

DIGITAL JUSTICE: ONLINE RESOLUTION OF MINOR CIVIL DISPUTES AND THE USE OF DIGITAL TECHNOLOGY IN COMPLEX LITIGATION AND CLASS ACTIONS

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This article focuses on two ends of the civil justice spectrum. At one end are high-volume, low-value disputes confined to specific facts and legal issues unique to the disputing parties. Many of these disputes do not presently enter the traditional civil justice system. At the other end are complex legal proceedings which encompass the claims of multiple litigants with similar causes of action against one or more ‘common’ defendants, such as class actions or mass tort proceedings. At both ends of the spectrum, there is a tension between the desire for individualised justice and the need to facilitate the resolution of claims in a manner which is efficient, economical, transparent and procedurally fair. We examine how digital technology is being deployed to resolve disputes at both ends of this spectrum. In the first part of the paper, we focus on the use of technology to resolve high-volume, low-value disputes which share a common objective: the resolution of high-volume claims at low-transaction cost. In particular, we examine the increasing adoption of processes and procedures from the world of commerce to resolve disputes in the public justice system. In the second part of the article we examine how new technologies can facilitate the conduct and resolution of large scale, complex class action litigation in the higher courts through client intake, claim management, discovery processes, trial procedures and the implementation of settlements. We conclude that online dispute resolution methods have the potential to achieve, and in many instances do in fact achieve, the economical and expeditious resolution of claims in a manner which is transparent and procedurally fair.

I INTRODUCTION

This article focuses on the use of digital technology to enhance justice outcomes at both ends of the civil justice spectrum. At one end are large numbers of relatively low-value disputes in which the issues are confined to the specific facts and legal issues unique to the parties in dispute. Many of these disputes do not presently enter the traditional civil justice system as the transactional costs to resolve them are disproportionate to the amount in dispute. At the other end are large, complex legal proceedings which encompass the claims of substantial numbers of persons with causes of action against one or more ‘common’ defendants, and which share common issues that may facilitate resolution through class actions or mass tort proceedings. We examine a number of recent developments in which digital technology is being deployed to resolve disputes at both ends of this spectrum. Although these digital technology innovations differ in the methodologies they use, they have a common objective – the resolution of high-volume claims at low transaction cost. Both ends of

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this civil claims justice spectrum share the goals of facilitating access to justice in a manner which is transparent, procedurally fair, economical and expeditious.

In the first part of the article, we focus on the use of digital technology to resolve high-volume, low-value disputes. In particular, we examine the increasing uptake of online dispute resolution ('ODR') platforms in public justice systems for the resolution of such disputes. These ODR platforms have adopted processes and procedures that were developed in the commercial realm to deal with high-volume disputes by consumers of products and services. One leading example is eBay, which resolves over 60 million disputes per year using ODR methodology. In this article, we explore the opportunities and challenges ODR presents for the resolution of high-volume, low-value disputes through the prism of fundamental principles of the civil justice system.

In the second part of the article, we focus on the use of digital techniques and new and emerging technologies in the management and resolution of large scale complex litigation, including class actions, in the higher courts. We examine a number of ways in which new technology, at lower cost and with less delay, may better facilitate the conduct and resolution of large scale complex litigation, including through client intake, claim management, discovery processes, trial procedures and the implementation of settlements.

At each end of this spectrum, as in many other areas of civil dispute resolution, there is a tension between the desire for individualised justice and the need to facilitate the resolution of large numbers of claims efficiently and economically. This tension exists from the inception of discrete individual claims through to the resolution of mass litigation. How this tension is resolved has important implications for the parties in dispute and the administration of justice.

Reform of the civil justice system is a continuous and iterative process to improve the system and ensure it meets community expectations. In a rapidly changing society that is increasingly reliant on digital technology in all areas of life, the justice system often lags behind. However, changes in technology and civil procedure can play an important role in facilitating access to justice, bringing about improvements in efficiency and outcomes, and in reducing costs and delay across the civil litigation spectrum. ODR is increasingly being implemented as a major reform in civil justice systems in Australia and internationally. At present, various Australian governments, including in New South Wales, are considering how to incorporate ODR into the civil justice system. As we seek to demonstrate, ODR methods have the potential to achieve, and in many instances do in fact achieve, the economical and expeditious resolution of claims in a manner which is transparent and procedurally fair.

II DIGITAL JUSTICE THROUGH ONLINE DISPUTE RESOLUTION OF HIGH-VOLUME LOW VALUE INDIVIDUAL CLAIMS

A *Origins of ODR*

ODR involves the use of information and communications technology to help parties resolve disputes.¹ Within a court and tribunal system, ODR is a digital platform that allows people to progress through dispute resolution for low-value disputes, from the commencement of a claim to final determination, entirely online. This process may involve different methodologies, including the use of information delivered through ‘guided pathways’, blind bidding, hybrid alternative dispute resolution (including facilitated negotiation and early neutral evaluation, either with human input or artificial intelligence algorithms), digital communication (such as remote or video participation in hearings and asynchronous messaging), and uploading and responding to evidence online.

ODR can empower parties to resolve disputes early, freeing up court and judicial resources to deal with complex and serious matters. It can streamline court processes and expand methods of access, reducing the need for extensive physical court infrastructure. In this part of the article, we examine ODR initiatives in Australia and other countries. We then consider ODR alongside three core principles of the civil justice system: access to justice, procedural fairness and open justice. These principles were selected as a starting point because an ideal ODR platform will incorporate these principles while facilitating the just, quick and cheap resolution of disputes. We examine opportunities and considerations for the implementation of ODR in Australian civil justice systems and lessons learned from ODR implementation around the world to date.

ODR was initially developed in the commercial sphere as a means of dealing with high-volume, low-value, consumer disputes arising from online transactions on e-commerce websites such as Amazon, eBay and PayPal. In these disputes, parties are often geographically distant and jurisdictionally distinct. The complexity and expense of going to court is disproportionate to the amount in dispute. ODR allowed buyers and sellers to resolve straightforward disputes expeditiously and at low cost, usually by agreement. Offering an in-built dispute resolution mechanism also served the commercial interests of these companies as parties often continued or increased their consumer activity after resolving a dispute online, regardless of the outcome.²

The potential of ODR to resolve disputes efficiently and effectively eventually attracted the attention of governments, courts and tribunals around the world. In the last six years, ODR has been incorporated into domestic justice systems and processes in several ways, including as an external process that feeds into a formal determination, as the default platform for a new tribunal, and integrated into a pre-existing court

¹ ‘Expanding Access to Justice through Online Dispute Resolution’, *The Digital Edge* (American Bar Association, 13 February 2018) <<https://legaltalknetwork.com/podcasts/digital-edge/2018/02/expanding-access-to-justice-through-online-dispute-resolution/>>.

² Colin Rule, ‘Quantifying the Economic Benefits of Effective Redress: Large E-commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution’ (2012) 34(4) *University of Arkansas at Little Rock Law Review* 767, 772.

(otherwise known as ‘court-annexed’ or ‘court-integrated’ ODR). ODR is also used to resolve disputes between jurisdictionally distinct parties under multilateral agreements. Court-integrated ODR has been used to greatest effect in high-volume, low-value disputes, where parties are usually unrepresented and their preference is for rapid resolution of the claim.

ODR has the potential to transform the efficiency and effectiveness of the justice system for low-value disputes. ODR can make dispute resolution more accessible for people in the community with unmet legal needs. Proponents claim that ODR improves efficiency and upholds high standards of justice, while simultaneously ‘bridging the justice gap’ by reducing barriers of cost, delay and complexity that can limit access to justice.³ ODR has been presented as a solution for courts and tribunals experiencing budget cuts, resource constraints and poor performance oversight on the progression and determination of disputes.

While ODR contributes to ongoing efforts to use technology to improve the civil justice system, it also represents a fundamentally different approach to reform.⁴ Rather than digitising litigation procedure and practices (which we explore in the second part of this article), successful ODR models re-engineer how dispute resolution processes can be designed to benefit users.⁵ This includes inverting dispute resolution design and redirecting investment to the early stages of dispute resolution, rather than to court or judicial resources.⁶ This process of redesign distinguishes ODR from previous justice innovations that use technology to streamline or enhance existing processes. Further, by uncoupling court process from both physical premises and paper-based processes, and rethinking the procedures required to deliver a just system, proponents contend that ODR has the potential to overcome the intrinsic tension between ‘efficiency’ and ‘justice’ in the civil justice system.⁷

B ODR in Australia

Court and tribunal ODR is in its infancy in Australia.⁸ While ODR is utilised within some state-funded alternative dispute resolution schemes, the Australian Dispute Resolution Advisory Council notes that ODR has not enjoyed the support and

³ See, eg, Orna Rabinovich-Einy and Ethan Katsh, ‘The New New Courts’ (2017) 67(1) *American University Law Review* 165, 188 (‘The New New Courts’); Ethan Katsh and Orna Rabinovich-Einy, ‘Access to Digital Justice’ in Ethan Katsh and Orna Rabinovich-Einy (eds), *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, 2017) 39, 51 (‘Digital Justice’).

⁴ Online Dispute Resolution Advisory Group, Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (Report, February 2015) 4 [1.3]–[1.4] <<https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>>.

⁵ Ibid 4–5 [1.3]–[1.7]; Rabinovich-Einy and Katsh, ‘The New New Courts’ (n 3) 167.

⁶ Lord Justice Michael Briggs, *Civil Courts Structure Review* (Final Report, July 2016) 115 [12.6] <<https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> (‘Civil Courts Structure Review’).

⁷ Orna Rabinovich-Einy and Ethan Katsh, ‘A New Relationship Between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution’ (2017) 32(4) *Ohio State Journal on Dispute Resolution* 695, 697.

⁸ Law Council of Australia, *The Justice Project Final Report – Part 2: Dispute Resolution Mechanisms* (August 2018) 10.

development that should be expected in a country with a geographically remote population that is an early adopter of technology.⁹

In 2018, the NSW Government indicated its support for integrating aspects of ODR into existing court process and infrastructure, providing a faster, cheaper way for parties to access the civil justice system.¹⁰ This commitment seeks to further the guiding principle of the *Civil Procedure Act 2005* (NSW) and the *Civil and Administrative Tribunal Act 2013* (NSW); to ensure that civil disputes are dealt with in a way that is just, quick and cheap.¹¹ In NSW, ODR will build on existing digital initiatives to streamline court processes such as the Online Court, e-Registry, eSubpoenas and Audio Visual Link technology.

Two other notable civil justice system ODR projects are the Victorian Civil and Administrative Tribunal (VCAT) small claims project and the Legal Services Commission of South Australia family law platform. The VCAT project involves piloting an ODR platform in a number of small claims with a view to expanding the platform in the area of small claims and possibly minor criminal and larger civil matters.¹² Australian-based firm Modron has been engaged to develop the platform, which will incorporate video chat and text chat. The Legal Services Commission of South Australia has received seed funding from the Commonwealth Government for a national ODR platform to assist separating couples to resolve family law disputes.¹³ This platform will help parties reach an agreement by providing relevant supporting information, such as agreements that have assisted other couples and previous judgments, to illustrate how judges have treated similar disputes.¹⁴

C *International Examples of ODR*

ODR projects have been introduced in a number of countries. We refer below to some recent developments in Canada, the United Kingdom, the Netherlands, the United States and the European Union.

