

# DEFINING CIVIL DISPUTES: LESSONS FROM TWO JURISDICTIONS

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*[Court systems have adopted a variety of mechanisms to narrow the issues in dispute and expedite litigation. This article analyses the largely unsuccessful attempts in two jurisdictions — the United States and Australia — to achieve early and efficient issue identification in civil disputes. Procedures that rely on pleadings to provide focus have failed for centuries, from the common (English) origins of these two systems to their divergent modern paths. Case management practices that are developing in the United States and Australia offer greater promise in the continuing quest for early, efficient dispute definition. Based on a historical and contemporary comparative analysis of the approach to pleadings in the United States and Australia, this article recommends that courts should rethink the function of pleadings, alter litigation incentives, and refine case management practices. This will lead to earlier issue identification, better framing of the discovery process, and a more efficient litigation process.]*

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## I INTRODUCTION

For centuries, courts have searched for ways to get litigants to define the parameters of their disputes. While this desire to get to the ‘real issues’ has a long history, tight government budgets, limited funding for civil courts and high litigation costs have intensified courts’ efforts to narrow issues and to expedite litigation.<sup>1</sup> Many litigants, however, prefer to keep their options open and are hesitant to abandon viable claims and defences — even weak or tangential ones. Litigants may lack the necessary information to evaluate the viability of their positions. They may also see strategic advantage in delay or in increasing their opponents’ litigation costs. For these reasons, parties often resist the courts’ efforts at issue narrowing. Plaintiffs may advance weak claims or conclusory descriptions of their complaints. Defendants may refuse to go beyond skeletal denials to provide information about the factual basis of their denials and affirmative defences.

Court systems have adopted a variety of mechanisms to try to force or encourage greater clarity at earlier points in a dispute. Their traditional tools have been the rules about pleadings, which use formal statements of the parties’ claims and defences to outline the issues, share information, and weed out baseless claims. While the rules have varied in different times and places, one common feature has been a largely unsuccessful quest to focus litigation on the parties’ actual dispute.<sup>2</sup> Some systems have used pleadings to emphasise the isolation of one single issue of law or fact, while others have used pleadings to try to define and confine litigation. Still other systems have limited pleadings to a notice-giving function while trying to find other ways to achieve issue definition.

As the 20<sup>th</sup> century neared its end, courts adopted institutionalised systems of case management.<sup>3</sup> Case management philosophy encourages judges to use supervision, communication, attitude adjustment, deadlines, and sanctions to achieve the goals of focus and disclosure that procedural rules have traditionally assigned to pleadings and discovery.<sup>4</sup> If the parties and lawyers acting on their own will not or cannot quickly and cooperatively identify the issues in dispute, limit discovery to the optimal amount of information exchange, and arrive at an

<sup>1</sup> For a consideration of the impacts of limited government funding on the operation of civil courts, see Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010) 45–51. For a consideration of the relationship between litigation costs and improved, early issue identification in civil disputes, see Chief Justice Michael Black, ‘The Role of the Judge in Attacking Endemic Delays: Some Lessons from Fast Track’ (2009) 19 *Journal of Judicial Administration* 88. See also Deborah R Hensler, ‘Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System’ (2003) 108 *Penn State Law Review* 165, 174, where the author discusses the relationship between decreased funding for courts, increased case filings and the development of the court management movement.

<sup>2</sup> Charles E Clark, ‘History, Systems and Functions of Pleading’ (1925) 11 *Virginia Law Review* 517, 518.

<sup>3</sup> Stephen N Subrin and Thomas O Main, ‘The Integration of Law and Fact in an Uncharted Parallel Procedural Universe’ (2004) 79 *Notre Dame Law Review* 1981, 1999; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 390 [6.3] (‘*Managing Justice*’).

<sup>4</sup> See, eg, Committee on Court Administration and Case Management, Judicial Conference of the United States, *Civil Litigation Management Manual* (2001); Black, above n 1, 91–2.

agreed resolution of the dispute, judges increasingly have tried to find ways to make it happen. Case management practices have evolved, moving from an emphasis on judges setting and enforcing deadlines to 'issue management' — judges participating at an early stage in structuring the issues in the case.<sup>5</sup> Although it is not often recognised, many of the goals of case management overlap with the traditional goals of pleadings, so the courts have in a sense created redundant regimes on parallel tracks.

This article will consider the wisdom and efficacy of these methods through the lenses of two countries that have adopted different techniques for encouraging issue identification: Australia and the United States ('US').<sup>6</sup> The two systems are similar enough that comparisons can be fruitful, but different enough to offer a range of information about the impacts of diverse practices. Both are common law systems that have inherited their pleading traditions from England, and both have wrestled with the challenge of how best to strike a balance between traditional pleading practice and effective issue management. Australia still relies on fact pleading to identify issues, while moving tentatively towards greater issue management. The US, however, has relied more heavily on issue management but may be retreating from that trend and returning to fact pleading. Each country has something to teach the other about issue definition, and the successes and failures of both provide insights for any court system seeking a just and effective way to expedite litigation.

In this paper we will argue that pleadings have failed, and will continue to fail, to facilitate early issue definition in civil proceedings. While pleadings may serve other useful purposes, there is no reason to spend litigant and court time in precisely and laboriously calibrating the content of written pleadings. Case management practices, while not without problems of their own, show promise as a way to encourage realistic and early identification of the central issues in a case, to focus discovery, and to specify the issues to be tried.

We will begin by examining a shared history, the evolution of pleading regimes in England. We will focus in particular on the origin of pleadings as an oral exchange between the parties' lawyers and the court for the purpose of achieving issue identification. We demonstrate that many of the problems with pleadings have remained constant across centuries and that one problem in

<sup>5</sup> For an overview of the evolution of case management in Australia from relatively undifferentiated timetabling, to more active and nuanced 'differential case management', to robust judicial intervention, see Justice J R T Wood, 'The Changing Face of Case Management: The New South Wales Experience' (1995) 4 *Journal of Judicial Administration* 121; Mark von Dadelszen, 'Case-flow Management — In Search of the "Meaningful Event"' (1996) 6 *Journal of Judicial Administration* 171; Black, above n 1. For an account of the American experience, see Judith Resnik, 'Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging' (1997) 49 *Alabama Law Review* 133.

<sup>6</sup> There are, of course, many levels of courts faced with different kinds of management challenges in these countries. This article will examine those that have been most affected by the type of case management designed to force the early identification and narrowing of issues: the federal courts and state superior courts in Australia and the federal courts in the US. We also recognise that there are differences in the two countries' procedural systems, legal professions, and political climates that affect efforts to achieve early issue identification, but nevertheless believe that the variables on which we focus — pleading and case management practices — are sufficiently dominant to make comparisons worthwhile.

particular — the failure of pleadings to achieve early issue identification — has preoccupied commentators and reformers. The article will then go on to consider the history and present state of pleadings and case management in Australia and the US.

Having thus set the historical stage and having compared and contrasted the two systems, we then recommend ways to realign the functions of pleadings and case management to eliminate redundancy and allow each to do what it can do best. First, we argue that the notion of ‘pleadings’ as gatekeeper and discloser of detailed facts ought to be abolished. Instead, a more basic narrative statement of claim and response can be used to outline a case. Second, we explain how modern case management — whether through deadlines or through more active issue management — can be used to achieve effective and early issue identification, and to shape the discovery process. Finally, because case management can only perform these functions when used carefully and when supported by appropriate incentive structures, we suggest some conditions that must be met for case management to succeed in achieving effective issue identification where pleadings and pleadings reforms have, for centuries, failed.

## II THE HISTORY OF PLEADINGS

Australia and the US have inherited their civil procedure systems from England, and in both countries the current pleadings rules have evolved from that common source. Until the mid 15<sup>th</sup> century, common law pleadings in England were oral exchanges before a judge, who helped guide the parties to an issue of law (to be decided by a court) or fact (to be decided by a jury).<sup>7</sup> The aim of the oral pleadings exercise was to narrow the issues in dispute:<sup>8</sup>

the debate between the opposing counsel, carried on subject to the advice or the rulings of the judge[,] allowed the parties considerable latitude in pleading to the issue. Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled.<sup>9</sup>

Over time, this practice of oral pleading was replaced by written pleading.<sup>10</sup> The reasons for this change are not entirely clear. A popular view is that oral pleading was both a feature and a product of a society ‘where writing was uncommon and where it was usual to make claims publicly.’<sup>11</sup> As literacy

<sup>7</sup> New South Wales Law Reform Commission, *Procedure (Common Law Pleadings; Scott Schedules)*, Working Paper No 14 (1975) 7–12 [2.1]–[2.8]. See also *Fieldturf Inc v Balsam Pacific Pty Ltd* [2003] FCA 809 (1 August 2003) [3] (Finkelstein J) (*‘Fieldturf’*); F G Brennan, ‘Written Pleadings’ (1975) 12 *University of Western Australia Law Review* 33, 44–6.

<sup>8</sup> John H Langbein, Renée Lettow Lerner and Bruce P Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen Publishers, 2009) 147–8, 253–5.

<sup>9</sup> Sir William Holdsworth, *A History of English Law* (Sweet & Maxwell, 5<sup>th</sup> ed, 1942) vol 3, 635, quoted in New South Wales Law Reform Commission, above n 7, 8 [2.3].

<sup>10</sup> New South Wales Law Reform Commission, above n 7, 8–9 [2.4].

<sup>11</sup> *Ibid* 8 [2.4]. See also Peter Goodrich, ‘Literacy and the Languages of the Early Common Law’ (1987) 14 *Journal of Law and Society* 422.

increased and litigation became more complex, so this view goes, it became more convenient to plead in writing.<sup>12</sup> Over time, written pleadings changed, from a narration of underlying events to a recitation of formulaic allegations that matched the elements of legal theories. Their complexity was eventually treated as natural and unavoidable. Supporters of stylised written pleadings boldly claimed that common law pleadings ‘were so logical as to be inevitable’<sup>13</sup> and that the system of pleadings was so scientific and finely calibrated ‘that any radical change must be for the worse, and would inflict damage not only on the law of pleading but on the common law as a whole.’<sup>14</sup> While pleading rules have changed, these attitudes persist among those who have mastered the art of pleading, and they have stood in the way of pleading reforms at many times and in many places.

