Ibid 205.

9 See the List of Interview Participants: ibid 211 (Appendix C).

to combine 'structure with flexibility'.[10] Participants were provided with an outline of topics prior to the interview.[11] This encompassed the concept of mega-litigation; the experience of interviewees in such litigation; the rules, principles and mechanisms governing the approach to procedural decisions and reform of procedural law.

Each of the participants was provided with a copy of the draft of what was proposed to be published based on their responses. The participants were given an opportunity to withdraw or amend material and '[a] small number of participants withdrew or amended some substantive material.'[12]

III Grappling with Theories on the Aims of Procedural Law

More problematic is Olijnyk's attempt to elicit the views of participants in relation to four 'leading academic theories on the aims of procedural law'.[13] Interviewees were provided with a brief summary of what was said to be the views of Adrian Zuckerman[14], Richard Posner[15], Ronald Dworkin[16] and Robert Summers.[17] The views of each of these writers were summarised by Olijnyk in one paragraph or, in the case of Posner, two paragraphs, provided to participants as part of the outline of topics provided in advance of the interview.

The first obvious problem is that such complex and diverse perspectives are not readily susceptible to being reduced to one or two paragraphs. As Olijnyk notes, some found it difficult to grasp the theories based on the summaries provided. A further problem was that some interviewees had not reviewed or considered the material in advance of the interviews. Furthermore, in two instances, this part of the interview was omitted due to time constraints.[18]

To the extent to which the participants were able to discuss whether such 'theoretical' perspectives had any resonance with their own experience of procedure in mega-litigation, the judicial responses are of interest. Some respondents had read and reflected on the 'theoretical' perspectives and were able to relate this to their personal experience and in a broader context. Even where participants were unfamiliar with the theories, Olijnyk notes that this part of the interview often

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10 Ibid (n 1) 201 n 7, citing Robin Legard, Jill Keegan and Kit Ward, 'In-Depth Interviews' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE Publications, 2003) 138, 141.

11 This is provided in Olijnyk (n 1) 207 (Appendix B).

12 Ibid 205.

13 Ibid 208.

14 Paraphrased from Adrian AS Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in AAS Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999) 3.

15 Summarised from Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer, 7th ed, 2007).

16 Summarised from Ronald Dworkin, *A Matter of Principle* (Clarendon Press, 1986).

17 Summarised from Robert S Summers, 'Evaluating and Improving Legal Processes — A Plea for "Process Values"' (1974) 60(1) *Cornell Law Review* 1.

18 Olijnyk (n 1) 205.

yielded insights into the philosophical approach of judges and elicited further discussion about the relationship between justice and efficiency.[19]

IV A Valuable Comparative Perspective

A further strength of *Justice and Efficiency in Mega-Litigation* is the comparative perspective on Australian and English practices, procedures and judicial views. One advantage of this is that a variety of issues are considered. A corresponding limitation is that many complex and important procedural and substantive issues are touched on somewhat superficially. Moreover, many of the interviews were conducted some time ago (in 2012 and 2013) and judicial attitudes and practices continue to evolve over time.

Overall, the methodology employed elicited important and interesting judicial insights into the way in which the participants sought to manage mega-litigation so as to achieve both justice and efficiency in the jurisdictions studied. However, as Olijnyk acknowledges, participants were 'to a degree, self-selecting' and may have tended to be persons with strong views whose active case management style and concern for efficiency may not be universal.[20] Moreover, it is not clear whether judges' positive views as to how they effectively and efficiently manage mega-litigation are shared by other participants in the process, including litigants, lawyers, insurers and litigation funders.

V Limitations on Judicial Control through Case Management

Furthermore, the study and views of many of the judicial participants are focused primarily if not exclusively on judicial control of the conduct of litigation through procedural case management. This reflects the underlying rationale of much recent civil procedure reform in both Australia and England and Wales, which has been designed to facilitate a transition from party control to judicial management of cases. There are, however, other approaches to the problem of controlling costs and delay, referred to at the end of this review, which are not adverted to by Olijnyk or her judicial interviewees.