1 *Canada*

Established in British Columbia in 2012,¹⁵ the Civil Resolution Tribunal ('CRT') is Canada's first online tribunal and the first in the world to be integrated into a public

⁹ Australian Dispute Resolution Advisory Council, 'Online Dispute Resolution and ADR' (Research Paper, 16 September 2016) 4

<https://docs.wixstatic.com/ugd/34f2do_cb997768a4574613b8e1d2f972769040.pdf>.

¹⁰ NSW Government, 'Budget Estimates 2018-19' (Budget Paper No 3, 30 June 2018) 6-3 <https://www.budget.nsw.gov.au/sites/default/files/budget-2018-06/6._Justice_Cluster-BP3-Budget_201819.pdf>.

¹¹ *Civil Procedure Act 2005* (NSW) s 56; *Civil and Administrative Tribunal Act 2013* (NSW) s 3.

¹² Victorian Civil and Administrative Tribunal (VCAT), 'VCAT Online Dispute Resolution Pilot Online' (YouTube, 13 September 2018) 00:03:46–00:04:03 <https://www.youtube.com/watch?time_continue=45&v=1cuKRgj-ong>.

¹³ Legal Services Commission of South Australia, Submission No 65 to Law Council of Australia, *The Justice Project* quoted in Law Council of Australia (n 8) 10.

¹⁴ Ibid.

¹⁵ *Civil Resolution Tribunal Act SBC 2012*, c 25 ('*Civil Resolution Tribunal Act*'); *Civil Resolution Tribunal Rules*, CRC, c 2017 ('*Civil Resolution Tribunal Rules*').

justice system.¹⁶ It is currently the mandatory forum for small claims disputes under \$5,000 and strata property claims of any amount. In April 2019, the CRT will begin determining some motor vehicle accident and injury claims up to \$50,000.¹⁷

The CRT's mandate is to provide 'accessible, speedy, economical, informal and flexible' dispute resolution services.¹⁸ It does this through a participatory and collaborative approach to dispute resolution which assists parties to reach a consensual agreement, with adjudication as a last resort. The CRT has four stages:

1. Solution Explorer: a free online tool which uses 'guided pathways' to help a person navigate options to resolve their dispute.¹⁹
2. CRT Intake and Negotiation: The initiating party enters the details of the claim. Notice is served on the other side and parties have the opportunity to negotiate directly.
3. Facilitation: An expert facilitator helps parties reach a consensual agreement using mediation, conciliation or early neutral evaluation.²⁰ If an agreement is reached, this can be turned into a binding order.²¹ If the parties cannot resolve the dispute, the facilitator helps parties prepare for adjudication.²²
4. Adjudication: A tribunal member considers the parties' evidence and arguments (usually in written form) and then issues a binding determination.²³ Hearings usually occur 'on the papers', but telephone or video conferencing hearings can be held if credibility or complex issues arise.²⁴

The CRT's performance is rigorously evaluated through detailed qualitative and quantitative analysis.²⁵ The CRT publishes selected statistics in a monthly blog.²⁶ Such data reveals that the majority of claims (70 percent) are resolved at the facilitation stage and very few claims require adjudication. Most participants (69 percent) agreed that the process was easy to understand and 82 percent agreed they were treated fairly throughout the process.²⁷

¹⁶ 'Online Dispute Resolution & Public Interest Design, with Shannon Salter', *Lawyerist* (Lawyerist.com, 31 January 2018) <<https://legaltalknetwork.com/podcasts/lawyerist-podcast/2018/01/157-online-dispute-resolution-public-interest-design/>> ('Online Dispute Resolution & Public Interest Design, with Shannon Salter').

¹⁷ 'Welcome to the Civil Resolution Tribunal', *Civil Resolution Tribunal* (Web page, 2019) <<https://civilresolutionbc.ca/>>.

¹⁸ *Civil Resolution Tribunal Act* SBC 2012, c 25, s 2(2)(a).

¹⁹ Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) *Windsor Yearbook of Access To Justice* 112, 120 ('British Columbia's Civil Resolution Tribunal').

²⁰ *Ibid* 121. The *Civil Resolution Tribunal Act* and *Civil Resolution Tribunal Rules* set out this process.

²¹ Salter, 'British Columbia's Civil Resolution Tribunal' (n 19) 121.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ 'Online Dispute Resolution & Public Interest Design, with Shannon Salter' (n 16).

²⁶ 'CRT Statistics Snapshot: September 2018', *Civil Resolution Tribunal* (Blog) <<https://civilresolutionbc.ca/crt-statistics-snapshot-september-2018/>>.

²⁷ 'Participant Satisfaction Survey – April to September 2018', *Civil Resolution Tribunal* (Blog, 9 October 2018) <<https://civilresolutionbc.ca/participant-satisfaction-survey-april-september-2018/>>.

2 *United Kingdom*

Another international example of the aspirational use of ODR is the United Kingdom's ('UK') £1 billion *Transforming Our Justice System* reform program, a wide-ranging courts modernisation program that aims to reduce the justice staffing pool by 5,000 and save £265 million a year through lower administration and judicial costs, fewer physical hearings and fewer courthouses.²⁸

Through this program, the entire process for civil money claims will be automated and digitised by 2020.²⁹ The 'Money Claim Online' pilot, launched in March 2018, is the initial release of this platform.³⁰ Money Claim Online is a starting point for the development of the 'digital by design and by default online court',³¹ a single online system for criminal, civil, family and tribunal cases.³² Money Claim Online allows people with money claims up to £10,000 to issue a claim, file a defence and attend mediation.³³ It also allows without-prejudice offers to be made and accepted, and constructs agreements based on these terms.³⁴ The website will be expanded to include facilities for negotiation and settlement, questioning parties and adjudicating between them, and online hearings.³⁵ The pilot has collected data on user experience and dispute resolution pathways, which revealed that 80 percent of users said the service was very good and easy to use.³⁶ The number of matters in which defences were filed rose from 22 percent to 40 percent and the default rate dropped from 53 percent to 24 percent.³⁷ Fifteen percent of cases were referred to mediation but only 27 percent of those went to the mediation appointment.³⁸ In a related development, the proportion

²⁸ Committee of Public Accounts, *Transforming Courts and Tribunals* (House of Commons Paper No 56, Session 2017–19) 4.

²⁹ Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, 'Transforming Our Justice System' (Policy Paper, Ministry of Justice and HM Courts and Tribunals Service, September 2016) 11 <<https://www.gov.uk/government/publications/transforming-our-justice-system-joint-statement>>.

³⁰ The pilot will end in November 2019; Sir Terence Etherton, 'Civil Justice After Jackson' (Conkerton Memorial Lecture 2018, Liverpool Law Society, 15 March 2018) 16 [33] <<https://www.judiciary.uk/announcements/speech-by-sir-terence-etherton-mr-civil-justice-after-jackson/>>.

³¹ Sir Terence Etherton, 'The Civil Court of the Future' (Lord Slynn Memorial Lecture, 14 June 2017) <<https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>> 16 [48].

³² Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, 'Transforming Our Justice System' (n 29) 6.

³³ The County Court Online Pilot 2018, Civil Practice Direction 51S <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51s-the-county-court-online-pilot>>.

³⁴ Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, 'Transforming Our Justice System' (n 29) 12.

³⁵ *Ibid* 12.

³⁶ *Ibid* 12.

³⁷ Clare Galloway, Service Manager, Civil Money Claims Team, HM Courts & Tribunals Service cited in Nick Hilborne, 'Judiciary Threatens to Pull Out of Online Court Pilot over Lack of Communication From Officials', *Legal Futures* (Web Page, 7 March 2018) <<https://www.legalfutures.co.uk/latest-news/judiciary-threatens-pull-online-court-pilot-lack-communication-officials>>; Sir Etherton, 'Civil Justice After Jackson' (n 30) 17 [33].

³⁸ Clare Galloway cited in Nick Hilborne (n 37).

of incorrectly completed divorce forms dropped from 40 percent to under 1 percent among users of the Digital Divorce Service.³⁹

ODR processes are also utilised for appeals against parking and traffic fines in the UK's Traffic Penalty Tribunal. Parties can upload evidence, including video and voice files, to an online platform for instant sharing.⁴⁰ Continuous online hearings through asynchronous messaging between the parties and the adjudicator can take place over several days.⁴¹ Decisions made on this information alone (e-decisions) are the norm, but telephone and face to face hearings are available in certain circumstances.⁴² Decisions are uploaded for viewing by the parties and then sent by post if the decision has not been viewed within two days, though this is rarely necessary.⁴³ Around 80 percent of Traffic Penalty Tribunal cases are resolved through e-decisions.⁴⁴ Seventy-five percent of appeals are closed within 21 days.⁴⁵ Telephone enquiries have been reduced by 30 percent and there has been a significant saving in the costs incurred by local authorities in dealing with disputes.⁴⁶

3 *The Netherlands*

Rechtwijzer ('Signpost to Justice') was an online platform for resolving relationship disputes, such as divorce and separation, landlord-tenant disputes and employment disputes.⁴⁷ Due to the ongoing nature of the relationships in many of these disputes, the platform focused on facilitating consensual and sustainable results.⁴⁸ *Rechtwijzer* enabled an online dialogue between the parties and also offered mediation, adjudication and neutral review of all agreements.⁴⁹ However, funding for the website was discontinued as it was deemed financially unsustainable after three years.⁵⁰

4 *United States*

In the United States, Matterhorn is a cloud-based ODR platform currently in use in 40 courts across eight states. It can be bought off-the-shelf and adapted to court systems

³⁹ HM Courts and Tribunals Service, 'Reform Update' (Reform Update, May 2018) 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717789/HMCTS_Reform_Update_19May2018.pdf>.

⁴⁰ Robert Thomas and Joe Tomlinson, 'The Digitalisation of Tribunals: What We Know and What We Need to Know' (Research Paper, Public Law Project, 5 April 2018) 23 <<https://publiclawproject.org.uk/wp-content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf>>.

⁴¹ *Ibid* 23–4.

⁴² 'How Your Appeal will be Decided', *Traffic Penalty Tribunal* (Web Page) <<https://www.trafficpenaltytribunal.gov.uk/how-your-appeal-will-be-decided/>>.

⁴³ JUSTICE Working Party, *What is a Court?* (Report, May 2016) 17 <<https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf>>.

⁴⁴ JUSTICE Working Party (n 43) 18.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* 17–8.

⁴⁷ Hiil, *Rechtwijzer 2.0: Technology that puts justice in your hands* <<http://www.hiil.org/project/rechtwijzer>>.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ Joint Technology Committee, 'Case Studies in ODR for Courts: A View from the Front Lines' (Resource Bulletin, 29 November 2017) 16 <<https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx>>.

that deal with high-volume claims, including small civil claims and claims about non-compliance with child support payments.⁵¹ It features real time or asynchronous communication, sends reminders to parties about upcoming dates for filing documents and hearings, and is optimised for mobile phone use. A third party (facilitator, mediator or arbitrator) can assist with the resolution of claims.