Some interesting possibilities were lost in the shift from oral to written pleadings, including ‘early settlements, instant definition of issues, [and] early compulsory education of Court and counsel in the facts and relevant law.’<sup>15</sup> The shift also decreased the role of the judge in issue formulation. The development of rules ‘as to what could be pleaded ... implicitly required a re-definition of the judge’s role, from that of organizer of the progress of the litigation and the “enforcer” as to content, to being merely the facilitator and ultimate judicial referee.’<sup>16</sup> The court’s role shifted to applying the law to the facts only after those facts had been determined by the jury.<sup>17</sup> In addition, the shift from orality to writing led to the pleading of less factual information and more statements of conclusions.<sup>18</sup> Pleadings tended to become more formulaic, as written pleadings that had been used in the past became models for the future. The resulting pleadings revealed relatively little about the real dispute, making trial by ambush possible and acceptable.<sup>19</sup>

Meanwhile equity courts, administered by the Lord Chancellor, evolved out of petitions to the monarch. Their pleading system was far less structured. Bills in equity were designed to convince the Chancellor to provide justice where the common law could not, and so they looked more like stories, factual in nature

<sup>12</sup> New South Wales Law Reform Commission, above n 7, 8 [2.4].

<sup>13</sup> W S Holdsworth, ‘The New Rules of Pleading of the Hilary Term, 1834’ (1923) 1 *Cambridge Law Journal* 261, 262.

<sup>14</sup> *Ibid.*

<sup>15</sup> Brennan, above n 7, 45. When recent case management developments — such as the Federal Court of Australia’s ‘Fast Track’ programme — are considered, it is interesting to note how the things that Brennan bemoaned as lost by the shift to written pleading are being reclaimed in modern case management practices, especially early identification of issues and early education of court and counsel. See also Black, above n 1, 94.

<sup>16</sup> D R Parratt, ‘“Something Old, Something New, Something Borrowed ...”: Civil Dispute Resolution in Scotland — A Continuing Story’ in C H van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia, 2008) 163, 168 (discussing a similar shift from oral to written pleadings in 18<sup>th</sup> century Scotland). See also New South Wales Law Reform Commission, above n 7, 8–9 [2.4], for comments on the changes to the role of judges brought about by the switch from oral to written pleading.

<sup>17</sup> S F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2<sup>nd</sup> ed, 1981) 70–4.

<sup>18</sup> *Feldturf* [2003] FCA 809 (1 August 2003) [3] (Finkelstein J).

<sup>19</sup> *Ibid* [5]; Brennan, above n 7, 45–6.

and made under oath.<sup>20</sup> Equity also employed ‘bills of discovery’, which allowed questions to be put to the defendant and required those questions to be answered under oath. There was no need for a single legal issue or a single factual theory, as the Chancellor rather than a jury decided the case.<sup>21</sup> Unfortunately, by the 19<sup>th</sup> century, equity too had become more structured and intricate, and equity courts were infamous for their delay.<sup>22</sup>

English procedural reformers began chipping away at pleading problems with a series of changes in the 19<sup>th</sup> century, culminating in the 1873 and 1875 *Judicature Acts*.<sup>23</sup> These Acts consolidated law and equity into a single Supreme Court of Judicature with simplified pleading rules, and the old forms of action were effectively abolished. The new rules provided that ‘[e]very pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved’.<sup>24</sup>

While these reforms relaxed the rigidity that characterised common law pleading, they did not provide a system of pleading that achieved efficient definition of the issues. In 1880, a committee led by Lord Chief Justice Coleridge, dissatisfied with the state of written pleadings, stated that ‘as a general rule, the questions in controversy between litigants may be ascertained without pleadings.’<sup>25</sup> They recommended that no party should deliver a pleading without leave of the court, and the pleadings rules were so amended.<sup>26</sup> It seems that this reform was ineffective because leave to deliver written pleadings was almost always asked for and granted.<sup>27</sup> The new rule was revoked in 1933.<sup>28</sup> In 1953, the Committee on Supreme Court Practice and Procedure (‘Evershed Committee’) concluded that pleadings were prolix, that pleaders used boilerplate forms of pleading that were ‘useless’, that defences often put every alleged fact in issue ‘without regard to common sense or reality’,<sup>29</sup> and that matters of law were not commonly pleaded even though they were sure to take the other party by surprise.<sup>30</sup> The

<sup>20</sup> Milsom, above n 17, 82–7.

<sup>21</sup> *Ibid.* 82–3.

<sup>22</sup> *Ibid.* 95–6.

<sup>23</sup> *Supreme Court of Judicature Act 1873* (Imp) 36 & 37 Vict, c 66; *Supreme Court of Judicature Act 1875* (Imp) 38 & 39 Vict, c 77. See Holdsworth, ‘The New Rules of Pleading’, above n 13, 271, quoting Sir Frederick Pollock, *The Genius of the Common Law* (Columbia University Press, 1912) 29, who discussed an unsuccessful and short-lived reform initiative in 1834 with the Hilary Rules, leading to ‘an outbreak of new technicalities’.

<sup>24</sup> *Supreme Court of Judicature Act 1875* (Imp) 38 & 39 Vict, c 77, O XIX para 4.

<sup>25</sup> New South Wales Law Reform Commission, above n 7, 10 [2.7], quoting ‘The Legal Procedure Committee’s Report’ (1881) 25 *Solicitors’ Journal* 911, 911. See generally L C B Gower, ‘The Cost of Litigation: Reflections on the *Evershed Report*’ (1954) 17 *Modern Law Review* 1, 5, where Gower, commenting about 70 years later on the place of written pleadings in the English civil justice system, observed that they were neither essential nor fundamental features of the English legal system and could be ‘eradicated or at least modified, without a complete reorganisation’ of that system.

<sup>26</sup> New South Wales Law Reform Commission, above n 7, 10–11 [2.7], quoting ‘The Legal Procedure Committee’s Report’ (1881) 25 *Solicitors’ Journal* 911, 911.

<sup>27</sup> New South Wales Law Reform Commission, above n 7, 11 n 19.

<sup>28</sup> *Ibid.*

<sup>29</sup> Committee on Supreme Court Practice and Procedure, *Final Report*, Cmd 8878 (1953) 42 [117].

<sup>30</sup> *Ibid.* See also Committee on Personal Injuries Litigation, *Report*, Cmnd 3691 (1968) 74 [254], [256], where similar criticisms of pleadings in road accident cases were made.

Committee's recommended changes, which included dispensing with pleadings in certain types of cases, were optional and do not seem to have resulted in any substantial changes in practice.<sup>31</sup>

Forty years later, pleadings problems persisted and were revisited by Lord Woolf in his *Interim Report*.<sup>32</sup> While his criticisms of pleadings practice have much in common with those discussed above, there are a few distinctive features. Lord Woolf assigned much of the blame for the failure of pleadings to the adversarial system, especially party control of pre-trial procedure.<sup>33</sup> According to traditional adversarial principles, judicial pre-trial oversight of the content of pleadings arises at the request of the parties in the form of applications for particulars, to strike out a pleading, or for summary judgment. That oversight, however, rarely results in better issue identification. Lord Woolf proposed changes to pleadings rules, but thought that rule changes without increased judicial scrutiny of the pleadings process would achieve nothing: 'If there is no expectation of judicial scrutiny, slapdash pleading and deliberate misuse can flourish.'<sup>34</sup> This solution is consistent with Lord Woolf's view that 'pleadings themselves do not directly define issues or identify the area in dispute; by setting out facts, they are the means to enable the court and the parties to do so.'<sup>35</sup> Thus Lord Woolf was reminding us of a piece of the puzzle that had been lost since the switch from oral to written pleadings five centuries earlier — namely, the role of the judge in issue identification.<sup>36</sup>

The Woolf reforms also introduced 'pre-action protocols' — not pleadings in the technical sense, but written communications between disputants that serve the same function as pleadings. They are intended to provide a better and earlier exchange of information about claims and defences, notice of the general outlines of the facts in dispute, copies of the basic relevant documents, and an opportunity to settle the matter.<sup>37</sup> For example, the pre-action protocol for personal injury cases begins with a letter from the claimant setting out 'a clear summary of the facts on which the claim is based, together with an indication of the nature of any injuries suffered and of any financial loss incurred.'<sup>38</sup>

The defendant's reply is supposed to inform the claimant 'whether liability is denied and, if so, giv[e] reasons for their denial of liability including any

<sup>31</sup> New South Wales Law Reform Commission, above n 7, 11 n 20. The New South Wales Law Reform Commission suggested that some of the Evershed Committee's recommended changes in pleading practice had been adopted in commercial cases.

<sup>32</sup> Lord Woolf, Department for Constitutional Affairs (UK), *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).

<sup>33</sup> *Ibid* 154–5.

<sup>34</sup> *Ibid*. See also Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2<sup>nd</sup> ed, 2006) 235 [6.2].

<sup>35</sup> Lord Woolf, *Interim Report*, above n 32, 153.

<sup>36</sup> Zuckerman, *Zuckerman on Civil Procedure*, above n 34, 235–6 [6.1]–[6.4].

<sup>37</sup> Lord Woolf, Department for Constitutional Affairs (UK), *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 107–11.

<sup>38</sup> Ministry of Justice (UK), *Civil Procedure Rules: Pre-Action Protocol for Personal Injury Claims* (2010) 5 [3.2] (emphasis altered).

alternative version of events relied upon.<sup>39</sup> In this sense, these reforms recognised the (pre-commencement) utility of mutual information exchange, separate in function from the formal, binding ‘pleadings’.