Olijnyk and a number of participants in her study do, however, concede that there are obvious limitations on the exercise of judicial power and discretion to control the forensic conduct of litigants and lawyers. Issues of procedural fairness and due process, together with a concern about perceived judicial bias, loom large and are acknowledged in *Justice and Efficiency in Mega-Litigation*. Yet other limitations receive little attention.

Information asymmetry is a problem in most civil litigation. Busy judges do not have the same time or resources as the parties to be on top of the relevant information and evidence, at least in advance of the final trial, which eventuates in

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19 Ibid 52.
20 Ibid 206.

only a small number of cases. Disputing parties will often have large numbers of corporate personnel, lawyers, consultants and experts deployed. The presiding judge will usually not be privy to the various complex commercial, economic, strategic and legal considerations bearing upon the forensic conduct of litigants and those financing or indemnifying them. Moreover, a large number of those participating in the conduct of the case will be professionally engaged on the matter full-time, whereas the judge will usually only have intermittent pre-trial involvement at periodic intervals during directions hearings or case management conferences, etc.

Problems of cost and delay in civil litigation are often caused or exacerbated by factors over which judges have little, if any, effective control. Many of these are inherent in our traditional adversarial civil justice system and have persisted despite changes to civil procedure rules. Time costing, the divided legal profession, party-appointed expert witnesses and inefficient and costly processes for the identification and review of relevant, or potentially relevant, documents by large numbers of legal personnel are some of the many factors that have endured to increase costs and delay.

VI The Review of Modern Civil Procedure Reforms

Justice and Efficiency in Mega-Litigation examines many historical[21] and modern civil procedure reforms in both Australia[22] and the United Kingdom.[23] In recent times, these have been predicated on the assumption that expanded judicial powers and discretions in relation to procedural case management, coupled with mantras incorporated in procedural rules or legislation,[24] will enhance access to justice and efficiency.

While necessary, it is apparent that these procedural reforms are not sufficient to deal with the problems of costs and delay. To some extent, such reforms have been supplemented by case management jurisprudence developed by both trial and appellate courts in England and Australia. Olijnyk provides a useful summary of the relevant case law[25] and an interesting analysis of the views of judges on the impact of procedural reforms and appellate decisions on the management of mega-litigation.

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21 Ibid ch 6.

22 Ibid ch 8.

23 Ibid ch 7.

24 In England and Wales, the overriding objective is in *Civil Procedure Rules 1998* (UK) r 1.1 ('*CPR*'). Also of relevance is art 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended ('*European Convention on Human Rights*'), which is applicable in English courts pursuant to the *Human Rights Act 1998* (UK). In Australia, there are some variations from jurisdiction to jurisdiction and the provisions in the Victorian *Civil Procedure Act 2010* (Vic) are discussed in further detail in Part XI below (although not referred to by Olijnyk or her interviewees). In the Federal Court of Australia, ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) set out the overriding objectives and the obligations on parties and lawyers to conduct proceedings consistent with the overriding purpose.

25 In the Australian context, including the decisions of the High Court, discussed in Olijnyk (n 1) 105–16: *Sali v SPC Ltd* (1993) 67 ALJR 841; *JL Holdings Pty Ltd v Queensland* (1997) 189 CLR 146; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

Notwithstanding procedural reforms and doctrinal development, complex civil litigation in most Australian and English jurisdictions remains prohibitively expensive and protracted. As noted by Olijnyk and a number of the English participants in her study, the first wave of civil justice reforms in England and Wales in the aftermath of the Woolf Report[26] fell short of achieving their stated objectives. It is not clear, to this writer at least, whether the second wave of reforms following the Jackson Report[27] have brought about desired changes in terms of 'proportionality' in the civil justice system in England and Wales. Olijnyk notes that Lord Justice Jackson found that judges had not taken a robust approach to case management and an ongoing failure to enforce compliance with the *Civil Procedure Rules 1998* (UK) ('*CPR*') had been a cause of excessive cost and delay.[28] His Lordship recommended, among other things, that costs considered to be disproportionate should be disallowed on an assessment of costs, even if they had been reasonably incurred.[29]