Matterhorn user data has demonstrated its platform increases access to justice and user satisfaction while decreasing the burden on court resources. Thirty-nine percent of users reported that they would not have been able to attend court in person to resolve their dispute.⁵² Ninety percent found the website easy to use and 92 percent understood the status of their case throughout the online process.⁵³ Cases closed in 14 days rather than the 50 days recorded for traditional court processes, and court staff completed their work in 20 percent of the time.⁵⁴

Like Matterhorn, Modria is a customisable ODR platform for US and international courts. Modria provides parties with a diagnosis of their issue and the likely process for resolution, which helps them to decide whether to proceed with their case.⁵⁵ If they do proceed, the platform collects intake information and opens a web chat between the parties to facilitate a resolution.⁵⁶ Either party can request that the dispute be escalated to a mediator or arbitrator.⁵⁷ The dispute resolution process can be tailored to different types of disputes, from simple debt cases to complicated child custody cases.⁵⁸ This ODR platform has resolved more than one million disputes around the world and claims to resolve cases in half the time taken by traditional processes.⁵⁹

5 European Union

The European Union's ODR platform facilitates the resolution of consumer complaints arising from online transactions in European Union countries.⁶⁰ The ODR platform provides a single point of entry for disputes between consumers and traders, and channels consumer disputes to one of over 300 certified external ADR bodies.⁶¹ The platform allows parties to choose their own language and includes automatic translation. The platform mandates deadlines to ensure a prompt resolution, such as

⁵¹ 'What is Matterhorn', *Matterhorn* (Web Page) <<https://getmatterhorn.com/tour/what-is-matterhorn>>.

⁵² Ibid.

⁵³ 'Ticket and Minor Infraction Resolution Results: Multiple Courts', *Matterhorn* (Web Page) <<https://getmatterhorn.com/get-results/traffic-court/ticket-minor-infraction-resolution-results/>>.

⁵⁴ Ibid.

⁵⁵ 'Modria', *Tyler Technologies* (Web Page) <<https://www.tylertech.com/solutions-products/modria/ODR>>.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ European Union, European Commission, *Report from the Commission to the European Parliament and the Council On the Functioning of the European Online Dispute Resolution Platform Established under Regulation (EU) No 524/2013 on Online Dispute Resolution for Consumer Disputes*, COM(2017) 744 Final, 13 December 2017, 2 <https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf>.

⁶¹ Ibid 1, 4.

30 days for negotiation and 90 days for ADR.⁶² More than 24,000 disputes were submitted in the first year of operation and 44 percent were resolved bilaterally outside the platform in the initial negotiation stage.⁶³

In April 2018, the European Union launched the *New Deal for Consumers* policy. One objective of the policy is to give consumers better tools to enforce their rights and to obtain compensation. As part of this strategy, the European Commission stressed the importance of strengthening ODR.⁶⁴ As such, it seems likely that the European Union will adopt more ODR processes in the coming years.

D *Evaluating ODR*

These examples demonstrate the enormous potential of ODR to reform the civil justice system by increasing access, resolving disputes earlier and reducing costs. The integration of ODR into the public justice system can both improve efficiency and reframe the way the civil justice system operates in relation to high-volume, low-value disputes.

For governments, courts and tribunals, ODR's most attractive feature is its potential to reduce the cost of the administration of justice. ODR can achieve this by: allowing courts to process large numbers of claims with little human input; potentially increasing the number of claims filed that require little cost to manage, thereby increasing fee revenue; reducing the human resources and physical infrastructure required to administer justice; freeing up judicial and registry resources to focus on areas of high demand or significant delay or backlog such as crime or complex civil litigation; and reducing the time needed to assist self-represented litigants navigate a complex justice system and comply with procedural requirements.

The cost-efficient administration of justice is an appropriate goal of civil justice system reform. Yet in designing and implementing system innovations, it is necessary to look beyond ostensibly 'objective' improvements in efficiency, timeliness and effectiveness in order to assess more qualitative elements of the justice system that have no tangible economic value or easily defined metric. These elements include considerations such as access to justice, transparency, procedural due process, fairness and the level of satisfaction of participants in the process.

When considering reforms that will reshape how justice is done, it is pertinent to use the principles underlying the civil justice system as the guiding lights by which to chart a path of reform. This is particularly important when adopting technology developed in the profit-oriented commercial sphere for use within the public justice system, which is necessarily guided by other considerations in addition to the bottom line.

Due to the nature of the exercise of judicial power, court-integrated ODR requires a different set of norms, values and outcomes to private or commercial ODR. While some commercial ODR initiatives incorporate aspirational values that align with civil

⁶² Ibid 2.

⁶³ Ibid 4, 7.

⁶⁴ For an assessment of the effectiveness of the EU Consumer platforms and a comparison with those developed in Brazil, see Maria José Schmidt-Kessen, Rafaela Nogueira and Marta Cantero, 'Success or Failure? - Effectiveness of Consumer ODR Platforms in Brazil and in the EU' (Research Paper No 19-17, Copenhagen Business School) <<http://ssrn.com/abstract=3374964>>.

justice goals, such as transparency, due process and fairness, commercial ODR is mostly an unregulated field operating within only the constraints of contract.⁶⁵ Commercial ODR may have opaque rules, questionable consumer protection and a lack of independent or appellate review.⁶⁶ In contrast, courts are subject to institutional norms and legal requirements, and must accommodate evidentiary and procedural rules.⁶⁷ These issues can be disregarded in commercial ODR design but are essential to any public justice ODR platform.⁶⁸

A central question is whether ODR is an improvement on the traditional civil justice system. Insofar as ODR facilitates the resolution of disputes that would never have entered into or been resolved through the civil justice system, it represents an obvious improvement. From the perspective of those in dispute, ODR will either facilitate the resolution of disputes that otherwise would not have been resolved or provide a less expensive, more expeditious and no less satisfactory resolution than would otherwise have been achieved through the traditional civil justice system.

Yet it is important that the purported benefits of ODR are not simply taken on face value. International experience indicates that proponents will be expected to demonstrate, using evidence, that ODR achieves the objectives it sets out to accomplish. Claims that ODR will improve dispute resolution has attracted scrutiny in the UK, where the legal profession and not-for-profit sector have expressed concerns that the proposed Online Court may reduce access to justice, reduce the fairness of the outcomes, diminish the integrity of the justice system or privilege efficiency over due process. The UK Committee of Public Accounts has required the HM Courts and Tribunals Service to publicly report how its digital justice reforms will improve access to justice.⁶⁹ In Australia, the desire to evaluate ODR with reference to evidence was reflected in the Law Council of Australia's *Justice Project Report*.⁷⁰ The report recommended investment in research which could inform the uptake of ODR in Australia, particularly in relation to the impact of ODR on disadvantaged users, having regard to their technological and legal capability and the necessary safeguards to support disadvantaged users.⁷¹

⁶⁵ Noam Ebner and John Zeleznikow, 'No Sheriff in Town: Governance for Online Dispute Resolution' (2016) 32(4) *Negotiation Journal* 297, 307; Kanake Chinthaka Liyanage, 'The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines' (2012) 17(2) *Deakin Law Review* 251, 264 Robert J Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab' (2017) 18(3) *Cardozo Journal of Conflict Resolution* 717, 733. Recent attempts to introduce a voluntary code of conduct include the International Council for Online Dispute Resolution's Standards; 'ICODR Standards', *International Council for Online Dispute Resolution* (Web Page) <<https://icodr.org/standards/>>.

⁶⁶ See generally Suzanne Van Arsdale, 'User Protections in Online Dispute Resolution' (2015) 21(Fall) *Harvard Negotiation Law Review* 107, 127.

⁶⁷ Michael Legg, 'The Future of Dispute Resolution: Online ADR and Online Courts' (2016) 27(4) *Australasian Dispute Resolution Journal* 227, 227 ('The Future of Dispute Resolution').

⁶⁸ Salter, 'British Columbia's Civil Resolution Tribunal' (n 19) 117.

⁶⁹ Committee of Public Accounts (n 28) 6.

⁷⁰ Law Council of Australia, *The Justice Project* (Final Report, August 2018) <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf>.

⁷¹ Law Council of Australia, *The Justice Project Final Report – Part 1: People with Disability* (August 2018) 8 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>.

ODR's data collection capabilities present an excellent opportunity to collect robust and meaningful data to assess whether ODR achieves the goals of providing transparent, procedurally fair, economical and expeditious justice for high-volume, low-value disputes.⁷² Leading international ODR platforms are utilising justice system principles as a framework to collect data to evaluate system design and performance. The CRT's highly detailed evaluation framework measures many metrics including the time taken from filing a claim to resolution, the cost to an individual to obtain that resolution, the proportion of decisions overturned on appeal and the fairness of the process.⁷³

A solid evidence base built around justice principles can inform the design of an appropriate platform and allows stakeholders to assess whether, firstly, ODR is an improvement on traditional justice processes and, secondly, whether the platform strikes the right balance between the sometimes competing civil justice values of fairness and efficiency.

E *Using Foundational Principles to Assess ODR*

In this section of the article, we examine the opportunities and challenges presented by ODR through the lens of three foundational principles of the civil justice system: access to justice, procedural fairness and open justice. These well-accepted legal principles have been adopted as evaluative criteria in leading international ODR projects, including the UK's emerging Online Court and the CRT in Canada.⁷⁴ For each of these principles, we will examine opportunities, considerations and examples in practice from international ODR projects.

1 *Access to Justice*

Access to courts and tribunals is an essential element of the rule of law and is a human right enshrined in international law.⁷⁵ Judicial resolution in a public setting enhances

⁷² The Productivity Commission has recognised that '[d]ata and evaluation have important and mutually-reinforcing roles in analysing and improving the civil justice system'; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 3 September 2014) 880.

⁷³ See generally 'Online Dispute Resolution & Public Interest Design, with Shannon Salter' (n 16).

⁷⁴ 'Ensuring access to justice' is one of three principles that have informed HM Courts and Tribunals Service's court estates reform program and the Civil Resolution Tribunal; see Ministry of Justice and HM Courts and Tribunals Service, 'Proposal on the provision of court and tribunal estate in England and Wales' (Consultation Paper, 16 July 2015) 7 <https://consult.justice.gov.uk/digital-communications/proposal-on-the-provision-of-court-and-tribunal-es/user_uploads/reform-estates-national-consultation_official-sensitive_final_050815.pdf>; Sandy, CRT Resolution Support Clerk, 'How the CRT Is Improving Access to Justice', *Civil Resolution Tribunal* (Web Page) <<https://civilresolutionbc.ca/crt-improving-access-justice/>>. See below for a discussion of the CRT's evaluation of access to justice and procedural fairness.

⁷⁵ Access to Justice Taskforce, Attorney General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009) 2 <<https://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>> ('*Strategic Framework*'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 8, 10; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

the legitimacy of the legal system by building public respect, trust and confidence in the system.⁷⁶ Binding decisions communicate and reinforce norms of social and economic behaviour while creating precedent and developing the law.⁷⁷ Access to a court to resolve a dispute provides the benefits of a (largely) publicly funded, open process that provides a determinative outcome and methods for enforcement. Unlike other dispute resolution options, a court is expected to exercise this decision-making power while being consistent, transparent and impartial.