### A Australia

#### 1 Pleadings

In Australia, a modified version of the pleading system created by the *Judicature Acts* is still generally in force.<sup>40</sup> Pleadings are intended to formulate the issues between the parties, to give notice of the case that will be put at trial, and to bind the parties to those issues.<sup>41</sup> Like English pleadings under the *Judicature Acts*, the rules require parties to plead material facts only, not evidence.<sup>42</sup> Parties may ask the court (and they often do) to require an opponent to supplement pleadings with particulars to provide further details of the case to be made at trial.<sup>43</sup>

Australia also has a robust discovery regime. Superior courts have rules allowing for pre-trial party access to documents and information held by an opponent and, in limited circumstances, access to documents before proceedings have been commenced.<sup>44</sup> Thus, pleadings are not the only vehicle that assists parties in evaluating the strengths and weaknesses of their cases, in preparing for trial, and in making informed decisions about settlement offers.<sup>45</sup>

While there is wide agreement that the purpose of pleadings is early identification of the real issues in dispute, there is also wide agreement that this aim is not being achieved by pleadings rules and practices. As Finkelstein J has stated, ‘no one seriously suggests that the system of pleadings is adequate.’<sup>46</sup> Among the main criticisms that have been levelled at Australian pleadings practices are the

<sup>39</sup> Ibid 6 [3.7].

<sup>40</sup> B C Cairns, *Australian Civil Procedure* (Lawbook, 8<sup>th</sup> ed, 2009) 190; Brennan, above n 7, 33–4.

<sup>41</sup> Cairns, above n 40, 193–5.

<sup>42</sup> See, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 13.02, which requires every pleading to ‘contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved’. See also *Federal Court Rules 1979* (Cth) O 11 r 2; *Court Procedures Rules 2006* (ACT) r 406; *Uniform Civil Procedure Rules 2005* (NSW) r 14.7; *Supreme Court Rules 1987* (NT) r 13.02; *Uniform Civil Procedure Rules 1999* (Qld) r 149; *Supreme Court Civil Rules 2006* (SA) r 98; *Rules of the Supreme Court 1971* (WA) O 20 r 8. Pleading law is not prohibited and is generally required if parties intend to rely on a statutory claim or defence.

<sup>43</sup> Note that the ‘rules of some jurisdictions expressly assume a distinction between material facts and particulars, in some other jurisdictions the distinction is implied, and in a few jurisdictions the distinction has been abolished’: Jill Hunter, Camille Cameron and Terese Henning, *Litigation 1: Civil Procedure* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2005) 173.

<sup>44</sup> Previous legislation in Victoria went further. For example, *Civil Procedure Act 2010* (Vic) s 34(2)(a), repealed by *Civil Procedure and Legal Profession Amendment Act 2011* (Vic) s 7, created a pre-litigation requirement that all persons involved in a civil dispute must exchange ‘appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute’. The recent amendment to that legislation has removed this pre-litigation requirement, leaving it to courts to decide whether such requirements will apply and, if so, in which categories of cases.

<sup>45</sup> Hunter, Cameron and Henning, above n 43, 217.

<sup>46</sup> *Fieldturf* [2003] FCA 809 (1 August 2003) [6].

failure of parties to plead matters of fact and law, the failure of pleadings to narrow the issues in dispute, and the tendency of parties to plead things that they know they cannot prove and to deny allegations that they know to be true.<sup>47</sup> Another criticism is that applications for amendments and for further and better particulars of a pleading are commonplace, resulting in satellite litigation that adds significantly to the cost of litigation but adds little to efficient and timely issue identification.<sup>48</sup>

Despite the consensus that pleadings are failing to identify issues promptly, criticisms have generated various reform proposals but few actual changes. In 1975, F G Brennan QC wrote that there was little interest in any major changes to pleadings rules and practice.<sup>49</sup> In the same year, the New South Wales Law Reform Commission tackled some of these vexed pleadings issues in a working paper, and recommended the abolition of pleadings in all non-jury actions.<sup>50</sup> While this robust recommendation seems to contradict Brennan's pessimistic view about a lack of appetite for pleadings reform, the failure of the 1975 Working Paper to result in any significant or lasting reform of pleadings tends to support it. Twenty years later, the Australian Law Reform Commission discussed the issue,<sup>51</sup> but its concerns about the deficiencies of pleadings rules and practices were not addressed in its subsequent major report on civil justice reform.<sup>52</sup>

In 1999, the Law Reform Commission of Western Australia proposed significant reform of pleadings rules and practice.<sup>53</sup> Its final report observed that while there had been many calls for reform, change had been slow and substantial reform was long overdue.<sup>54</sup> The Commission recommended, among other things, the abolition of pleadings, to be replaced with early, non-technical, non-legalistic case statements in narrative form.<sup>55</sup> In its view, '[t]he system of formal written pleadings is not itself of cardinal importance to the efficient administration of civil justice. But the function of pleadings — to define issues and provide due notice "at the earliest possible stage" — is essential.'<sup>56</sup> Despite the Commission's bold statement, its proposals did not lead to any significant reforms of pleadings rules or practice.

<sup>47</sup> See, eg, Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Report No 92 (1999) 72 [10.4]–[10.6]; Caron Beaton-Wells, 'Solving the Problems of Pleadings: Are There Lessons to Be Learnt for Civil Justice Reform in General?' (1998) 8 *Journal of Judicial Administration* 36, 40, citing Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997) [7.9]; Brennan, above n 7, 35–9; Black, above n 1, 90–1.

<sup>48</sup> Brennan, above n 7, 35.

<sup>49</sup> *Ibid* 33.

<sup>50</sup> New South Wales Law Reform Commission, above n 7, 27 [8].

<sup>51</sup> Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, above n 47, [7.6]–[7.13].

<sup>52</sup> Australian Law Reform Commission, *Managing Justice*, above n 3.

<sup>53</sup> Law Reform Commission of Western Australia, above n 47, 72–82 [10.8]–[10.26].

<sup>54</sup> *Ibid* 71 [10.2].

<sup>55</sup> *Ibid* 72–4 [10.8]–[10.10].

<sup>56</sup> *Ibid* 71 [10.3].

Other less ambitious reforms have been proposed and implemented in Australia in an effort to address pleadings problems. One of these is the ‘truth in pleading’ requirement that an affidavit or certificate verifying the truth of the contents of a pleading be presented.<sup>57</sup> Another attempt to achieve effective reform of pleadings practice has been to remove the prohibition against pleading matters of law. Pre-*Judicature Acts* pleadings had been criticised for mixing fact and law and for ‘conceal[ing] as much as possible what was going to be proved at the trial’.<sup>58</sup> It was thought at the time of the *Judicature Acts* that if parties were limited to pleading only facts, and not law or evidence, this would increase the chances that the true facts in dispute would be revealed. Instead, lack of focus on the applicable law tended to obscure the issues and lead to late-stage amendments. The distinction itself also bred disputes.<sup>59</sup> As the Law Reform Commission of Western Australia stated, ‘[t]he distinction between fact and law in any event is often blurred and is of dubious utility in helping parties to identify the real issues in a case and resolve them sooner rather than later.’<sup>60</sup>

The Federal Court of Australia has achieved what law reform commissions could not, by abolishing traditional pleadings practices for cases in its ‘Fast Track’.<sup>61</sup> The Fast Track resembles the ‘Rocket Docket’ case management approach used in some US courts, which sets very short deadlines for pre-trial activities. It began in 2007 as a pilot programme in the Victoria District Registry (Melbourne) and has now been adopted nationally by the Federal Court of Australia for commercial disputes whose trials will not exceed five days.<sup>62</sup> One of its key features is to replace traditional pleadings with Fast Track Statements, Responses and Cross-Claims. These documents must avoid undue formality, describe the nature of the dispute, and identify the factual and legal issues involved and the relief claimed.<sup>63</sup> Responses must clearly state the factual and legal substance of the respondent’s case.<sup>64</sup> Michael Black, writing when he was the Chief Justice of the Federal Court, identified the ‘interest in [the] elimination of surprise and the efficient clarification of the issues in dispute’,<sup>65</sup> and the rejection of traditional pleadings rules and practices, as bedrock principles of the Fast Track approach.<sup>66</sup> The abolition of pleadings, combined with other features of the Federal Court Fast Track discussed below, has reduced time-consuming

<sup>57</sup> See, eg, *Federal Court Rules 1979* (Cth) O 11 r 1B, which requires legal representatives to certify pleadings in writing; *Uniform Civil Procedure Rules 2005* (NSW) r 14.23, which requires parties in many cases to file an affidavit verifying their pleading; *Civil Procedure Act 2010* (Vic) s 42, which requires legal practitioners to certify that there is a proper basis for every allegation, denial and non-admission.

<sup>58</sup> *Spedding v Fitzpatrick* (1888) 38 Ch D 410, 414 (Cotton LJ), quoted in New South Wales Law Reform Commission, above n 7, 10 [2.6].

<sup>59</sup> New South Wales Law Reform Commission, above n 7, 10 [2.7].

<sup>60</sup> Law Reform Commission of Western Australia, above n 47, 74 [10.10].

<sup>61</sup> The Fast Track Directions are set out in Federal Court of Australia, *Practice Note No CM 8 — Fast Track Directions*, 25 September 2009 (‘Fast Track Directions’).

<sup>62</sup> Black, above n 1, 92.

<sup>63</sup> *Fast Track Directions* pt 4.

<sup>64</sup> Black, above n 1, 94.

<sup>65</sup> *Ibid* 94 n 25.

<sup>66</sup> *Ibid* 94.

and expensive interlocutory pleadings disputes. Chief Justice Black's early evaluation of this new approach to pleadings was optimistic:

It has to be said that substitution of these statements for traditional pleadings is not without its critics, but those involved in the process consistently report that the statements have largely eliminated surprise, have avoided pleading arguments and have greatly assisted in the early identification of the issues.<sup>67</sup>

## 2 Evolution of Case Management

When case management was finding a place on Australian reform agendas in the early 1980s, it was more about timetabling and scheduling, and less about judges taking an early and active role in identifying the issues in dispute.<sup>68</sup> Party and lawyer control, not active and early judicial involvement, were dominant features of this approach. The shortcomings of this type of case management, including increased backlogs and delays,<sup>69</sup> were soon recognised. Case management practices continued to evolve. Judges and registrars became more active in the case management process, and the need to replace party control with judge control was accepted and embraced. Further, differentiated case management techniques — providing 'pathways along which cases could proceed through the court system at a pace, and with that degree of management, which was appropriate for their needs'<sup>70</sup> — were implemented.