Although not making a specific recommendation to this effect, but, as Olijnyk observes, in line with the spirit of his report, the *CPR* were amended in 2013 to add to the overriding objective in r 1.1 an obligation to ensure that cases are dealt with 'at proportionate cost'. To this end, one procedural innovation in England and Wales that has not, to date, been generally adopted in Australia, and that does not appear to be dealt with by Olijnyk, is a requirement of parties, in certain cases commenced after 1 April 2013, to submit, for judicial review, a costs budget no later than 21 days before the first case management conference.[30] Once a budget is approved by the court recoverable costs are restricted to the budget unless a party can persuade the court that there is a good reason to depart from it.[31]

As Olijnyk notes, in the context of mega-litigation, following the somewhat disastrous *Bank of Credit and Commerce International* ('*BCCI*')[32] and *Equitable Life* cases,[33] the Commercial Court and the Financial List in London are now said to facilitate the trial or resolution of commercial cases efficiently and effectively.[34] In part, this has been due to: the allocation of a significant number of judges with commercial expertise; the adoption of innovative case management techniques; and the relocation of the Commercial Court to the Rolls building in 2011 with state-of-the-art facilities. Moreover, the Commercial Court appointed a Users Committee,

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26 Lord Woolf, *Access to Justice: Final Report* (1996) ('Woolf Report'); Lord Woolf, *Access to Justice: Interim Report* (June 1995).

27 Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009) ('Jackson Report').

28 Olijnyk (n 1) 90–91.

29 Ibid 90.

30 *CPR* r 3.13(1)(b).

31 Ibid r 3.18(b). See also *Practice Direction 3E*, which supplements *CPR* Part 3 Section II: *Practice Direction 3E — Costs Management* (30 November 2017) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3e-costs-management>.

32 The *BCCI* litigation (*Three Rivers District Council v Bank of England*) is discussed by Zuckerman: Adrian Zuckerman 'A Colossal Wreck: The *BCCI–Three Rivers* Litigation' (2006) 25(Jul) *Civil Justice Quarterly* 287, cited by Olijnyk (n 1) 96 n 72.

33 The *BCCI* and *Equitable Life* cases are discussed by Sir Anthony Clarke MR, 'The Supercase — Problems and Solutions: Reflections on *BCCI* and *Equitable Life*' (KPMG Forensic's Annual Law Lecture 2007, 29 March 2007), cited by Olijnyk (n 1) 96 n 72.

34 Olijnyk (n 1) 98.

including judges, solicitors, barristers and representatives of major repeat litigants.[35] Finally, the Long Trial Working Committee, formed under the auspices of the Users Committee, made a number of user-driven recommendations[36] which were implemented swiftly.

VII Social, Legal and Cultural Causes of Mega-Litigation

In chapter 3 of *Justice and Efficiency in Mega-Litigation*, Olijnyk examines the social, legal and cultural causes of mega-litigation. Five factors were said to emerge from the literature and the interview data. These are: the complexity of commercial life; the proliferation of documents due to technology; the availability of funding for litigation; the content of the substantive law and the culture of the legal profession. She reviews each of these factors in some detail.

In terms of the substantive law, several trends are identified. These include a transition in the substantive law towards individualised discretionary solutions, rather than the principled application of general rules.[37] The complex and flexible content of the substantive law is said to be a contributing factor to mega-litigation, including through the proliferation of alternative causes of action.

The analysis of 'legal culture' is, as Olijnyk notes, 'a perennial theme in discussions of the cost, complexity and delay' in civil litigation.[38] She refers to the concern about 'adversarialism'[39] and notes the observation of Zuckerman that 'sanctions against wasteful procedural posturing' were

> bound to be ineffectual, if the incentives for such behaviour are not removed at the same time. The forensic practices of the legal profession are, inevitably, bound up with the profession's financial interest in litigation. Accordingly, as long as practitioners are paid by the hour or by the day, they will continue to have an interest in ... expanding the litigation process.[40]

The views of a number of judges interviewed endorsed such concerns, although some were complimentary about the 'efficient, cooperative and reasonable' conduct of legal practitioners conducting litigation.