Although courts and tribunals are the enduring symbol of justice, it is estimated that only three to four percent of civil disputes end up in courts or tribunals, with the vast majority resolved through other means.⁷⁸ Despite this, the accessibility of these forums is crucial. The remainder of the civil justice system, including informal and non-legal dispute resolution, operates in the shadow of the mandatory and coercive powers of the courts.

Access to justice is a key goal of the civil justice system.⁷⁹ Yet for each dimension of access to justice, there are multiple barriers preventing entry. Attending a court or tribunal is a significant personal undertaking. In addition to the obstacles of cost, procedural complexity and delay, the psychological and emotional toll of entering into an adversarial dispute resolution process dissuades many people from taking their legal matter to a court or tribunal.

Failing to provide meaningful access to justice means that disputes may go unresolved at great social or financial cost.⁸⁰ People may resort to private or non-binding agreements, capitulate to the stronger party's demands, or simply put up with a problem if it requires too much effort or expense to resolve. If people cannot readily defend their rights, enforce their rights or seek justice, the rule of law is weakened and unfair or illegal activity can flourish.⁸¹

ODR is one means to remove or diminish the profound barriers caused by the cost, time and delay involved in going to court.⁸² There are two main structural changes associated with ODR that increase access to justice.

⁷⁶ Professor Dame Hazel Genn, 'Online Courts and the Future of Justice' (Birkenhead Lecture, Gray's Inn, 16 October 2017) 6
<https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf>.

⁷⁷ Ibid 6.

⁷⁸ Christine Coumarelos et al, 'How Are Legal Problems Finalised in Australia?' (*Updating Justice* No 19, Law and Justice Foundation of NSW, February 2013) 3
<[http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_19_Finalisation_Aus_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_19_Finalisation_Aus_FINAL.pdf)>.

⁷⁹ Access to Justice Taskforce, *A Strategic Framework* (n 75) 62–3.

⁸⁰ Nigel J Balmer and Pascoe Pleasence, 'From the Frying Pan to the Fire: The Impact of Small Businesses' Legal Problems' (*Updating Justice* No 52, Law and Justice Foundation of NSW, June 2017)
<[http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_52_Frying_pan_business.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_52_Frying_pan_business.pdf)>; Victorian Small Business Commissioner, 'The Costs of Participating in Business-to-Business Disputes at the Victorian Civil and Administration Tribunal (VCAT)' (Information sheet, 2014) 2 <<https://www.vsbv.vic.gov.au/wp-content/uploads/2014/08/vsbv-business-dispute-costs.pdf>>.

⁸¹ Access to Justice Taskforce, *A Strategic Framework* (n 75) 62–3

⁸² Rabinovich-Einy and Katsh, 'The New New Courts' (n 3) 169.

(a) *Remote and Asynchronous Dispute Resolution*

The first is a decoupling of the justice process from physical locations. An ODR platform can connect an individual to other parties, facilitators and adjudicators who may be geographically distant.⁸³ With remote participation being the default, parties can participate from wherever they are – a reversal of the traditional justice system’s requirement that all parties be at the same place to progress or resolve a matter. This makes justice more accessible by reducing the need for parties, especially for people in rural, regional or outer metropolitan areas, to travel significant distances and incur transport fees to attend a courthouse or wait weeks or months for an infrequent circuit court visit.

The second change is the move from a synchronous (at the same time) to an asynchronous (at different times) process. ODR allows people to progress a dispute whenever it is convenient. In traditional court processes, all parties (as well as the judge, the court and registry staff) are required to be present at the same time and place, usually in person. This can cause delays due to scheduling conflicts and the unavailability of court resources. Court processes usually occur during business hours, meaning that if parties are self-represented, they must take time off work or arrange childcare to attend a hearing. Allowing people to progress disputes at a time that is convenient to them improves the flexibility of the civil justice system, increases the court’s capacity to handle cases and reduces the barriers to justice created by court processes which require parties to be gathered at the same place and time.⁸⁴

As ODR reduces the cost and time consequences of going to court to resolve or respond to a dispute, more people who have been marginalised or excluded by the court’s traditional operating system may begin to utilise the courts. This can include people with an ‘unmet need’ (a justiciable legal claim) who were prevented from accessing the courts due to geographical or financial constraints, including disadvantaged people, caregivers or people with a disability;⁸⁵ and people who have ‘lumped it’ because the time, cost and complexity of using a traditional court process were not worth it for the amount in dispute.⁸⁶

(b) *Alternative Dispute Resolution*

A key principle of access to justice is that disputes should be resolved as early as possible, in a manner proportionate to the amount or issues in dispute. Alternative dispute resolution (‘ADR’) is a common method of obtaining early and appropriate resolution. ADR is also a core component of commercial ODR platforms and a feature of successful ODR platforms used in the context of public justice.

⁸³ Shannon Salter and Darin Thompson, ‘Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal’ (2016-17) 3 *McGill Journal of Dispute Resolution* 113, 135 (‘Public-Centred Civil Justice Redesign’).

⁸⁴ Rabinovich-Einy and Katsh, ‘The New New Courts’ (n 3) 203.

⁸⁵ See, eg, Joint Technology Committee (n 50) 7.

⁸⁶ In his Interim Report, Lord Justice Briggs discussed the concept of ‘The Line’, below which the aggregate costs of legal representation in litigation are disproportionate to the amount in contention. Most people consulted stated that the value of the dispute would need to be between £50,000 and £100,000 to go over The Line. Lord Justice Briggs concluded this represented a real barrier to access to justice; Lord Justice Briggs, *Civil Courts Structure Review* (n 6) 46.

ADR in ODR increases access to justice by allowing people to resolve disputes at the earliest opportunity, at minimal cost and by consent (where appropriate). Intelligent system design can offer bespoke dispute resolution options which suit the needs of the parties – for instance, conciliation if resolution is likely, or early neutral evaluation if one party requires an objective appraisal of the merits of their case.

Most ODR models incorporate at least two standard ADR tools: negotiation and facilitation (which can include conciliation or mediation). In Canada's CRT, ADR is the default method for resolving disputes, reversing the traditional model of presuming adjudication is the end point and ensuring that only the most intractable disputes, or those where agreement is not appropriate, result in a judicial determination.⁸⁷ ODR takes the concept of ADR offering a 'multi-door courthouse' to its ultimate form: a system designed to tailor both technology and dispute resolution processes to the parties' specific needs.⁸⁸

(c) *Pre-action Protocols*

ODR's emphasis on resolving disputes early reflects the objectives of pre-action protocols. Pre-action protocols are procedural mechanisms to facilitate the resolution of disputes before they result in full court proceedings.⁸⁹ They involve threshold requirements that parties must, or are expected to, comply with before starting a court case.

Evidence from the UK, where pre-action protocols have been in place for over 20 years, has shown that these procedures focus attention on the key issues at an early stage, encourage greater openness between the parties and facilitate the resolution of many cases that would have otherwise proceeded to litigation.⁹⁰ In Australia, threshold requirements are already a feature of some court processes and there are some 'pre-action' requirements for some types of cases in some Australian jurisdictions. For instance, in the NSW Supreme Court Possession List, parties are expected to have narrowed the issues in dispute and discussed the possibility of settling the dispute by ADR before the initial hearing.⁹¹ However, attempts to introduce more wide-ranging pre-action protocols in Victoria and New South Wales have been unsuccessful.⁹² Embedding a checklist of requirements that a party should consider or must comply with before commencing a claim through an ODR platform can help narrow the issues

⁸⁷ Darin Thompson, 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1(2) *International Journal of Online Dispute Resolution* 4, 10 ('Creating New Pathways').

⁸⁸ Ayelet Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation' (2016) 26(Winter) *Cornell Journal of Law & Public Policy* 331, 384 ('Streamlining Justice').

⁸⁹ Peter Cashman, 'Civil Procedure, Politics and the Process of Reform' in Michael Legg and Miiko Kumar (eds), *Ten Years of the Civil Procedure Act 2005 (NSW)* (Lawbook Co, 2015) 225, 229.

⁹⁰ Tamara Goriely, Richard Moorhead and Pamela Abrams, 'More Civil Justice? The Impact of the Woolf Reforms on Pre-action Behaviour' (Research Study 43, The Law Society and Civil Justice Council, 2002) xiii <<https://orca.cf.ac.uk/44483/1/557.pdf>>.

⁹¹ Supreme Court of New South Wales, *Practice Note No. SC CL 6: Supreme Court Common Law Division - Possession List*, 10 August 2012, cl 15 <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed00a2b08/ae3b414fa0c27a5bca2579c6007cac2e?OpenDocument>.

⁹² Cashman (n 89) 227.

in dispute and encourage ADR. This can encourage the parties to resolve the dispute in a timely and proportionate way.

(d) *The Digital Divide*

ODR relies on parties having both digital access (access to a working internet connection) and digital ability (the ability to use the internet to navigate an online platform). However, sizeable segments of the Australian population are digitally excluded due to a lack of digital access and ability.⁹³ Practical barriers to digital access include black spots and intermittent broadband, especially in rural and regional Australia; accessibility of websites; the affordability of internet connection; and the limited opening hours and resources of free internet providers such as libraries. This 'digital divide' can present a barrier for people accessing an internet-based platform like ODR. There is a strong relationship between digital ability and socio-economic status. Australians with low levels of income, education and employment are significantly less digitally literate.⁹⁴ They are also more likely to experience legal problems and less likely to resolve their legal problems than other people in the community.⁹⁵ A platform that does not address the connection between disadvantage, low digital skills and exclusion from the legal system risks entrenching this marginalisation.

The accessibility of ODR is at the forefront of the discussion around digital inclusion initiatives in the UK. Two landmark reports have explored how to reduce digital exclusion for civil justice system users.⁹⁶ Under the UK's reform program, the Good Things Foundation has been funded to provide face-to-face support and assistance in navigating online forms for users of digital justice pilots through community-based Online Centres in libraries, churches and GP clinics.⁹⁷

⁹³ See generally JUSTICE Working Party, *Preventing Digital Exclusion from Online Justice* (Report, April 2018) 4 <<https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf>>; Julian Thomas et al, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017* (Report, 2017) <<https://digitalinclusionindex.org.au/wp-content/uploads/2016/08/Australian-Digital-Inclusion-Index-2017.pdf>>.

⁹⁴ Thomas et al (n 93) 5.

⁹⁵ Hugh M. McDonald and Zhigang Wei, 'Resolving Legal Problems: The Role of Disadvantage' (*Updating Justice* No 19, Law and Justice Foundation of NSW, June 2018) 1 <[http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_56_Resolution_disadvantage.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_56_Resolution_disadvantage.pdf)>.

⁹⁶ JUSTICE Working Party (n 93); Catrina Denvir et al, 'Assisted Digital Support for Civil Justice System Users: Demand, Design and Implementation' (Final Research Report, Civil Justice Council, April 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/06/cjc-report-on-assisted-digital-support.pdf>>.