The development of case management in Australia was dealt a blow in 1997 by the decision of the High Court of Australia in *Queensland v J L Holdings Pty Ltd* ('*J L Holdings*').<sup>71</sup> At first instance, the judge refused to allow a late amendment of a pleading because she was concerned that allowing it might necessitate a postponement of the trial.<sup>72</sup> The High Court reversed that decision, holding that no principle of case management ought to be allowed to supplant the attainment of justice, 'even in changing times'.<sup>73</sup> The Court also held that case management principles could not be used, 'except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable'.<sup>74</sup> The impact of this case has been described as follows:

These comments simultaneously acknowledge and circumscribe the principles and practices of modern case management that were emerging in 1997. The *J L Holdings* precedent has become a part of the fabric of civil litigation and has preserved a view that requests for amendments and adjournments ought to be allowed as long as any prejudice can be compensated with an appropriate costs order. ... [P]ractitioners often cite *J L Holdings*, 'as a quasi-biblical injunction against any hard edge of case management principles that might press against

<sup>67</sup> Ibid.

<sup>68</sup> See, eg, Wood, above n 5, 124–7, where Wood describes the transition in New South Wales from passive to active case management.

<sup>69</sup> Ibid 124.

<sup>70</sup> Ibid 128.

<sup>71</sup> (1997) 189 CLR 146.

<sup>72</sup> *J L Holdings v Queensland* (Unreported, Federal Court of Australia, Kiefel J, 28 August 1996).

<sup>73</sup> *J L Holdings* (1997) 189 CLR 146, 154 (Dawson, Gaudron and McHugh JJ).

<sup>74</sup> Ibid.

them'. The Victorian Law Reform Commission, referring to comments of the Chief Justice of the State of Victoria, stated that, 'parties all too often attempt to exploit [the judgment] and judges and masters often feel their hands are tied'. There is also judicial comment to the effect that the case has had a 'chilling effect' on case management and has 'unfairly hamstrung courts', especially in complex commercial cases ...<sup>75</sup>

In 2009, in *Aon Risk Services Australia Ltd v Australian National University* ('*Aon*'),<sup>76</sup> the High Court revisited and overruled *J L Holdings*. The joint judgment of Gummow, Hayne, Crennan, Kiefel and Bell JJ stated that the limits imposed by *J L Holdings* on case management were not based on sound principle and were 'not consonant with [the High Court's] earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants.'<sup>77</sup>

Notwithstanding the significant chilling effect of *J L Holdings*, initiatives by federal and state courts to improve their case management processes continued in the 12 year period between *J L Holdings* and *Aon*. The Federal Court adopted its pilot Fast Track programme (discussed above), courts at the federal and state levels developed case management protocols, and many individual judges became more assertive case managers.

## B *United States*

### 1 *Pleadings*

During colonial times and into the 19<sup>th</sup> century, US courts operated under what was basically a common law system of pleading.<sup>78</sup> The most important 19<sup>th</sup> century development came even before the *Judicature Acts* in England, as New York in 1848 adopted what came to be known as the *Field Code*.<sup>79</sup> The *Field Code* merged law and equity, abolished the forms of action, and eliminated the search for a single issue in litigation. American procedural reformers were concerned that common law pleading as it had come to be practiced 'obscured facts and legal issues, rather than distilling and clarifying them.'<sup>80</sup> Therefore, the *Field Code* required the plaintiff to plead in 'ordinary and concise language without repetition'<sup>81</sup> the facts, not law, constituting a cause of action.<sup>82</sup> The drafters of the *Field Code* wanted pleadings to lead to the 'real charge' as quickly

<sup>75</sup> Camille Cameron, 'New Directions for Case Management in Australia' (2010) 29 *Civil Justice Quarterly* 337, 338–9 (citations omitted).

<sup>76</sup> (2009) 239 CLR 175.

<sup>77</sup> *Ibid* 217 [111].

<sup>78</sup> Stephen N Subrin, 'How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 *University of Pennsylvania Law Review* 909, 927–8.

<sup>79</sup> *An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of This State*, ch 379, 1848 NY Laws 497 ('*Field Code*').

<sup>80</sup> Subrin, above n 78, 932–3.

<sup>81</sup> *Ibid* 934, quoting *Field Code* § 62.

<sup>82</sup> Subrin, above n 78, 985.

and efficiently as possible.<sup>83</sup> About half of the states adopted procedure codes inspired by the *Field Code* during the next few decades, and this form of pleading became known as ‘code pleading’.<sup>84</sup> Unfortunately, the requirements of code pleading that the plaintiff plead ‘facts’ but not ‘evidence’ or ‘law’ generated an enormous motion practice and case law but failed to increase clarity or decrease cost and delay.<sup>85</sup>

Unhappiness with code pleading continued to grow,<sup>86</sup> and the eventual result (in 1938) was a new set of rules for the federal courts: the *Federal Rules of Civil Procedure* (*FRCP*).<sup>87</sup> Charles Clark, the *FRCP*’s principal architect, had little confidence in the capacity of pleadings, on their own, to clarify or narrow issues. As he later explained, ‘every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings’.<sup>88</sup> Accordingly, *FRCP* r 8 required only that the complaint include ‘a short and plain statement of the claim showing that the pleader is entitled to relief’.<sup>89</sup> The new pleading system was reinforced by a pro-amendment attitude, as the rules provided that permission to amend shall be freely given as justice requires.<sup>90</sup>

The other significant change brought about by the *FRCP* was the adoption of a number of discovery devices, including interrogatories, document production, oral depositions, and requests for admission.<sup>91</sup> Discovery, rather than pleading, was intended to aid in the identification of the disputed and undisputed issues between the parties.<sup>92</sup>

The functions formerly performed by pleadings alone were thus spread among several pre-trial devices. Pleading became less central to the process of identifying issues, as discovery, pre-trial conferences, and summary judgment joined it as methods of clarifying the scope of the lawsuit, sharing crucial information, and eliminating meritless claims.<sup>93</sup> This system allowed more cases to advance further and to encompass more issues compared to a system that used stylised

<sup>83</sup> Commissioners on Practice and Pleadings (New York), *First Report of the Commissioners on Practice And Pleadings: Code of Procedure* (1848) 152–3 §133.

<sup>84</sup> Subrin, above n 78, 939.

<sup>85</sup> For discussions of the courts’ extensive but unsuccessful attempts to distinguish between pleading facts, pleading legal conclusions, and pleading evidence, see Walter Wheeler Cook, ‘Statements of Fact in Pleading under the Codes’ (1921) 21 *Columbia Law Review* 416, 416–17; C E C, ‘Pleading Negligence’ (1923) 32 *Yale Law Journal* 483, 484.

<sup>86</sup> Subrin, above n 78, 944–56.

<sup>87</sup> *Ibid* 973.

<sup>88</sup> Charles E Clark, ‘Special Pleading in the “Big Case”’ (1957) 21 *Federal Rules Decisions* 45, 46.

<sup>89</sup> *FRCP* r 8(a)(2) (1938).

<sup>90</sup> *Ibid* r 15(a).

<sup>91</sup> *Ibid* rr 30, 33, 34, 36.

<sup>92</sup> Edson R Sunderland, ‘Foreword’ in George Ragland Jr, *Discovery Before Trial* (Callaghan and Company, 1932) iii, iii. See *Conley v Gibson*, 355 US 41, 47–8 (1957), where Black J delivered the opinion of the Court and stated that ‘the liberal opportunity for discovery and the other pre-trial procedures ... [will] define more narrowly the disputed facts and issues.’ In large measure, the *FRCP* adopted practices and mindsets that were characteristic of equity practice. See also Subrin, above n 78, 974.

<sup>93</sup> Kevin M Clermont and Stephen C Yeazell, ‘Inventing Tests, Destabilizing Systems’ (2010) 95 *Iowa Law Review* 821, 825.

pleadings to force a single issue or a system that required factually specific complaints before a case may proceed.

Some welcomed this result; it allowed greater private enforcement of legal rights, and thereby went hand in hand with statutory and common law developments that created new rights. During the 20<sup>th</sup> century, Congress passed new laws regulating business monopolies and securities markets, recognising labour union rights, creating new consumer rights, and prohibiting discrimination in employment.<sup>94</sup> The common law also developed expanded rights for plaintiffs in a number of areas, particularly in tort and warranty claims alleging injuries from consumer goods.<sup>95</sup> While there was some agency oversight under these new norms, private litigation was the primary vehicle for enforcing rights against unwilling corporate defendants. The federal pleading rules allowed cases to go forward even though the plaintiff did not have pre-suit access to evidence such as the defendant's internal practices or state of mind. Those facts did not have to be alleged with particularity in the initial complaint but could be acquired during discovery. The new laws, coupled with the new procedures, made litigation against powerful entities more accessible for ordinary citizens.<sup>96</sup>

Potential defendants, on the other hand, disliked the result. A rule that required only a 'short and plain statement of the claim', as in *FRCP* r 8, with no requirement of particularised facts, made it easy to file a lawsuit that could turn out to be baseless. Nor did it provide much in the way of limits on discovery, which was allowed as to anything 'relevant to the subject matter' of the litigation, even including information that was 'reasonably calculated to lead to the discovery of admissible evidence.'<sup>97</sup> The discovery allowed by this system could be expensive, and since there is little fee shifting to prevailing defendants in US courts,<sup>98</sup> even defendants who won their cases could not recoup the costs of litigation. These factors — notice pleadings rules, courts' generosity in granting amendments, broad discovery and no costs shifting — have arguably made the US debate about procedure reform considerably more politicised than it has been in other countries.<sup>99</sup>

<sup>94</sup> See, eg, *Sherman Act*, ch 647, 26 Stat 209 (1890), codified at 15 USC §§ 1–7; *Securities Exchange Act of 1934*, Pub L No 111-72, 48 Stat 881 (1934), codified at 15 USC §§ 78a–78jj; *National Labor Relations Act*, Pub L No 7-198, 49 Stat 449 (1935), codified at 29 USC §§ 151–69; *Consumer Credit Protection Act*, Pub L No 90-321, 82 Stat 146 (1968), codified at 15 USC §§ 1601–1667f, 1671–7, 1681–1681x, 1691–1691f, 1692–1692p, 1693–1693r; *Magnuson-Moss Warranty Act*, Pub L No 93-637, 88 Stat 2183 (1975), codified at 15 USC §§ 2301–12; *Title VII of the Civil Rights Act of 1964*, Pub L No 88-352, 78 Stat 253 (1964), codified at 42 USC §§ 2000e–2000e-17.