Other legal, cultural or attitudinal factors identified included: the increasing tendency for barristers to become involved as part of the forensic team, rather than

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35 See, eg, *Commercial Court User's Group: Latest Minutes* (Web Page, 3 February 2020) <https://www.judiciary.uk/announcements/commercial-court-users-group-latest-minutes/>.

36 As Olijnyk notes, '[t]he impetus for the report was dissatisfaction in the business community about the length and cost of commercial litigation': Olijnyk (n 1) 97. See Judiciary of England and Wales, *Report and Recommendation of the Commercial Court Long Trial Working Party* (December 2007).

37 Olijnyk (n 1) 29, referring to a 1995 observation to this effect by then Chief Justice of NSW (and later Chief Justice of the High Court of Australia): Chief Justice Gleeson in 'Individualised Justice — The Holy Grail' (1995) 69(6) *Australian Law Journal* 421, 421.

38 Olijnyk (n 1) 30.

39 Ibid 31.

40 Ibid, quoting Adrian Zuckerman, 'Reform in the Shadow of Lawyers' Interests' in AAS Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on 'Access to Justice'* (Clarendon Press, 1995) 61, 76–7.

to exercise independent judgment; a reluctance to abandon any arguable point; a failure to limit the issues to be litigated and a 'battlefield mentality'.[41]

From this writer's experience in the conduct of complex class actions, both in the United States and in Australia, each of the factors identified by Olijnyk and her judicial interviewees has resonance. While identifying such matters, *Justice and Efficiency in Mega-Litigation* fails to analyse them in any detail. Although a shortcoming, this is understandable given the nature of the research in question and the limited length and scope of the publication.

VIII The Burdens and the Benefits of Mega-Litigation

Chapter 4 of *Justice and Efficiency in Mega-Litigation* seeks to explore both the burden and the benefits of mega-litigation with reference to what are described as the 'broader themes of the book: justice and efficiency, from the point of view of the parties to litigation and also that of the public'.[42]

As Olijnyk and a number of interviewees note, such litigation impacts negatively on the parties, the individual judges handling cases, the court system as a whole and the community. Olijnyk also refers to a number of notorious cases where the legal costs incurred by the parties were very substantial.

Justice and Efficiency in Mega-Litigation raises concern about the direct public costs incurred through the court system in dealing with such cases. However, neither Olijnyk nor her interviewees refer to the hidden cost to the public purse through the tax system as a result of the tax deductibility of the legal costs incurred by commercial parties engaged in corporate litigation.

In terms of the 'benefits' of mega-litigation, Olijnyk notes some divergence of views between Australian and English judges. In England, such litigation was sometimes perceived 'as a boon for the local economy (because it attracts business to London) and a source of pride for the court system'.[43] It was considered desirable to continue to attract large commercial disputes in the face of competition from other jurisdictions, including New York and Singapore. This was said to have a positive consequence in that the capacity to attract such litigation both rests on and contributes to the perception (and, hopefully, the reality) that the jurisdiction will provide litigants with 'fair, efficient and high quality processes'.[44]

IX The Attitudes and Characteristics of Judges

Chapter 9 of *Justice and Efficiency in Mega-Litigation* focuses on the approaches and attitudes that judges bring to mega-litigation and the characteristics of such judges. Those interviewed were clearly very proudly proactive in their management

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41 Olijnyk (n 1) 31–2.
42 Ibid 38.
43 Ibid 42.
44 Ibid 43 n 24, citing Eva Lein et al, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to London Based Courts* (Ministry of Justice Analytical Series, 2015) 14–16.

of cases. From the data derived from the interviews with participants, Olijnyk characterised them as active, creative, flexible and fair.[45] The interview data was said to indicate that the manner in which they managed mega-litigation was (not surprisingly) heavily influenced by their experience and personality.[46] This involved understanding and managing human behaviour and not just applying the law.