⁹⁷ Good Things Foundation and HM Courts and Tribunal Service, 'HM Courts and Tribunals Service Face-To-Face Assisted Digital Service: A Handbook for Online Centres' (Handbook, 20 March 2018) <https://www.onlinecentresnetwork.org/sites/default/files/online_centre_handbook_v.1.pdf>

2 *Open Justice*

Transparency is a core part of the justice system and open justice is a hallmark of the exercise of judicial power.⁹⁸ The principle requires court proceedings to be open and subject to public and professional scrutiny. Courts will not act contrary to this principle save in exceptional circumstances.⁹⁹ Open justice has been described as ‘one of the most pervasive axioms of the administration of justice in common law systems’ and ‘a fundamental tenet of Australian democracy’.¹⁰⁰

Open justice has several practical manifestations. Proceedings are conducted in an open court, which the public and press can access, and judgments are accessible. Information and evidence presented in court are communicated to those present, and fair and accurate reporting of judicial proceedings conducted in open court is permitted.¹⁰¹

Open justice ensures judicial accountability and protects against the risk of a court abusing its decision-making powers.¹⁰² Open justice also maintains confidence in the integrity and independence of the courts, educates the public about judicial application of the law and reduces the likelihood of people bringing vexatious claims or giving false evidence.¹⁰³

As in other jurisdictions, in NSW there is a presumption that substantive civil hearings occur in public.¹⁰⁴ However, open justice can be restricted, particularly where it is necessary to secure the proper administration of justice or when it is otherwise in the public interest.¹⁰⁵ Suppression orders, hearing evidence ‘in camera’ or hearing certain interlocutory matters in the absence of the public are some ways open justice is altered in NSW. Moreover, open justice only requires scrutiny of the judicial process and, therefore, does not apply to every process and procedure of courts and tribunals.¹⁰⁶ There is no freestanding right for the public to access court documents filed in proceedings and held as part of the court record.¹⁰⁷ Material that is not admitted into evidence or read in open court is generally not available, even after the conclusion of the proceedings.¹⁰⁸ Transcripts of proceedings are not readily available and are not generally free.

⁹⁸ Murray Gleeson, ‘The Judicial Method: Essentials and Inessentials’ (2010) 9(4) *The Judicial Review* 377, 384.

⁹⁹ *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46, 60 [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹⁰⁰ Justice James Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29(2) *University of New South Wales Law Journal* 147, 150; Chief Justice Marilyn Warren, ‘Open Justice in the Technological Age’ (2014) 40(1) *Monash University Law Review* 45, 45.

¹⁰¹ Jason Bosland and Jonathan Gill, ‘The Principle of Open Justice and the Judicial Duty to Give Public Reasons’ (2014) 38(2) *Melbourne University Law Review* 482, 483–4.

¹⁰² Justice Spigelman (n 100) 154.

¹⁰³ Sharon Rodrick, ‘Open Justice, the Media and Avenues of Access to Documents on the Court Record’ (2006) 29(3) *University of New South Wales Law Journal* 90, 94.

¹⁰⁴ See, eg, *Local Court Act 2007* (NSW) s 54.

¹⁰⁵ *Hogan v Hinch* (2011) 243 CLR 506, 531 [21] (French CJ); *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–7 (McHugh JA, Glass JA agreeing at 467).

¹⁰⁶ Rodrick (n 103) 95.

¹⁰⁷ *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521 [31] (Spigelman CJ, Mason and Beazley JJ agreeing at 503).

¹⁰⁸ Rodrick (n 103) 129.

Open justice presents a challenge for ODR given that digital processes can both expand and constrain open justice. Removing processes and decisions from a publicly viewable forum could make the justice system more opaque, resulting in a loss of scrutiny of judicial decision-making. Judges, reform officials and peak legal professional organisations have expressed concern about the loss of transparency in the Online Court in the UK.¹⁰⁹ Some NGOs have asserted that ODR by its nature threatens open justice, especially when criminal proceedings are involved.¹¹⁰ Journalists have emphasised the importance of public and media access to court proceedings to ensure visibility and scrutiny of the judicial process.¹¹¹

On the other hand, digital technology can radically enhance open justice by making processes and proceedings more observable and transparent. ODR can increase public participation and engagement by allowing people who cannot access the court in person to view proceedings.¹¹² This can include through streaming or broadcasting hearings, making messaging transcripts available and creating a publicly searchable database of online court files.¹¹³ Members of the judiciary in the UK have recognised that ‘our digital courts must be open courts’ and are optimistic that embedding open justice in digital platforms presents a technical challenge rather than an insuperable obstacle.¹¹⁴

In the development and implementation of ODR, the meaning and importance of ‘open justice’ may also face scrutiny from the parties themselves. Many parties would prefer to resolve their disputes privately. In the process of resolving a dispute, there is often disclosure of private and confidential information, including medical data and financial records. The user-centric focus of ODR platform design, which involves understanding the end users’ needs and expectations, may lead to new iterations of open justice for online platforms.

Open justice has traditionally intersected with other rights, including in respect of reputation, the right to privacy and the right to a fair trial.¹¹⁵ On a digital platform, the tension between these rights is amplified, with new challenges arising in information privacy, the prevention of cyber-hacking, and data storage and security. Concerns about information security is reportedly one of the main barriers to the adoption of ODR especially, as ODR platforms which are entirely online are vulnerable to data breaches in a way that current case management systems are not.¹¹⁶

The permanence of information and evidence exchanged via ODR is another contentious issue. Digital platforms generally record all information exchanged in a

¹⁰⁹ See, eg, Sir Etherton, ‘Civil Justice After Jackson’ (n 30) 19 [39].

¹¹⁰ Paul Magrath, ‘Court Reform and Open Justice: Responses to the Public Accounts Committee’s Transforming Courts and Tribunals inquiry’, *Transparency Project* (Blog, 12 June 2018) <<http://www.transparencyproject.org.uk/court-reform-and-open-justice-responses-to-the-public-accounts-committees-transforming-courts-and-tribunals-inquiry/>>.

¹¹¹ See, eg, Committee of Public Accounts (n 28) 13 [22].

¹¹² JUSTICE Working Party (n 43) 43.

¹¹³ See, generally, Legg, ‘The Future of Dispute Resolution’ (n 67) 234.

¹¹⁴ Sir Ernest Ryder, ‘Securing Open Justice’ (Speech, Max Planck Institute Luxembourg for Procedural Law & Saarland University, 1 February 2018) 2, 5 [8] <<https://www.judiciary.gov.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf>>; Lord Justice Briggs, *Civil Courts Structure Review* (n 6) 50 [6.69].

¹¹⁵ Justice Spigelman (n 100) 158.

¹¹⁶ ‘Expanding Access to Justice through Online Dispute Resolution’ (n 1); Condlin (n 65) 750.

dispute. This means that sensitive information could continue to be available and potentially misused in the future. Parties may be dissuaded from using a service if they cannot be certain that their information will remain confidential.¹¹⁷ ODR platforms that promote open justice will be required to carefully balance various rights and take privacy and data collection and storage issues into account.

For all its novel applications, ODR also represents the next phase in the evolution of open justice in response to technology changes from both within and outside the court. The concept of an ‘open court’ has been adapted to contemporary civil justice procedures, such as the increased reliance on written submissions, affidavits and statements to provide evidence-in-chief rather than in-person oral evidence (which was traditionally a key aspect of ‘open court’ by virtue of it being communicated in public).¹¹⁸ An observer of court hearings will frequently witness documents and witness statements simply being tendered and admitted into evidence without any open disclosure of their contents.

The courts themselves are spearheading the expansion of open justice by leveraging technology. For example, in NSW, the Supreme Court publishes easy-to-read summaries of significant cases and maintains a Twitter account to alert the public of upcoming decisions. To engage a broader audience beyond those who can attend court in person, some higher courts in Australia and internationally facilitate recordings of proceedings which can be viewed in real time or after the event. The Supreme Court of the United States began audio recording hearings in 1955. Proceedings before the High Court of Australia, the Supreme Court of the United States and the Supreme Court of the United Kingdom, among others, can now be viewed online. It is both necessary and appropriate that the concept of open justice reflect its technological and legal context, and the expectations of the community it serves.

Justice system bodies that have adopted ODR technology have implemented different approaches to transparency. In Canada, the CRT’s *Information and Access Policy* provides a framework for openness in respect of the CRT’s decision-making process, which balances transparent decision-making with protecting the privacy of parties and witnesses. In the UK, methods under discussion to ensure open justice in the eventual Open Court include live streaming of virtual court proceedings (both online and via ‘viewing booths’ installed in court buildings)¹¹⁹ and providing booths within court buildings to allow the public to access approved parts of certain court files.¹²⁰

The degree of open justice required in ODR is a vexed question. A leading judicial proponent of the UK’s Online Court, Lord Justice Briggs, is confident that ‘modern IT can facilitate better public access to civil proceedings than exists at present’.¹²¹ Other senior members of the judiciary believe that the ‘delivery of justice should be as open

¹¹⁷ Thomas and Tomlinson (n 40) 30.

¹¹⁸ Rodrick (n 103) 90–1.

¹¹⁹ Sir Etherton, ‘The Civil Court of the Future’ (n 31) 18 [56]; Sir Etherton, ‘Civil Justice After Jackson’ (n 30) 19 [39]. Note that the Prison and Courts HC Bill (2016-17) 170, cl 34 included provision for public participation in proceedings conducted by video or audio. This bill did not proceed due to the general election.

¹²⁰ Lord Justice Briggs, *Civil Courts Structure Review* (n 6) 25 [4.11]; Sir Etherton, ‘The Civil Court of the Future’ (n 31) 18 [56].

¹²¹ Lord Justice Briggs, *Civil Courts Structure Review* (n 6) 53 [6.85].

to scrutiny as Parliamentary debate'.¹²² Others argue this level of openness would be unnecessary and undesirable in most civil proceedings.¹²³ How this tension will be resolved in the development of ODR systems in Australia remains to be seen.

3 Procedural Fairness

Procedural fairness is the fairness of the *process* through which a substantive decision is made.¹²⁴ Procedural fairness is an aspect of the general principle that parties are entitled to a fair hearing. This is enshrined in multiple places in Australian law, including the Australian Constitution, procedural rules and the court's inherent power to prevent abuse of its process.¹²⁵

The requirements of procedural fairness change depending on the circumstances of the individual case or the type of case.¹²⁶ Procedural fairness generally requires that parties are given a reasonable opportunity to lead evidence, make submissions, present a case and cross-examine witnesses.¹²⁷ The overarching consideration is 'fairness', which is evaluated in the context of the case itself and having regard to the interest of justice generally, including the need to facilitate the timely and economical resolution of disputes.¹²⁸

The content of procedural fairness has evolved over time. Traditional civil proceedings often involved full party control of pre-trial stages through to a full hearing with both parties legally represented. More recently, proactive judicial managerial control can lead to, amongst other things, restricting the number of witnesses; not requiring oral submissions; restricting the length of written submissions; limiting the ambit of discovery of documents; and refusing applications for adjournment.¹²⁹ The transition from party control of civil proceedings to more proactive judicial case management has given rise to contentious issues about procedural fairness.¹³⁰ These concerns also arise within ODR, in which case management is entrenched into the process through platform design.

Yet overall, ODR presents an opportunity to strengthen procedural fairness by allowing creative thinking about how to make the process fairer. Dimensions of procedural fairness in ODR include the role of legal representation, digital innovations

¹²² Sir Etherton, 'The Civil Court of the Future' (n 31) 18 [56].

¹²³ Judge Nigel Bird, 'Open Justice in an Online Post Reform World: A Constant and Most Watchful Respect' (2017) 36(1) *Civil Justice Quarterly* 23, 32.