<sup>95</sup> Stephen C Yeazell, 'Re-Financing Civil Litigation' (2002) 51 *DePaul Law Review* 183, 190–3.

<sup>96</sup> See also *ibid* 183, which discusses changes in litigation financing make it easier for plaintiffs to sue.

<sup>97</sup> *FRCP* r 26(b) (1966 revision introduced this language, which was amended in 2000).

<sup>98</sup> John F Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 *American University Law Review* 1567.

<sup>99</sup> Arthur R Miller, 'From *Conley* to *Twombly* to *Iqbal*: A Double Play on the *Federal Rules of Civil Procedure*' (2010) 60 *Duke Law Journal* 1, 5; Paul D Carrington, 'Politics and Civil Procedure Rulemaking: Reflections on Experience' (2011) 60 *Duke Law Journal* 597, 599–600.

By 1976, complaints about frivolous litigation, uncontrolled discovery, unethical attorney conduct, and excessive judicial discretion were gaining currency.<sup>100</sup> Although empirical studies have repeatedly shown that in most cases litigation costs are modest and discovery is used appropriately,<sup>101</sup> rule-makers responded to the complaints. Over the next few decades, the rules were amended in a number of ways to try to impose more limits on litigation through changes to discovery rules and requirements that pleadings have probable evidentiary support.<sup>102</sup> In addition to actual rule amendments, the Supreme Court wrote several opinions in the 1980s that changed the meaning of the summary judgment rule in a way that made it easier for defendants to terminate cases before trial.<sup>103</sup>

The pleading rules, however, remained unchanged, despite evidence that trial courts were requiring heightened factual specificity in pleading in certain types of cases.<sup>104</sup> The Supreme Court repeatedly reversed cases in which heightened pleading requirements had been imposed by judicial fiat.<sup>105</sup> In addition, the Advisory Committee on the *FRCP* refused to amend the pleading rules to require plaintiffs to plead their claims with greater specificity before a case would be allowed to proceed to discovery.<sup>106</sup>

Repeat defendants such as large corporations and their insurers remain vocally unhappy with the system and have continued to lobby for fundamental change. For example, in 2010 a coalition including the Voice of the Defense Bar, the Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel, prepared a White Paper for presentation to the Advisory Committee on the *FRCP*. They argued in favour of amendments to the pleading

<sup>100</sup> These views were expressed at the Pound Conference, held on the 70<sup>th</sup> anniversary of Roscoe Pound's famous 1906 address to the American Bar Association. The 1976 conference was sponsored by the Judicial Conference of the United States, the Conference of Chief Justices and the American Bar Association. See generally 'Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice' (1976) 70 *Federal Rules Decisions* 79.

<sup>101</sup> For a review of the research, see Elizabeth G Thornburg, 'Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals' (1999) 52 *Southern Methodist University Law Review* 229, 246–9. The most recent study is Emery G Lee III and Thomas E Willging, 'Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules' (National Case-Based Civil Rules Survey, Federal Judicial Centre, October 2009).

<sup>102</sup> See Richard L Marcus, 'Discovery Containment Redux' (1998) 39 *Boston College Law Review* 747, 753–68; Richard Marcus, 'Not Dead Yet' (2008) 61 *Oklahoma Law Review* 299, 305; Rex R Perschbacher and Debra Lyn Bassett, 'The Revolution of 1938 and Its Discontents' (2008) 61 *Oklahoma Law Review* 275, 292–3.

<sup>103</sup> See, eg, *Matsushita Electric Industrial Co Ltd v Zenith Radio Corporation*, 475 US 574 (1986); *Anderson v Liberty Lobby Inc*, 477 US 242 (1986); *Celotex Corporation v Catrett*, 477 US 317 (1986).

<sup>104</sup> Christopher M Fairman, 'The Myth of Notice Pleading' (2003) 45 *Arizona Law Review* 987, 1011–59.

<sup>105</sup> See, eg, *Swierkiewicz v Sorema*, 534 US 506 (2002); *Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit*, 507 US 163 (1993).

<sup>106</sup> See, eg, Advisory Committee on Civil Rules, Judicial Conference of the United States, *Minutes — Advisory Committee on Civil Rules* (3–5 May 1993) 22–3, which discusses but does not adopt heightened pleading requirements for certain types of cases; Advisory Committee on Civil Rules, Judicial Conference of the United States, *Draft Minutes — Advisory Committee on Civil Rules* (20 April 1995) 17–18, which discusses but rejects heightened pleading requirements.

rules to require greater factual specificity, dismissal of cases that cannot be pleaded in sufficient detail, very limited discovery, and early identification and limitation of the issues.<sup>107</sup>

## 2 *Evolution of Case Management*

Even Charles Clark, crusader for a minimally demanding pleading system, contemplated the possibility that someone might have to step in and impose limits. In 1924 he suggested that ‘there should be provided masters or court officers to frame issues for the parties when these are not made clear by the parties themselves.’<sup>108</sup> The committee that drafted the 1938 *FRCP* considered a proposal that would permit judges to enter an ‘[o]rder formulating issues to be tried.’<sup>109</sup> After hearing the parties argue, the judge could decide that there was no ‘real and substantial dispute as to any one or more of the issues presented by the pleadings’<sup>110</sup> and eliminate them from the case. However, the drafting committee rejected this plan, both because judges in many areas were considered too busy to be narrowing issues and because allowing judges the right to ‘strike out’ issues without a full record and with no right of appeal gave judges too much power.<sup>111</sup> A hint of this plan survived, however, in *FRCP* r 16, which has become the source of case management. The original version of that rule suggested that pre-trial conferences could consider the simplification of issues, although there was no indication that judges could force such simplification on unwilling parties.<sup>112</sup>

The case management movement in the US began in the mid 20<sup>th</sup> century as a way to encourage judicial efficiency, and was reinforced by the adoption of a system in which single judges handled entire cases from beginning to end.<sup>113</sup> This version of case management urged judges to keep track of case progress and not to leave the pace of litigation to the parties; it consisted mainly of setting interim deadlines and an early, firm trial date. In time, however, proponents of case management sought a more forceful role in defining the nature of the dispute. Judges had found that the setting of reasonable time limits required an understanding of the issues in the case, and this in turn encouraged them to work with the lawyers to try to identify and narrow those issues. Rule 16 was repeatedly amended, each time nudging the judge towards using more tools to provide the focus and early disposition that were not provided by the pleading rules, and

<sup>107</sup> See Barry Bauman, ‘LCJ White Paper Provides Impetus to New *FRCP* Initiative’ (2010) 18(5) *Metropolitan Corporate Counsel* 5 <<http://www.metrocorpounsel.com/current.php?artType=view&EntryNo=10925>>.

<sup>108</sup> Clark, ‘History, Systems and Functions of Pleading’, above n 2, 550.

<sup>109</sup> Subrin, above n 78, 978, citing Advisory Committee on Civil Rules, *Tentative Draft III* (March 1936) r 24.

<sup>110</sup> Subrin, above n 78, 978.

<sup>111</sup> *Ibid* 979. See further Charles E Clark, ‘Summary and Conclusion to an Understanding Use of Pre-Trial’ (1961) 29 *Federal Rules Decisions* 454, 455, where Clark, who later became a Second Circuit judge, insisted that this kind of issue narrowing was designed to prepare the case for trial, not to dispose of it.

<sup>112</sup> Subrin, above n 78, 979. See also *FRCP* r 16(c)(2) (1938).

<sup>113</sup> Judith Resnik, ‘Managerial Judges’ (1982) 96 *Harvard Law Review* 374, 395, 397–9; Hensler, above n 1, 174.

finally requiring federal judges to undertake certain management tasks.<sup>114</sup> The current version of *FRCP* r 16 shows that case management has precisely the same goals as the pleading-discovery system: defining issues, sharing information, encouraging settlement, eliminating meritless claims, and positioning the case for trial.<sup>115</sup>

The Committee on Court Administration and Case Management of the Judicial Conference of the United States, in a manual written to guide federal trial judges, emphasises the importance of early issue management:

One of the most important tasks in the initial case management conference is early identification of the issues in controversy (in both claims and defenses) and of possible areas for stipulations ... Issue narrowing is aimed at refining the controversy and pruning away extraneous issues.<sup>116</sup>

Judges, it says, should not 'blindly accept' lawyers' statements that they need time to develop their cases, and should press for specific information about witnesses and evidence.<sup>117</sup>

In the context of this kind of case management, if the trial judge takes it seriously, there is little need to use motions to require more factual specificity in pleading. In the US, therefore, motions requesting greater factual detail were likely to be filed primarily by defendants in cases in which more detail might reveal a fact destroying the plaintiff's claim.<sup>118</sup> Only in those cases could the pleadings give the defendant something that case management could not.

### 3 *Pleadings Redux*

Contrary to popular belief, discovery costs in most US cases are quite low, and are proportional to the stakes involved in litigation. Consistent with earlier studies, a 2009 report of the Federal Judicial Center confirms that the cost of discovery and related pre-trial proceedings ranges from 1.6 per cent to 3.3 per cent of the amounts in dispute.<sup>119</sup> There is, however, a small subset of cases that, despite the existence of case management, remain contentious, complex, and expensive.<sup>120</sup> The costs of defending these cases can be substantial, even for cases that defendants believe to be meritless. Further, those costs will not generally be shifted to the losing plaintiffs.<sup>121</sup> For these reasons, the US has seen

<sup>114</sup> See generally Resnik, 'Managerial Judges', above n 113, 399–402; Resnik, 'Changing Practices, Changing Rules', above n 5, 160–85, which describes the evolution of case management from the 1940s onwards.