Having analysed the experience and attributes of the participants in the study, in chapter 10 Olijnyk focuses on the ways in which procedural techniques are used by the participants in mega-litigation. This encompasses: active and continuous case management; seeking to define (and limit) the issues at an early stage; dealing with the problem of document discovery; the separate determination of specific issues, which may facilitate settlement or dispose of the litigation; sharing the burden of the judicial task(s) with others; control over the structuring of the trial and the presentation of evidence; controlling and limiting submissions; using technology and managing the complex relationships. The judicial techniques used in mega-litigation were found to be 'broadly similar' in Australia and England.[47]A detailed consideration of each of these issues is outside the scope of the present review.

In chapter 11, Olijnyk offers three answers to the central question of how judges reconcile the demands of justice and efficiency in mega-litigation:

> first,… judges use innovative means to achieve both efficiency and justice; secondly, … sharp focus on the issue promotes efficiency without diminishing the quality of justice; and, thirdly,… any conflict between justice and efficiency is likely to be resolved by recourse to the judge's expert intuition.[48]

As Olijnyk notes, despite the various theoretical, legislative and doctrinal responses to the problem of justice and efficiency in civil proceedings, the individual judge is left with a wide discretion. She contends that there may not be any realistic alternative to the ad hoc balancing approach and the ultimate reliance on expert judicial intuition. In her view:

> [t]he fact that procedural decision-making is not governed by a consistent normative principle may indicate that judges, scholars and law makers have not yet hit upon a satisfactory normative basis for procedural law… Perhaps there is no normative principle capable of capturing this intensely practical and human task.[49]

This leads to her conclusion that in seeking to reconcile conflicting aims and objectives in mega-litigation and in civil litigation generally, it is 'not necessarily a bad thing' to entrust the resolution of this 'to the expert intuition of the individual judge'.[50]

This relatively benign and narrow focus on the role of the individual judge in seeking to achieve justice and efficiency in mega-litigation is not unexpected given the parameters of the study and the focus on the role and attitude of judges who were interviewed.

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45 Olijnyk (n 1) 122–36.
46 Discussed at ibid 136–41.
47 Ibid 175.
48 Ibid177.
49 Ibid 189.
50 Ibid 190.

X Other Factors that Impact on Mega-Litigation

However, from a broader policy perspective, there are a variety of factors that impact on the conduct of mega-litigation, and which are a cause of ongoing prohibitive cost and inordinate delay, which are to some extent outside the ambit of judicial discretion and control, or at least are unlikely to be curtailed by the exercise of judicial power in many, if not most, cases. The fact is that mega-litigation in Australia, and class actions in particular, continue to give rise to substantial delay and excessive cost notwithstanding procedural and doctrinal reforms and despite the proactive use of judicial management techniques. A detailed consideration of the reasons for this is outside the scope of the current review.

XI Transcending the Constraints on Proactive Judicial Control

In her analysis of civil procedural reform in Australia, Olijnyk makes no mention of a somewhat radically different approach adopted by the Victorian Law Reform Commission ('VLRC').

In its *Civil Justice Review Report*,[51] the VLRC noted that, in response to concerns about costs and delays, provisions had been introduced in a number of jurisdictions into statutes and rules of court to impose certain obligations on courts in the management of civil litigation.[52] The VLRC further noted that, in some instances, obligations have also been imposed on litigants and lawyers to assist the court in achieving the overriding objectives. These procedural reforms are the focus of the analysis by Olijnyk.

Although the VLRC considered that these are important initiatives, which the Commission had in large measure drawn on, it concluded that given constraints on the judicial control of litigation, a primary focus should be on a more direct method of seeking to improve the conduct of participants in civil litigation. Such participants are the parties, their lawyers and others who exercise commercial or other influence or control over the conduct of proceedings, including litigation funders and insurers.

The VLRC recommended 'a new set of statutory provisions to expand the overriding obligations and duties (the "overriding obligations") to be imposed on all key participants in civil proceedings before Victorian courts, and to more clearly define the "overriding purpose" sought to be achieved by the courts in civil proceedings'.[53] These provisions sought to address one of the key policy objectives of the review; namely, 'improving the standards of conduct of participants in the

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51 Victorian Law Reform Commission ('VLRC'), *Civil Justice Review* (Report 14, 2008) ('*Civil Justice Review Report*').