¹²⁴ Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] *Journal of Dispute Resolution* 1, 3.

¹²⁵ See, eg, *Civil Procedure Act 2005* (NSW) s 62(4).

¹²⁶ *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ) quoted in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 552.

¹²⁷ *Civil Procedure Act 2005* (NSW) s 62(4). Note that parties do not have the right to cross-examine witnesses in the Small Claims Division.

¹²⁸ *National Companies & Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 312 (Gibbs CJ, Brennan J agreeing at 326).

¹²⁹ Michael Legg, 'Reconciling the Goals of Minimising Cost and Delay with the Principle of a Fair Trial in the Australian Civil Justice System' (2014) 33(2) *Civil Justice Quarterly* 157, 169 ('Reconciling the Goals'). See section 62(3) of the *Civil Procedure Act 2005* (NSW) as to directions that a court can make that may restrict the 'fairness' of a trial.

¹³⁰ See, eg, Sonya Joy Willis, 'The Case for Case Management: Justice, Efficiency and Procedural Fairness in Australian Civil Procedure' (PhD Thesis, The University of Sydney, 2018).

to improve the justice experience, creating a level playing field through platform design and user testing to inform fairness settings.

(a) *Legal Representation*

Legal representation is a key way that parties have traditionally obtained procedural fairness in legal matters. However, either by preference or design, the individuals in dispute, rather than their lawyers, are the primary participants in ODR platforms.¹³¹ The intention is that legal representation is not a prerequisite to successfully resolving a claim, so a party will not be substantially disadvantaged if they do not have a lawyer. This reverses the standard court model of adversarial dispute resolution where ‘equality of arms’ means both parties are legally represented.

The presumption of no legal representation in ODR platforms reflects the reality of low-value claims. In most traditional court matters, the costs of legal representation far outweigh the value in dispute so most people are unrepresented, often to their detriment. In the NSW Local Court, self-represented litigants make up 25 percent of plaintiffs and 42 percent of defendants in defended claims.¹³² This is a large proportion of parties navigating a complex legal system without support.

Even if both parties do not need, or choose not to use, legal representation in the ODR context, a power imbalance may still exist between the parties. This may arise from disparity between their resources, education and experience, cultural factors or the comparative ability of the parties to reduce the issues in dispute into a justiciable claim or defence.

Courts already recognise that they must be diligent to ensure self-represented litigants are afforded procedural fairness.¹³³ In a similar vein, successful ODR platforms must go further than simply digitising pre-existing procedural rules, which would replicate the current barriers self-represented litigants face. International ODR platforms have done this through translating legal rules and forms designed for legal professionals into plain language and avoiding the term ‘self-represented litigant’ (a phrase which denotes an exception rather than the rule).¹³⁴

¹³¹ Lord Justice Briggs, *Civil Courts Structure Review* (n 6) 41 [6.22]–[6.26]; *Civil Resolution Tribunal Act* s 20(1).

¹³² Suzie Forell and Catriona Mirrlees-Black, ‘Data Insights in Civil Justice: NSW Local Court’ (Report, Law and Justice Foundation of NSW, November 2016) 8 <[http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/Local_Court_Report_2016.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/Local_Court_Report_2016.pdf)>.

¹³³ See Supreme Court of NSW, ‘Representing yourself in civil proceedings in the Supreme Court of New South Wales’ (Fact Sheet, March 2015) <<http://www.supremecourt.justice.nsw.gov.au/Documents/Services%20and%20Support/Self%20Represented%20Litigant%20Fact%20Sheet%20Version%2013.docx>>; See *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279, [38]–[42] (Young JA) for a discussion regarding the court’s duty in relation to self represented litigants.

¹³⁴ Salter, ‘British Columbia’s Civil Resolution Tribunal’ (n 19) 124–5; Sela, ‘Streamlining Justice’ (n 88) 337–9; Thompson, ‘Creating New Pathways’ (n 87) 8–9.

(b) *The User Experience of Procedural Justice*

The concept of ‘procedural *justice*’ as distinct from ‘procedural *fairness*’ has gained greater prominence in discourse about ODR because it adopts a technology-driven focus on human-centred design and the user experience. ‘Procedural justice’ arises from an individual’s perception of the fairness of a process, which can be shaped by their experience of control/voice, neutrality, respect, and trust in the decision-maker.¹³⁵ Unlike procedural fairness, procedural justice is not an objective legal principle, but an individual’s subjective belief about how they were treated in a given situation.¹³⁶

When a party loses a case in a court setting, they will often be more satisfied by the outcome if they feel that the proceedings were procedurally fair. Similarly, delay has a corrosive impact on party and public perceptions of the justice system. One interesting yet unsurprising finding from research on consumer perceptions of ODR in a commercial context is that expedition enhances satisfaction with the process, even when the outcome is unfavourable to the party.

The digital flexibility of ODR allows experimentation to strengthen procedural justice. Big data collection and analysis and targeted qualitative research can offer ideas for platform and process design. In this regard, findings from the emerging field of research into procedural fairness in ODR are instructive.

For instance, self-represented litigants report a preference for communicating with judges using ‘lean’ text-based messages but receiving responses through ‘rich’ media such as video messages.¹³⁷ This increases their sense of being ‘heard’ and reduces feelings of hopelessness, stress and frustration.¹³⁸ In another study, parties preferred receiving interpersonal cues from a remotely-based decision maker (for example, a picture of the decision maker or biographical details) because knowing who was determining the dispute enhanced participants’ belief that their contribution was valued.¹³⁹

In the first study, self-represented litigants reported a more meaningful experience through asynchronous messaging because it gave them more time to compose responses than at an in-person hearing.¹⁴⁰ Separately, litigants who found an online platform easy to use were more likely to view the process as fair and feel positive about the court.¹⁴¹

Determining what ‘standard’ of procedural fairness should be upheld by ODR forums is a vexed question. Some research findings indicate users have the same expectations

¹³⁵ Hollander-Blumoff and Tyler (n 124) 3.

¹³⁶ Ibid 9.

¹³⁷ Sela, ‘Streamlining Justice’ (n 88) 377.

¹³⁸ Sela, ‘Streamlining Justice’ (n 88) 377, 381–2.

¹³⁹ Youyang Hou et al, ‘Factors in Fairness and Emotion in Online Case Resolution Systems’ (Conference Paper, CHI Conference on Human Factors in Computing Systems, 6–11 May 2017) 2511, 2519
<<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2995&context=articles>>.

¹⁴⁰ Sela, ‘Streamlining Justice’ (n 88) 359–361.

¹⁴¹ Youyang Hou et al (n 139) 2520.

of procedural justice in ODR as they have with the traditional courts.¹⁴² However, people interact with and expect differing standards of service online.¹⁴³ Expectations for transparency, voice and respect are likely to be different. Given the scope for digital technology to improve fairness at relatively little cost, ODR should aim to deliver high standards of procedural fairness.

(c) *Levelling the Playing Field through System Design*

A goal of procedural justice is to treat parties fairly by providing an equal opportunity to present their case. Yet parties themselves are rarely equal. Most cases are characterised by parties with dramatically different resources. ‘One-shotters’ (who use court once or infrequently) often confront ‘repeat players’, who utilise the court system regularly and generally have the upper hand in litigation because they have superior knowledge of the legal process, ready access to specialist expertise, and can influence precedent.¹⁴⁴ Parties with deep pockets can also draw out proceedings in order to force the other party to settle or capitulate.¹⁴⁵ Offsetting this power imbalance can be difficult in a forum historically designed for, and often by or under the influence of, repeat players.

ODR can level the playing field through design features that minimise power imbalances between the parties.¹⁴⁶ This can involve identifying power imbalances in the current system and mitigating unfair advantages through ODR platform and process design. International solutions include both innovative uses of technology and procedural reform, including adopting fixed procedural options to mitigate any unfair advantage of repeat players;¹⁴⁷ enforcing time limits to prevent orchestrated strategic delay;¹⁴⁸ adopting ‘gateway checks’ (similar to pre-action protocols); and incorporating expert knowledge or artificial intelligence to guide users towards resolution without expert assistance from a lawyer.¹⁴⁹

(d) *User Data to Improve Fairness*

Collecting and utilising data on user experience can guide the development of a fair and efficient ODR platform. Data can be used to design reforms, improve court performance, reduce system demand, and develop iterative changes to the platform design itself.¹⁵⁰ This can include both qualitative and quantitative data, which can be collected through online forms, IP addresses (for ascertaining geographical location and use patterns), or online user surveys (to measure user satisfaction). ODR

¹⁴² Ibid 2519.

¹⁴³ Catrina Denvir et al (n 96) 47.

¹⁴⁴ Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9(1) *Law and Society Review* 95, 98–103.

¹⁴⁵ Legg, ‘Reconciling the Goals’ (n 129) 172.

¹⁴⁶ See, eg, Joint Technology Committee (n 50) 6.

¹⁴⁷ See, eg, Ayelet Sela, ‘The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions’ (2017) 21(3) *Lewis & Clark Law Review* 633, 659.

¹⁴⁸ See, eg, Joint Technology Committee (n 50) 8.

¹⁴⁹ Thompson, ‘Creating New Pathways’ (n 87) 4.

¹⁵⁰ Joe Tomlinson, ‘Measuring to Know and Measuring to Manage: An ODR Access to Justice Audit’, *Law, Technology and Access to Justice* (Blog, 1 August 2018) <<https://law-tech-a2j.org/odr/measuring-to-know-and-measuring-to-manage-the-proposal-for-an-access-to-justice-audit-of-odr-procedures/>>.

developers have utilised human-centred design, which focuses on end-user experience, to guide data collection and in turn shape the ‘fairness’ of the ODR platform and process. In the Canadian CRT, this began with extensive user testing in the early design stages and continues through qualitative user surveys and website feedback.¹⁵¹ The feedback helps to determine whether the process is providing procedural justice and has informed changes to improve the fairness of the platform.¹⁵²

This would represent a significant advance given the limited user feedback currently sought by Australian courts. Current civil justice data collection is limited, with only a few metrics used and with limited qualitative studies about the user experience.¹⁵³ Data quality and completeness is compromised by aging case management systems, a lack of uniform or adequate definitions and the costs and errors of manual data entry.¹⁵⁴ However, by prioritising data collection and iterative improvements based on the analysis of results, ODR can shape a platform which ensures that each unique user experiences a high standard of procedural fairness. Collecting more and better data will reveal how ODR design can improve the dispute resolution process and may shed light on what may prevent disputes from occurring.

E *Conclusions concerning ODR in High-Volume, Low-Value Individual Disputes*

ODR platforms have the potential to resolve large numbers of small-scale disputes more expeditiously, at lower cost to the parties and the public, and with greater user satisfaction compared to traditional civil litigation processes and procedures. However, in the design and implementation of such platforms, important objectives in terms of access to justice, open justice and procedural fairness need to be accommodated. We have sought to outline how this might be achieved with reference to ODR innovations in other countries and some findings from empirical research. The alignment of an ODR platform to these goals needs to be established using evidence, and not merely asserted.