<sup>115</sup> *FRCP* r 16(a) (1938).

<sup>116</sup> Committee on Court Administration and Case Management, above n 4, 21.

<sup>117</sup> *Ibid.*

<sup>118</sup> Richard L Marcus, 'The Puzzling Persistence of Pleading Practice' (1998) 76 *Texas Law Review* 1749, 1759. Marcus notes that because pre-trial orders supersede pleadings, setting limits for the scope of litigation is not an important purpose for pleading practice, but pleading makes disposition on the merits available in a small percentage of cases: at 1756.

<sup>119</sup> Lee and Willging, above n 101, 2.

<sup>120</sup> Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation* (2010) 3 <<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf>>.

<sup>121</sup> Vargo, above n 98.

continuing pressure from repeat defendants for courts to create an enhanced gatekeeping role for plaintiff's pleadings.<sup>122</sup> Defendants are not as interested in requirements that ask for more information about the basis for denials. Many corporate defendants contend that management-based limits on discovery and issues do not provide what they seek: an immediate end to litigation and its attendant expenses.<sup>123</sup> They also argue that some judges will not use their discretion and their managerial powers to impose sufficient limits on discovery (and that plaintiffs' lawyers will endeavour to file their lawsuits in those particular judges' courts).<sup>124</sup>

In two recent Supreme Court decisions, a majority of justices accepted this argument, and as a result the Court reinterpreted *FRCP* r 8 to allow easier dismissal of cases. In so doing, they harked back to code pleading's distinction between facts and law, or facts and conclusions. In *Ashcroft v Iqbal* ('*Iqbal*'),<sup>125</sup> the Supreme Court extended a test first enunciated by the Court in *Bell Atlantic Corporation v Twombly* ('*Twombly*').<sup>126</sup> The majority in *Iqbal* advised trial judges that although they are required to take all facts pleaded as true, they are not required to accept pleaded inferences.<sup>127</sup> If the judge finds those pleaded inferences, characterised as 'legal conclusions', to be implausible based on the judge's 'experience and common sense', *Iqbal* instructs the trial judge to dismiss the case without allowing discovery.<sup>128</sup>

This use of fact pleading is different from that reflected in code pleading or in Australia's practice of requiring 'further and better particulars' — it is not about notice or focus, it is about termination.<sup>129</sup> *Iqbal* and *Twombly* explicitly reject the sufficiency of case management to control costs:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.<sup>130</sup>

<sup>122</sup> See, eg, Bauman, above n 107.

<sup>123</sup> See, eg, Miller, above n 99, 11, commenting on the lobbying for the heightened pleading requirement in the *Private Securities Litigation Reform Act of 1995*, Pub L No 104-57, 109 Stat 737, and stating at 15:

In recent years, the business community has used its influence to weaken the enforcement of public laws and policies regulating their activities. Procedural modifications have been employed to achieve substantive changes for defense interests. With *Twombly* and *Iqbal*, the favored disposition technique has moved earlier in time from summary judgment to the motion to dismiss.

<sup>124</sup> Lawyers for Civil Justice et al, 'Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure' (Paper presented at 2010 Conference on Civil Litigation, Duke Law School, 2 May 2010) x, 6–18.

<sup>125</sup> 129 S Ct 1937 (2009).

<sup>126</sup> 500 US 544 (2007).

<sup>127</sup> *Iqbal*, 129 S Ct 1937, 1949–50 (Kennedy J for Roberts CJ, Kennedy, Scalia, Thomas and Alito JJ) (2009).

<sup>128</sup> *Ibid.*

<sup>129</sup> Kevin M Clermont, 'Three Myths About *Twombly-Iqbal*' (2010) 45 *Wake Forest Law Review* 1337, 1347–8.

<sup>130</sup> *Iqbal*, 129 S Ct 1937, 1953 (Kennedy J for Roberts CJ, Kennedy, Scalia, Thomas and Alito JJ) (2009), quoting *Twombly*, 500 US 544, 559 (Souter J for Roberts CJ, Souter, Scalia, Kennedy,

While case management will undoubtedly continue in many cases, pleadings have been reinvigorated as a way to limit litigation.

Ironically, the Supreme Court's new approach has created in the US the situation from which Australia is trying to escape by using case management — a world in which parties and courts spend significant amounts of time on disputes about the pleadings. *Iqbal* and *Twombly* have brought new life to pleading motions, as evidenced by the fact that *Twombly* had been cited just under 24 000 times, and *Iqbal* more than 6000 times, as of March 2010, with both cases racking up additional citations at a rate of over 500 per month.<sup>131</sup> Any court time saved by early termination of a few cases may be outweighed by the added costs of this preliminary skirmishing. Parties will incur additional costs and delay as a result of these pleading motions. In addition, preliminary empirical data indicates that the specificity of pleading is not a good predictor of the plaintiff's ultimate ability to succeed on the merits.<sup>132</sup> From the standpoint of access to justice, a return to a system in which full information is required at the outset means that some meritorious claims will not be allowed to go forward and that deep-pocketed parties will have a strong upper hand.<sup>133</sup>

### III FORMULATING A MORE COHERENT APPROACH

In the two systems we have analysed, efforts to clarify and narrow issues proceed on two parallel and overlapping tracks: rules that attempt to force pleading of more specific facts, and case management aimed at issue identification. Managerial judges urge the parties to limit their cases to the 'real issues', and parties try to force each other to plead with greater particularity. This redundancy is inefficient in many ways. Unless each process serves a unique purpose, doing both will increase costs to the parties and costs to the court system. What, then, is the most effective way to provide the desired focus?

Thomas, Breyer and Alito JJ (2007). *Twombly* in turn relies on Justice Frank H Easterbrook, 'Discovery as Abuse' (1989) 69 *Boston University Law Review* 635, 638, where Justice Easterbrook states, 'Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves.'

<sup>131</sup> Adam N Steinman, 'The Pleading Problem' (2010) 62 *Stanford Law Review* 1293, 1357–60.

<sup>132</sup> Alexander A Reinert, 'The Costs of Heightened Pleading' (2011) 86 *Indiana Law Journal* 119, 161–6. A recent study by the Federal Judicial Center, comparing motions to dismiss on the pleadings before *Twombly* and after *Iqbal*, has found a significant increase in the filing of pleadings-based motions. It also found a general increase in the rate at which such motions were granted, although they are normally granted with leave to amend. This seems to reflect a newly-invigorated motion practice centering on pleading specificity, including increased party and court costs. It has not, however, resulted in an increased rate of dismissal in most types of cases. For an overview of this study, see Joe S Cecil et al, 'Motions to Dismiss for Failure to State a Claim after *Iqbal*: Report to the Judicial Conference Advisory Committee on Civil Rules' (Federal Judicial Center, March 2011) <[http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf)>.

<sup>133</sup> The Supreme Court, however, may already have signalled a retreat from the most aggressive readings of *Twombly* and *Iqbal*. In *Matrixx Initiatives v Siracusano*, 131 S Ct 1309, 1323 (Sotomayor J for the Court) (2011), the Supreme Court rejected a challenge to the plaintiffs' pleading of materiality and scienter in a securities fraud case, explaining that *Twombly* requires only that pleadings "raise a reasonable expectation that discovery will reveal evidence" satisfying the materiality requirement'.

### A Rethinking Pleadings

Attempts to require factual specificity in pleadings have failed for centuries to achieve the desired level of issue definition. Common law pleadings became intricate and formulaic, and thus uninformative.<sup>134</sup> US code pleading and Australian pleading rules (including requests for further and better particulars), while in theory requiring the revelation of facts, turn out to be similarly ineffective at forcing parties to define issues. The pleading requirements are often satisfied by deferring to boilerplate forms that follow established pleading precedents, but which reveal little about the parties' actual claims and defences.<sup>135</sup> They also lead to expensive but unproductive interlocutory hearings on pleading issues. While pleading law, rather than fact, is now permitted, one legacy of the historical prohibition on pleading law is that some parties fail to frame their claims in a legal context, leaving their pleadings incoherent and uninformative.<sup>136</sup> A lack of candour and specificity in defendants' responses also impedes the ability of pleadings to generate clearly defined issues.<sup>137</sup> In any case, modern US notice pleading never claimed to be a vehicle for significantly narrowing the issues in a lawsuit.

Pleadings have failed as the key to issue identification for at least four reasons. First, uncertainty encourages litigation, and pleading rules create uncertainty because they turn on the difference between 'facts' and 'legal conclusions', and allow 'further particulars' at the judge's ad hoc, case-specific discretion. There will therefore be little reason *not* to file a pleading motion if either success or the cost of litigation itself could produce a strategic advantage. Second, in some cases the time of initial pleading is simply too soon to expect certainty from the parties. If necessary information can be acquired only through discovery, attempts to require detailed pleadings are premature. Third, many courts have interpreted the plaintiff's burden of proof as requiring from the defendant nothing but bare denials rather than explanations of the facts underlying those denials. This is not conducive to a narrowing of the issues. Finally, the formality and binding nature of pleadings puts lawyers in full adversary mode, with the result that concessions are unlikely, strategic behaviour is maximised, and the arguments focus on technicalities rather than a shared effort to resolve the dispute.

A striking feature of the reform initiatives we examined above is that they all endorse a completely different role for pleadings as the best response to our seemingly incurable problems. The Australian proposals describe this as 'abolishing' pleadings (and replacing them with something else)<sup>138</sup> because pleadings practice is such a part of the fabric of adversarial litigation that no other type of reform, big or small, will make any appreciable difference. We agree with this

<sup>134</sup> See, eg, Brennan, above n 7, 35–7.

<sup>135</sup> See, eg, Justice Anthony Graham and Paul Graham, *Victorian Pleading Precedents* (LBC Information Services, 2<sup>nd</sup> ed, 1997) 16.

<sup>136</sup> Beaton-Wells, above n 47, 41–2.