52 One of the Victorian judges interviewed by Olijnyk, David Harper, was a member of the VLRC and involved in the *Civil Justice Review*. The writer of this book review was the Commissioner in charge of the Review.

53 *Civil Justice Review Report* (n 51) 149 [1.1]. See generally ch 3 ('Improving the Standards of Conduct of Participants in Civil Litigation').

civil justice system to facilitate early dispute resolution, to narrow the issues in dispute and to reduce costs and delay'.[54]

The overriding obligations comprised a set of positive obligations and duties. 'These commence with a statement of a paramount duty to the court to further the administration of justice' (consistent with procedural reforms in other Australian jurisdictions and in England and Wales, which are discussed by Olijnyk). However, in a somewhat radical departure from other procedural reforms, the VLRC also proposed 10 more specific obligations and duties to be imposed by statute.[55]

In summary, the VLRC proposed that:

> Each of the persons to whom the overriding obligations are applicable:
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> - shall at all times act honestly
> - shall refrain from making or responding to any claim in the proceeding, where a reasonable person would be of the belief that the claim or response (as appropriate) is frivolous, vexatious, for a collateral purpose or does not have merit
> - shall not take any step in the proceeding unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding
> - has a duty to cooperate with the parties and the court in connection with the conduct of the proceeding
> - shall not engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive or knowingly aid, abet or induce such conduct
> - shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution (ADR) processes
> - where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute
> - shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
> - shall use reasonable endeavours to act promptly and to minimise delay
> - has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.[56]

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54 Ibid 149 [1].
55 Ibid 150 [1.1].
56 Ibid.

'In addition to the overriding obligations various [quite onerous] certification provisions were proposed in relation to both parties and legal practitioners.'[57]

The overriding obligations were proposed to apply not only to litigants and lawyers (as is the case with other civil procedure reforms), but also to litigation funders and insurers (to the extent that such entities or persons exercise any direct or indirect control or influence over the conduct of any party in a civil proceeding),[58] and (in a limited respect) to expert witnesses.[59] They were also applicable to not only the conduct of proceedings in court, but to ancillary processes, such as mediation.[60]

The proposed provisions were accompanied by

> a broad range of sanctions and remedies available to the court to deal with nonconforming behaviour. Some of these are compensatory as well as punitive. They included payment of legal costs, expenses or compensation, requiring that steps be taken to remedy the breach and precluding a party from taking certain steps in the proceeding.[61]

The rationale for the recommendations was to impose affirmative statutory obligations on participants in the civil justice system, and those funding and influencing their conduct, with serious consequences for non-compliance, so as to improve the standards of forensic behaviour in a manner analogous to that sought to be achieved by model litigant guidelines adopted by various governments and agencies.[62] They were accompanied by a range of other recommendations designed to address the problems of cost and delay in civil proceedings.

As the VLRC noted, the rationale for its recommendations in relation to overriding obligations

> did not arise out of any serious concern about widespread 'improper' conduct on the part of the … legal profession. In part, the proposals arose out of the view that what has been traditionally regarded as 'proper' or normal professional conduct, and in particular the adversarial approach to litigation and the primacy often given to the partisan interests of clients, has not always been conducive to the quick, efficient or economical resolution of disputes.[63]

Many of the VLRC recommendations, including most of the above-mentioned proposals in respect of overriding obligations, were adopted and incorporated, with some modifications, in the *Civil Procedure Act 2010* (Vic). This reflects a very different approach to the management and conduct of civil litigation generally, and mega-litigation in particular, than the primary reliance on judicial management that is the subject of the study by Olijnyk and the focus of the judges who were interviewed.

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57 Ibid.
58 Ibid 181–2 [3.7].
59 Ibid 172–81 [3.5].
60 Ibid 191 [5.1].
61 Ibid 151.
62 Ibid 152–5.
63 Ibid 153–4.

XII Conclusion

Notwithstanding the above comments concerning the limits of the scope of the research, *Justice and Efficiency in Mega-Litigation* is a very valuable contribution to the scholarship on civil procedure, presents important insights into how judges seek to achieve the goals of justice and efficiency in complex mega-litigation and is essential reading for those interested in civil justice reform.