II THE USE OF DIGITAL TECHNOLOGY IN LARGE, COMPLEX LITIGATION IN THE HIGHER COURTS

Class actions and the resolution of mass disputes give rise to a number of challenging problems for litigants, lawyers, judges and the legal system. All too often class action litigation is protracted and costly. Although class actions were designed to facilitate access to justice, this encompasses more than mere access to the courts by the commencement of a class action proceeding. The ongoing delay in many class actions erodes the confidence of class members in the justice system and the substantial

¹⁵¹ Salter, ‘British Columbia’s Civil Resolution Tribunal’ (n 19) 124; Salter and Thompson, ‘Public-Centred Civil Justice Redesign’ (n 83) 124–5.

¹⁵² Salter and Thompson, ‘Public-Centred Civil Justice Redesign’ (n 83) 122.

¹⁵³ The Productivity Commission collects basic civil justice data; Productivity Commission, *Report on Government Services* (24 January 2019) ch 7 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice/courts>>.

¹⁵⁴ For an analysis of civil justice data quality and completeness for the purposes of answering policy questions in NSW, see Law and Justice Foundation of NSW, *Data Insights in Civil Justice* (Report series, 2016–8) <<http://www.lawfoundation.net.au/ljf/app/5141D05E8AC0EF1D85258078004EC072.html>>.

transaction costs erode the net amounts that they receive if the case is successfully resolved.

However, as with the resolution of high-volume, low-value *individual disputes*, digital technology and online dispute resolution mechanisms can facilitate the more economical and more expeditious resolution of *mass claims* in a manner which is both procedurally fair and transparent.

In this section we examine, with reference to several recent and current class actions in Australia and North America, the use of digital technology in the development and maintenance of client data bases by lawyers; the review of voluminous documentation produced on discovery; the filing and exchange of court documents and evidence by parties; the judicial management of documentation and evidence; the conduct of trials; and the administration of settlement distribution schemes.

A *The Commencement of Litigation: The Development and Management of Client Data Bases by Lawyers*

Prior to and after the commencement of litigation, lawyers often desire to sign up substantial numbers of those with claims as clients, even though this is not necessary to commence a class action. In cases funded by a commercial litigation funder prior to the relatively recent endorsement of common fund orders,¹⁵⁵ it was often considered necessary to enter into contractual litigation funding agreements with large numbers of claimants and to obtain documentary information and instructions from them concerning the nature and quantum of their individual claims. In commercial parlance, this is known as ‘book building’.

Even after the advent of common fund orders it may be necessary in some cases to take instructions from all prospective class members.¹⁵⁶ Such documentary information obtained from claimants may encompass:

1. fee and retainer agreements and costs disclosure documents provided by the law firm(s) conducting the litigation;
2. litigation funding agreements provided by the litigation funder;
3. instructions concerning the nature of the circumstances giving rise to each individual claim;
4. instructions and documents concerning the nature, extent and quantum of the individual damages suffered by each claimant; and
5. records or information in the possession of third parties needed as evidence to prove causation (for example, in the case of personal injuries arising out of

¹⁵⁵ Common fund orders have been endorsed by the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 192 and further upheld by the recent decisions of the Full Federal Court in *Lenthall v Westpac Life Insurance Services Ltd* (2018) 363 ALR 698, 715 [63] and the NSW Court of Appeal in *Brewster v BMW Australia Ltd* [2019] NSWCA 35, [117] following a joint sitting of both courts.

¹⁵⁶ In the class action arising out of the Montara oil spill, claims for losses by Indonesian seaweed farmers were not commenced within the applicable limitation period. Thus, the proceeding was commenced after individual instructions were obtained from 15,000 group members with each seeking an extension of time for the purpose of pursuing their claim. The lead applicant succeeded in obtaining an extension of time in respect of his claim; *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 3)* [2017] FCA 1272.

defective products) or the nature and extent of personal injuries or economic loss.

Current methods for obtaining such instructions and information encompass:

1. Collection through websites established by law firms and in some instances courts;
2. The distribution, execution and return of agreements by electronic means;
3. The use of standard form questionnaires which may be completed electronically;¹⁵⁷ and
4. The distribution of newsletters and other information, including FAQs, to claimants by electronic means.

When proceedings are to be commenced, many courts, including the Federal Court of Australia, have introduced procedures for the electronic filing of pleadings, court documents and evidence (as discussed below). In some class actions it may be necessary to establish databases of group members who have exercised their right to opt out of the proceeding. Relatively conventional and readily available digital processes and programs have been adopted to gather and process these types of information. There are numerous off-the-shelf computer programs available for these purposes.¹⁵⁸

B *The Conduct of Litigation: Reviewing Voluminous Documentation Produced on Discovery*

It is not unusual in large complex litigation generally, and in class actions in particular, for a large volume of documentation to be reviewed and produced by way of discovery. With increases in the use of computers and advances in digital technology there has been an exponential increase in the volume of electronic information that may be relevant to litigation.¹⁵⁹ As Justice Vickery has noted:

We are now dealing with very large numbers. A major commercial bank in the world today produces some 2 terabytes of Electronically Stored Information (ESI) every minute, and some as much as 2.5 TB per minute. To put this in perspective: A terabyte (TB) is a multiple of the unit 'byte' for digital information. One terabyte is one trillion bytes or 1,000 gigabytes. It is estimated that over 85 million pages of Word documents would fill one terabyte. It would contain electronic information equivalent to an 8 foot stack of CD's or about 150 DVD's. A single TB would hold all 350 episodes of The Simpsons or a pile of 80,000 telephone books.¹⁶⁰

¹⁵⁷ Some of the pitfalls of using standard questionnaires (or online systems) rather than client interviews are illustrated by the case of *Robert v Cashman* [2000] NSWSC 770 [53]–[64] (Whealy J).

¹⁵⁸ See, eg, the off-the-shelf programs reviewed at 'Legal Software', *Software Advice* (Web Page, 15 June 2019) <<https://www.softwareadvice.com/au/legal/>>.

¹⁵⁹ See, eg, Justice Peter Vickery, 'Managing the Paper: Taming the Leviathan' (2012) 22(2) *Journal of Judicial Administration* 51, 52.

¹⁶⁰ Justice Peter Vickery, 'New Horizons for the Bar in the Age of Technology' (Conference Paper, Australian Bar Association Conference, 7 July 2017) 17. <https://austbar.asn.au/uploads/pdfs/abaconf2017/Vickery,%20the%20Hon.%20Justice%20Peter_New%20Horizons%20for%20the%20Bar%20in%20the%20Age%20of%20Technology.pdf> ('New Horizons for the Bar').

Historically, the process of document review has been time consuming and expensive. The substantial cost incurred in the traditionally time consuming and inefficient methods used for the manual review of such documents has led to various procedural changes which have substantially attenuated the ambit of or the right to discovery in some types of cases. Various law reform proposals have also been directed at narrowing the criteria for the discoverability of relevant or potentially relevant documents.¹⁶¹

In many cases, lawyers for the litigants will seek to reach an agreement on protocols for the electronic exchange of documentary information, subject to judicial supervision and approval. Before the digital revolution, each potentially relevant document was reviewed manually. With the advent of computer technology, various key words became customarily used for the electronic scanning of documents in order to sort the wheat from the chaff. Key words could be used individually or in combination to conduct electronic searches. This involves the use of Boolean operators, connecting search words using terms such as ‘and’, ‘or’, ‘not’ and ‘near’, or mathematical symbols to define and refine searches by combining or limiting search terms.¹⁶² This methodology is also used in internet search engine technology.

The limitations of Boolean search technology are well known and have been the subject of detailed empirical research. From such research it is clear that Boolean searches often miss a substantial number of relevant documents. In fact, traditional key word Boolean search methods may miss the majority of relevant documents. In one study, 67 percent of relevant documents were only found when techniques other than Boolean search were used.¹⁶³

Traditional methods of document review are also very expensive. A study by the Rand Institute for Civil Justice (‘Rand Institute’) found that traditional linear discovery accounts for 73 percent of e-Discovery costs in the United States.¹⁶⁴ Rand Institute research found that parties in civil litigation could possibly lower the high costs of large scale electronic discovery by using predictive coding (discussed below) to reduce the number of documents requiring human review, although the cost effectiveness of such

¹⁶¹ See, eg, Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 28 May 2008) ch 6; Australian Law Reform Commission, *Managing Discovery of Documents in Federal Courts* (Report No 115, 25 May 2011) chs 4–6.

¹⁶² George Boole was an English mathematician who developed an algebraic method described in his book *The Mathematical Analysis of Logic* (1847) and further elaborated in *An Investigation of the Laws of Thought* (1854).

¹⁶³ Douglas W Oard, *Search and Retrieval for ESI*, College of Information Studies and Institute for Advanced Computer Studies, University of Maryland, College Park, Maryland MD United States, March 10, 2010. Oard and his co-authors have conducted significant research and published numerous papers on the design and evaluation of electronic methods for the review of documentary evidence in civil litigation; ‘Doug Oard’s Research Page’ (Web Page, 2 Jan 2015) <<https://ece.umd.edu/~oard/research.html#image>>.

¹⁶⁴ Nicholas M Pace and Laura Zakaras, ‘The Cost of Producing Electronic Documents in Civil Lawsuits: Can They Be Sharply Reduced Without Sacrificing Quality?’ (Research Brief, Rand Institute for Civil Justice, April 2012) 1 <https://www.rand.org/pubs/research_briefs/RB9650.html>.

coding is yet to be determined.¹⁶⁵ Thus, as Justice Vickery has observed: ‘If the age of technology has produced the problem – it can also assist in providing the answer’.¹⁶⁶ In the United States, the Text Retrieval Conference (‘TREC’) periodically reviews empirical research on the effectiveness of text retrieval methods.¹⁶⁷ It is administered by the US National Institute of Standards and Technology (‘NIST’), an agency of the US Department of Commerce. As Judge Grimm of the US District Court for the District of Maryland has noted, it is a research collaboration ‘aimed at studying the e-discovery review process to evaluate the effectiveness of a wide array of technologies’.¹⁶⁸ As he observes:

There is room for optimism that as search and information retrieval methodologies are studied and tested, this will result in identifying those that are most effective and least expensive to employ for a variety of [electronically stored information] discovery tasks.¹⁶⁹

As another United States District Court Judge has observed:

Whether search terms or ‘keywords’ will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics ... Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.¹⁷⁰

More sophisticated electronic search methods have been developed recently and deployed in large complex litigation, including class actions, where a large body of electronically stored information (‘ESI’) may be in issue. This involves the use of Technology Assisted Review (‘TAR’), whereby a person with expertise in the subject matter of interest reviews a subset of the documents with a view to identifying those of relevance and developing a set of coding or search terms which can then be applied to the whole body of documents. This is often an iterative process which, when combined with sophisticated ‘intelligent’ software, can produce much more reliable identification of relevant documents. The process involves predictive coding and continuous active learning (‘CAL’), including the use of algorithms derived from statistical modelling to identify documents that are conceptually similar to a sample of documents that were subjectively reviewed by a person or persons with knowledge and expertise in the subject matter of interest. Other TAR methods are based on systematic

¹⁶⁵ Nicholas M Pace and Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (Rand Corporation, 2012) 66 <https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf>.

¹⁶⁶ Justice Vickery, ‘New Horizons for the Bar’ (n 160) 17.