<sup>137</sup> Lord Woolf, *Interim Report*, above n 32, 153 [4].

<sup>138</sup> See, eg, Law Reform Commission of Western Australia, above n 47, 72–3 [10.8].

assertion. Improving the prospects of achieving early issue identification requires significant reform of the fact pleading model.

The next obvious question is, what should replace pleadings? The result could look like the proposals of the Law Reform Commission of Western Australia or the Federal Court of Australia's Fast Track programme. It could involve the abolition of 'pleadings', to be replaced by non-technical, non-legalistic 'case statements' in narrative form, or a 'short and plain statement of the claim showing the pleader is entitled to relief' (as interpreted before *Twombly*), or pre-action protocol information exchanged by the parties (as suggested by the Woolf reforms in the UK). If pleadings could be reconceived as an exchange of communications designed to provide a narrative of the litigants' positions, they may do a better job of providing the raw material needed to identify areas of agreement, areas of dispute, and areas where additional information is required.<sup>139</sup> Even for those cases in which the disputes are straightforward and hands-on management is not required, these narrative statements can do more than traditional pleadings to fulfil the 'notice' function and define the issues sufficiently for the parties to proceed to mediation, settlement or trial.

We do not expect such a change, in isolation, to work miracles. History, even recent history, shows that attempts to change pleadings regimes can have unintended consequences. In South Australia, for example, two attempts to reform pleadings resulted only in the new pleadings rules being used as 'tactical weapons and as a means to oppress opponents',<sup>140</sup> with pleadings becoming too long and so particularised as to be almost unintelligible.<sup>141</sup> There is also some evidence that Lord Woolf's pre-action protocols can be abused to increase costs and delay while still avoiding real disclosure and issue narrowing.<sup>142</sup> Furthermore, notice pleading can be abused when it is so conclusory as to be non-informative. Adding judicial supervision to the mix, however, could be what makes the difference.<sup>143</sup> As the Law Reform Commission of Western Australia noted, '[t]he issues in a case are better addressed directly rather than through the guise of an application relating to a pleading.'<sup>144</sup>

### B Issue Identification through Case Management

Can case management achieve a level of candour and focus that pleadings have not achieved? We think that it has this potential. There is a historic precedent for this approach: the use of an early case conference to lead the parties toward legally viable claims is in some ways a throwback to oral pleading, where the representatives of both parties met with the judge and bandied allegations

<sup>139</sup> Elizabeth Fajans and Mary R Falk, 'Untold Stories: Restoring Narrative to Pleading Practice' (2009) 15 *Journal of the Legal Writing Institute* 3, 54.

<sup>140</sup> Law Reform Commission of Western Australia, above n 47, 71 [10.3].

<sup>141</sup> Beaton-Wells, above n 47, 49.

<sup>142</sup> Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 134–5.

<sup>143</sup> See also Project Board of the Civil Courts Review, Scottish Court Service, *Report of the Scottish Civil Courts Review* (2009) vol 2, 138 [60], 145 [116], which recommends abbreviated pleadings as well as case management.

<sup>144</sup> Law Reform Commission of Western Australia, above n 47, 72 [10.7].

back and forth until a claim and denial emerged that matched an existing legal theory.<sup>145</sup> Modern case management offers various ways of achieving the desired goals.

Differential case management sets and enforces interim deadlines and directly or indirectly limits discovery, either in an order specifically tailored for an individual case or by assigning cases to 'tracks' with default limits and deadlines. This type of management encourages issue narrowing indirectly, because the parties must prioritise their efforts in order to meet the deadlines and efficiently discover the most relevant information. Empirical data suggest that shortened deadlines for discovery correlate directly with lower attorney work hours and shorter times to disposition (both of which presumably reduce party costs).<sup>146</sup> In many cases, this type of management is all that is needed, but unfortunately, it can be undermined. This is the case, for example, if one side acts to obstruct timely discovery, especially if the other side lacks pre-suit access to important information; if deadlines are ignored; or if sanctions for noncompliance are weak or not enforced. These examples demonstrate that such types of case management neither clarify the issues nor further the just resolution of disputes.

Issue management, on the other hand, attempts in a more direct way to cajole opposing lawyers into communicating frankly in a meeting with the judge (and sometimes in the presence of their clients). These case conferences seek to lead the parties to consensus about which issues are genuinely disputed and worth the cost of litigating. Rule 16 of the *FRCP* explicitly authorises such case conferences. They are also provided for in the rules and legislation of Australian state jurisdictions, and the Federal Court of Australia's Fast Track programme has incorporated them as a cornerstone of its case management approach.

Existing models provide some evidence of the potential of case management to achieve early issue identification. The Fast Track rules of the Federal Court of Australia, for example, require parties to attend an initial conference about six weeks after the case is filed.<sup>147</sup> Lawyers must bring to this conference an initial witness list with a very brief summary of each witness's expected testimony. In addition, the parties are asked to outline the issues and facts that appear to be in dispute.<sup>148</sup> In a similar way, the manual prepared for US federal judges suggests that at the initial pre-trial conference the judge should ask the lawyers 'direct and leading questions' such as 'What do you expect to prove and how? How do you expect to defeat this claim?'<sup>149</sup> The specificity of the judge's inquiry, directed at all parties, can educate both the court and the lawyers and help get to the heart of the dispositive issues. Some cases may only require this initial conference to achieve focus and impose a pre-trial schedule, while others will require further

<sup>145</sup> Langbein, Lerner and Smith, above n 8, 149–52.

<sup>146</sup> James S Kakalik et al, 'Discovery Management: Further Analysis of the *Civil Justice Reform Act* Evaluation Data' (1998) 39 *Boston College Law Review* 613, 666–8.

<sup>147</sup> *Fast Track Directions* [6.1].

<sup>148</sup> *Ibid* pt 6. This process assumes that by the time this type of claim is filed, the parties already have engaged in extensive communications and have access to all or most of the relevant documents and witnesses.

<sup>149</sup> Committee on Court Administration and Case Management, above n 4, 22.

time for discovery and additional issue and deadline management. While there is still little hard data documenting time or cost savings across the board, lawyers who are surveyed tend to express a desire for the kind of ‘adult supervision’ that judicial management entails.<sup>150</sup>

The above analysis assumes, of course, that judges are skilled at identifying the cases in which this type of management is appropriate,<sup>151</sup> skilled at facilitating the type of conversations that make management work, and able to avoid the biases about persons or issues that can come with this kind of close involvement in developing the case. It also assumes that the system as a whole can be designed to deter the kind of strategic behaviour by parties and lawyers that makes it so difficult for pleadings to clarify disputes. The next section addresses these challenges.

#### IV MAKING ISSUE MANAGEMENT WORK

A number of systemic changes would be required to maximise the potential for issue management (and even deadline-setting) to succeed. Much would depend on two things: adjustment of incentives, and training of lawyers, judges, and court staff. In addition, courts would need adequate resources to allow the tracking and supervision of cases and to provide for prompt trials and decisions. Case management will function properly only as an adjunct to a fully-functioning, adequately resourced system of adjudication.

##### A Lawyers

If lawyers are to embrace judge-led issue management, they would first have to be given reasons to forsake pleading applications and motions. What is needed is not an inspirational lecture about a culture shift, but a change in rules and incentives. First, the pleading rules would need amendment, as described above, so that the structure and content of pleadings would be calibrated to facilitate a management conference and not to provide factual detail. Applications and motions requesting greater particularity should be strongly disfavoured and permitted only in response to an incomprehensible pleading.<sup>152</sup>

Second, ethics rules and norms in some jurisdictions might need adjustment, to make clear that a lawyer’s duty to the client does not include raising claims and defences that are neither supported by evidence nor likely to be so after a reasonable opportunity for discovery. Depending on the jurisdiction, this might

<sup>150</sup> Richard L Marcus, ‘E-Discovery beyond the Federal Rules’ (2008) 37 *University of Baltimore Law Review* 321, 330; Thomas E Willging et al, ‘An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments’ (1998) 39 *Boston College Law Review* 525, 587.

<sup>151</sup> See, eg, *Fast Track Directions* [2.1], [2.3], which provide that the Federal Court of Australia’s Fast Track process is available only in a limited range of cases, such as those involving commercial transactions, the construction of commercial documents, and non-patent intellectual property cases. Further, only cases that are expected to take no more than five trial days are eligible.

<sup>152</sup> Cf *FRCPP* r 12(e) (2011), which states: ‘A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.’

involve amending the ethics rules, issuing an authoritative ethics opinion,<sup>153</sup> or even enacting legislation insulating lawyers from malpractice liability claims based on a refusal to pursue unjustified claims or defences.<sup>154</sup> Informal norms are also important here. Professional training and law firm mentoring should encourage young lawyers to identify and assert only justified positions, should support them when they forego unjustified positions, and should help them develop the skills needed to isolate significant disputed issues.

Third, cost rules would have to change to avoid rewarding lawyers for litigating pleadings issues.<sup>155</sup> If lawyers have more to gain from pleadings disputes than from management conferences, or more to gain from prolonging the case than from ending it expeditiously, some will tend to cling to the motions and the applications for particulars. Where pleadings motions are filed without legal justification, or where frivolous legal positions are taken in pleadings, lawyers could be ordered to pay costs. Even if lawyer self-interest is not a significant problem, lawyers need training to equip them to advise clients about costs and to enable clients to compare the costs and benefits of fighting about pleadings. In order to enforce the obligation to provide this type of information, litigation budgets might become a feature of managed cases.<sup>156</sup>

Finally, some pleadings specialists (in Australia, primarily barristers) — those lawyers who cherish their pleading art, to paraphrase former Chief Justice Black — will in appropriate cases have to forgo their ‘artist’s delight in a finely drawn statement of claim or an elegant defence’<sup>157</sup> for a less traditional approach, but one that more effectively facilitates issue management. Chief Justice Black’s analysis is reminiscent of Holdsworth’s view that pleaders of centuries past who extolled the purity of pleading ‘were inclined to cherish all parts of their science, and to cut down all projects of change to a minimum.’<sup>158</sup>

### B *Litigants*

There are limits to what can be accomplished with attempts to induce a more cooperative attitude among lawyers. Pressure to take unwarranted positions may come from clients. Even when litigants are given full information about costs, it is and will be in the interest of some litigants to delay the resolution of the controversy and to increase the opponent’s costs. It is unreasonable to expect that

<sup>153</sup> See, eg, Supreme Court of Texas and the Court of Criminal Appeals, *The Texas Lawyer’s Creed: A Mandate for Professionalism*, 7 November 1989 <<http://www.supreme.courts.state.tx.us/pdf/TexasLawyersCreed.pdf>>.

<sup>154</sup> Law Reform Commission of Western Australia, above n 47, 81 [10.25].

<sup>155</sup> A A S Zuckerman, ‘Lord Woolf’s Access to Justice: Plus ça change ...’ (1996) 59 *Modern Law Review* 773, 775–8.

<sup>156</sup> *Civil Procedure Act 2010* (Vic) s 50(1)(a)(ii) states that a court may make an order at any time in a civil proceeding directing a lawyer ‘to prepare a memorandum setting out ... the estimated costs and disbursements in relation to the trial’. But see *ibid* 785–6, where it is noted that Lord Woolf’s suggestion that litigation budgets be introduced to increase predictability and proportionality resulted in an outcry from the legal profession, and the idea was not pursued.

<sup>157</sup> Black, above n 1, 91.

<sup>158</sup> Holdsworth, ‘The New Rules of Pleading’, above n 13, 265.

all litigants will willingly forfeit strategic but permitted uses of the procedure rules. Incentives are therefore needed to adjust litigant behaviour.

Lawsuits represent real disputes and litigants are asserting real rights. Case management is not a licence to force parties to abandon supportable positions or to ignore the importance of enforcing substantive norms. 'Identifying' issues is not always the equivalent of 'narrowing' them. Rather, case management can affect litigant incentives by rewarding cooperation, by ruling promptly on pre-trial disputes so that bad behaviour loses some of its power to generate delay, by setting and then keeping early trial dates, and by imposing interim cost orders where appropriate.

In more extreme cases, litigant incentives may need to be punitive, so that those who abuse the process and encourage their lawyers to take unreasonable positions are themselves at risk. In Australia, for example, overriding obligations are being extended by legislation to parties,<sup>159</sup> insurers and litigation funders.<sup>160</sup> Procedure rules in the US and Australia allow courts to impose sanctions on litigants when they are responsible for unsupported factual allegations or fail to cooperate with case management processes.<sup>161</sup> Sanctions are calibrated by their ability to deter the offending party, and others similarly situated, from continuing to find obstructive behaviour more rewarding than good faith compliance with court orders and procedure rules. First instance and appellate courts, in turn, must have the will to use the sanctions if the rules are to have any chance of addressing the conduct of litigants who prefer a scorched earth, take-no-prisoners approach to litigation.<sup>162</sup>

### C Judges

Judges are not universally enthusiastic about case management. If case management is to be the primary tool for issue identification, judges' incentives need attention and sustained, high-quality training is crucial. Incentives and training would go hand in hand, and empirical research is important to both.

Empirical research indicates that a majority of cases proceed smoothly to settlement, with proportional costs and little delay.<sup>163</sup> To invest time and energy in judicial issue management in these cases (especially management techniques that frontload costs) would be wasteful and increase costs for both parties and courts. Therefore, an important topic for research is to identify the characteristics of cases that will benefit from issue management. This information can, in turn, help persuade judges that it is in their own interests to identify those cases in which some early and continuing hands-on management will actually save time

<sup>159</sup> See, eg, *Civil Procedure Act 2005* (NSW) s 56(3); *Civil Procedure Act 2010* (Vic) s 10; *Federal Court of Australia Act 1976* (Cth) s 37N.

<sup>160</sup> See, eg, *Civil Procedure Act 2005* (NSW) s 56(4); *Civil Procedure Act 2010* (Vic) s 10.

<sup>161</sup> *Civil Procedure Act 2010* (Vic) ss 18, 23, 28–31, 42, 46–53; *FRCP* rr 11(c), 16(f) (2011).

<sup>162</sup> See also Kakalik et al, *Evaluation of Judicial Case Management*, above n 146, xxxiii, which cites RAND Institute for Civil Justice research in the US emphasising that enforcing deadlines is crucial if management of any type is to improve efficiency.

<sup>163</sup> See, eg, Lee and Willging, above n 101, 2.

and help move the disputes efficiently toward settlement or trial. This kind of targeted management could also be less daunting for those judges who were acculturated as barristers to value a passive judicial role.

Research can also identify techniques that facilitate issue identification without sacrificing legitimate claims or defences. It is already clear that case management works best in individual docket systems, where a single judge is assigned to supervise a case from beginning to end and statistics are kept on an individual judge basis in order to help assess what is working and what is not.<sup>164</sup> Empirical investigation can also help identify which types of management techniques are effective, and can guide training programmes for judges and their staff.

The degree of discretion and difficulty in setting standards for case management leads to a potential problem with which training must also contend: case management orders may vary substantially from judge to judge. Some judges reject a managerial role (either because they believe in a more passive role or because they are sceptical that management is an efficient use of their time), while others embrace it. Even among those who attempt to manage all or some of the cases in their courts, different judges will reach different conclusions about which disputes are genuine, how much discovery is appropriate, and how much time should be allowed for pre-trial phases. Judges, because they are human, are subject to biases arising out of their own personal and professional training and experience.<sup>165</sup> Standards and training about case management must recognise this phenomenon and do what is possible to guide judges and minimise unacceptable variations.

In addition, case management should not be envisioned as a way to provide justice 'on the cheap'. Rather, it needs adequate resources, including not only research and training but also court personnel to supervise deadlines and implement management tasks, and sophisticated information technology to track and help enforce deadlines with less judicial involvement. Case management techniques, in order to be successful, require adequate staffing of the courts so that deadlines can be checked and enforced, mediators and other dispute resolution practitioners can be supplied in a timely fashion, and cases that have not settled can proceed promptly to trial.<sup>166</sup>

Until further research is done, we are agnostic about whether simplified pleading plus case management will lower costs for courts or for litigants. Information about the Federal Court of Australia's Fast Track programme is encouraging, but

<sup>164</sup> Adrian Zuckerman, 'Litigation Management under the CPR: A Poorly-Used Management Infrastructure' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 89, 105. See generally Findlay McRae and David Ruschena, 'Trial Date Certainty: The Adoption of the Individual Docket System within the Victorian Federal Court Registry' (2000) 9 *Journal of Judicial Administration* 201; Resnik, 'Managerial Judges', above n 113, 399.

<sup>165</sup> Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 *Cornell Law Review* 1, 2–3, reporting on a study showing that trial judges rely on intuition in making their decisions.

<sup>166</sup> See also Genn, above n 1, 125, who is of the view that '[w]e need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination.'

at this early stage, still impressionistic and anecdotal.<sup>167</sup> We are confident, however, that the approach proposed in this article offers more effective early issue identification than is provided when fact pleading and pleading disputes are the primary tools used to achieve focus and limits on the scope of litigation. Even in a world in which court funding is inadequate, narrative statements will provide better notice of claims and defences than stylised pleadings, and court attention to scheduling and discovery disputes will use resources more effectively than the time currently spent on pleading motions.

#### D *Early Issue Identification and the Need for Discovery*

Where all litigants have pre-suit access to relevant information, early issue management may be efficient and appropriate. In cases of information asymmetry, however, it is important that issue management not be imposed too rigorously nor too early, in ways that would undermine the ability of litigants to use discovery to access the information they need. Otherwise it will also undermine the ability of settled or tried outcomes to approximate the accurate application of substantive law to 'real' facts. Taking early control is not the same as prematurely finalising issues and then prohibiting discovery.

In some cases, tailored discovery may be the best device for providing notice and focusing the dispute. Production of key documents, and even the pre-trial oral examination of key witnesses, may provide more information about disputed and undisputed facts, and about the litigants' contentions and denials, than any amount of pleading or issue management.<sup>168</sup> Without adequate discovery, neither pleadings nor case management will be able to achieve the 'just' resolution of disputes called for by the principles underlying the rules of civil procedure.

### V CONCLUSION

The experiences of Australia and the US illustrate the futility of relying on pleadings alone to identify the issues in litigation. Nor is extended squabbling about the specificity of pleadings an efficient or effective way to determine which cases should move forward and what those cases should be about. Case management, when used carefully and facilitated by case statements and discovery, allows for the exploration of the merits of a case, while still keeping a check on the proportionality of cost and the strategic use of delay.

To maximise efficiency and fairness, a management-based system requires an empirical basis, adequate resources, excellent training, and judicial self-awareness to combat the risk of arbitrariness, bias, and inequity. It also requires

<sup>167</sup> See Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009) vol 2, 592, where Lord Justice Jackson reported that Australian lawyers who had experience of the Federal Court's Fast Track process thought that it significantly reduced the costs of litigation. One practitioner estimated a 50 per cent saving in costs (but spoke critically of its 'new age pleadings') and another practitioner reported 'huge cost savings'. See also Black, above n 1, 91–2, 98–9, which suggests that the Fast Track process results in reduced overall time and costs.

<sup>168</sup> See, eg, Victorian Law Reform Commission, above n 142, 386–7, recommending pre-trial oral examinations.

that courts have the power and the courage to enforce management orders (such as deadlines) against parties who fail to meet their obligations.

Pleadings cannot bear the entire weight of giving notice and limiting disputes. It is time to abandon both the 'elaborate minuet in which the participants follow pre-ordained ritualistic rules gliding around and around each other without ever coming into direct contact'<sup>169</sup> and the 'belts and suspenders' approach where both pleading and case management try to do the same thing. Instead, 'pleadings' (by whatever name) can be introductory statements that begin a structured process of court-led conversations that identify the parameters and needs of litigation. This allows reconceived pleadings and targeted case management to go hand in hand in moving cases towards a just and timely resolution.

<sup>169</sup> Law Reform Commission of Western Australia, above n 47, 73 [10.9].