¹⁶⁷ See generally ‘Text REtrieval Conference (TREC)’, *TREC* (Web Page, 30 May 2019) <<http://trec.nist.gov>>. The TREC workshops encompass research in information retrieval in a wide range of areas and disciplines, not confined to law. A number of scholarly articles on electronic search methodologies are published in the journal *Artificial Intelligence and Law* (Springer). See also Ellen M Voorhees and Donna K Harman (eds), *TREC Experiment and Evaluation in Information Retrieval* (The MIT Press, 2005).

¹⁶⁸ *Victor Stanley, Inc. v. Creative Pipe, Inc.* 250 FRD 251, 262 (D Md, 2008).

¹⁶⁹ *Ibid.*

¹⁷⁰ *US v O’Keefe* 537 F Supp 2d 14, 24 (DDC, 2008).

rules that emulate the expert decision making process.¹⁷¹ As Justice Vickery has noted, TAR is often used as part of a suite of technologies.¹⁷²

An independent person may be engaged to assist in the review process.¹⁷³ Also, as part of the iterative process, validation methods based on a sample of documents are usually used in order to obtain some measure of how effective the TAR process is. This will often involve measuring the percentage of responsive documents that TAR identifies, the percentage of non-responsive documents identified and the degree of volatility of the process, based on the percentage of documents that have changed from one designation category to another between rounds of the process.¹⁷⁴ The process does not work on non-text documents, such as old hard copies, photographs, diagrams or drawings, and is of limited application with spreadsheets.¹⁷⁵

In 2012, a US Federal District Court endorsed the use of TAR to review ESI in appropriate cases.¹⁷⁶ The Supreme Court of Victoria was the first court in Australia to order the use of TAR techniques to assist in the process of discovery in civil litigation.¹⁷⁷ In the first Victorian case in which TAR was ordered, 4 million documents had been produced on discovery. After the elimination of duplicates, this was reduced to 1.4 million. According to Justice Vickery, a junior solicitor taking one minute to review and catalogue each document manually would have taken 583 working weeks, or 10 years, to complete the task. Hence, TAR was ordered to expedite and simplify the process.¹⁷⁸ This resulted in a reduction to 300,000 documents, 210,000 of which were likely to be irrelevant, thus reducing the pool to 100,000 documents.¹⁷⁹

¹⁷¹ Erick Gunawan and Tom Pritchards, Technology and the Law Committee, 'Technology Assisted Review' (Research paper, Law Institute of Victoria, 24 November 2017) 1 <https://www.liv.asn.au/getattachment/Professional-Practice/Areas-of-Law/Technology-and-the-Law/Resources/20171124_LP_TechnologyAndTheLaw_TAR_V04.pdf.aspx>.

¹⁷² These include de-duplication technology; near duplication technology; email threading technology; and automated privilege detection; Justice Vickery, 'New Horizons for the Bar' (n 160) 19.

¹⁷³ For example, in *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* (2016) 51 VR 421, Vickery J of the Victorian Supreme Court appointed a special referee to assist with questions arising from discovery and inspection of voluminous documents, in particular the use of electronic discovery processes such as TAR or predictive coding review.

¹⁷⁴ See generally John Tredennick et al, *TAR for Smart People: How Technology Assisted Review Works and Why it Matters for Legal Professionals* (Catalyst, 3rd ed, 2018); Gordon V Cormack and Maura R Grossman, 'Evaluation of Machine-Learning Protocols for Technology-Assisted Review in Electronic Discovery' (Conference Paper, ACM SIGIR Conference on Research and Development in Information Retrieval, 6–11 July 2014) <<http://plg2.cs.uwaterloo.ca/~gvcormac/calstudy/study/sigir2014-cormackgrossman.pdf>>; Thomas Davey and Michael Legg, 'Predictive Coding: Machine Learning Disrupts Discovery' (2017) 32 *LSJ: Law Society of NSW Journal* 82.

¹⁷⁵ Gemma Thomas, 'Five Tips for Successful Use of Technology Assisted Review (TAR)', *Pinsent Masons* (Web Page, 15 February 2018) <<https://www.out-law.com/en/articles/2018/february/five-tips-for-successful-use-of-technology-assisted-review-tar/>>.

¹⁷⁶ *Da Silva Moore v Publicis Groupe* 287 FRD 182, 183 (SDNY 2012).

¹⁷⁷ See *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* (2016) 51 VR 421, 422; *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 2)* [2017] VSC 640; Supreme Court of Victoria, *Practice Note SC Gen 5: Technology in Civil Litigation*, 2 July 2018.

¹⁷⁸ 'Technology Assisted Review Plays Key Role in Litigation', *Supreme Court of Victoria* (News Update, 14 December 2016) <<https://www.supremecourt.vic.gov.au/news/technology-assisted-review-plays-key-role-in-litigation>>.

¹⁷⁹ Justice Vickery, 'New Horizons for the Bar' (n 160) 31.

As the Supreme Court of Victoria noted, TAR has been endorsed by a number of courts in other countries, including the High Court of England and Wales,¹⁸⁰ the High Court of Ireland,¹⁸¹ and the Federal District Court in the United States.¹⁸² TAR has also been used in a number of other international cases.¹⁸³ More recent judicial scrutiny of this process has focused on issues concerning the objections of parties; proportionality; mechanisms for cooperation and transparency; the initial selection of test documents or ‘seed sets’; recall and precision; and validation and audit practices.¹⁸⁴ TAR has been deployed in a number of Federal Court of Australia class action proceedings,¹⁸⁵ and is currently being used in the VW ‘diesel gate’ litigation presently pending in the Federal Court of Australia.¹⁸⁶ In that litigation, five class actions and a proceeding seeking penalties instituted by the ACCC are all progressing concurrently before Foster J.¹⁸⁷ The problem of voluminous discovery documentation has loomed large. At the time of writing, the respondents in the VW litigation had identified over 100 million documents to be reviewed for relevance, most of which are in German. TAR has also been used in proceedings in the Supreme Court of Queensland.¹⁸⁸ In terms of cost, Justice Vickery has estimated that TAR would cost only one fifth or less compared with a manual review.¹⁸⁹ In one Australian matter, TAR was used to review 778GB of data, equivalent to 6.6 million documents. This was reportedly reduced in 31 hours to 157,000 by deploying only one lawyer, a service provider and an independent consultant.¹⁹⁰

C The Filing and Exchange of Court Documents and Evidence by Parties

The electronic filing and exchange of court documents, pleadings and evidence has become the norm in many Australian courts. This has saved time and cut costs for both litigants and the courts. The Federal Court of Australia was one of the first courts in the world to adopt an electronic filing system. This development does not require further elaboration here.

¹⁸⁰ *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch). In *David Brown v BCA Trading Ltd* [2016] EWHC 1464 (Ch), 17.6 million potentially discoverable documents were initially reduced to 3.1 million using de-duplication technology.

¹⁸¹ *Irish Bank Resolution Corporation Ltd Quinn* [2015] IEHC 175. In that case, the High Court of Ireland noted that technology assisted review using predictive coding is at least as accurate as and probably more accurate than manual or linear methods in identifying relevant documents and would facilitate a more economical and expeditious discovery process; *Irish Bank Resolution Corporation Ltd Quinn* [2015] IEHC 175, [66]–[67].

¹⁸² *Rio Tinto Plc v Vale SA* 306 FRD 125 (SDNY 2015).

¹⁸³ Justice Vickery, ‘New Horizons for the Bar’ (n 160) 25.

¹⁸⁴ James A Sherer, David Choi and Csilla Boga-Lofaro, ‘Court Guideposts for the Path to Technology Assisted Review Adoption’ (2018) 35(2) *Computer and Internet Lawyer* 1, 2.

¹⁸⁵ See, eg, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 2)* [2017] FCA 1231 (6 October 2017).

¹⁸⁶ *Cantor v Audi Australia Pty Ltd (No 3)* [2017] FCA 1079.

¹⁸⁷ *Ibid.*

¹⁸⁸ See, eg, *Parbery v QNI Metals Pty Ltd* (2018) 358 ALR 88; *Parbery v QNI Metals Pty Ltd* [2018] QSC 180; *Parbery v QNI Metals Pty Ltd* [2018] QSC 276.

¹⁸⁹ Justice Vickery, ‘New Horizons for the Bar’ (n 160) 33.

¹⁹⁰ ‘eDiscovery in SA - Basic guide to Technology Assisted Review for SA’, *Terry Harrison* (Web Page, 10 July 2018) <<http://www.terryharrison.co/blog/2018/7/10/ediscovery-in-sa-basic-guide-to-technology-assisted-review-for-sa>>.

D *The Judicial Management of Documentation and Evidence*

In many cases, voluminous documentation in the higher courts is stored in electronic and readily searchable form. Various commercial service providers are available in Australia to facilitate this.

E *The Conduct of Trials*

In many instances, ‘electronic trials’ have been conducted whereby the court and the parties may access and use in the hearing, and in oral and written submissions, extensive computer based information rather than hard copies. For example, this occurred in the VW litigation, specifically at the hearing concerning whether the cars in issue were fitted with illegal ‘defeat devices’.¹⁹¹

Whilst the use of such computer based technologies has made forensic information access and management considerably more convenient than the traditional paper based modus operandi, this has not been without significant financial cost. Commercial service providers are usually appointed, and approved by the court, to obtain, process, store and facilitate access to, and the retrieval of, digital information. Often additional technology personnel will also be deployed by the parties. The commercial cost of these services is considerable.

However, in many class actions and in other forms of ‘mega’ litigation, Justice Sackville’s observation applies: ‘It would have been virtually impossible to conduct the trial without the use of modern technology’.¹⁹² In a number of cases, it has been estimated that there had been a substantial reduction in trial time through the use of modern technology.¹⁹³

Although electronic trials have become relatively commonplace, there has been relatively little use of technology to facilitate participation in hearings by remote advocates and witnesses. This usually only occurs in limited circumstances, usually when dealing with interlocutory or procedural matters and often only with either the consent of the parties or judicial approval.¹⁹⁴ There is often judicial resistance given the perceived benefits of having witnesses give evidence in person in court.¹⁹⁵

F *Concluding Litigation*

The tension between the desire for individualised justice and the need to deal with large numbers of claims continues to manifest itself at the conclusion of class action and mass tort proceedings. Where an ‘opt out’ class action is converted to a closed

¹⁹¹ *Cantor v Audi Australia Pty Ltd (No 3)* [2017] FCA 1079.

¹⁹² *Seven Network Ltd v News Ltd* [2007] FCA 1062, [10].

¹⁹³ See Anna Olijnyk, ‘Justice and Efficiency in Mega-Litigation’ (PhD thesis, University of Adelaide, 2014) 196

<<https://digital.library.adelaide.edu.au/dspace/bitstream/2440/91442/3/02whole.pdf>>. This text is now also available as a book; Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019).

¹⁹⁴ Robert Size, ‘Taking Advantage of Advances in Technology to Enhance the Rule of Law’ (2017) 91(7) *Australian Law Journal* 575, 585.

¹⁹⁵ See, eg, *Campaign Master (UK) v Forty Two International (No 3)* (2009) 181 FCR 152, 171 [78] (Buchanan J) cited in Size (n 194) 586; *Blackrock Asset Management Services Australia Ltd v Waked (No 2)* [2011] FCA 479 [46] (Perram J) cited in Size (n 194) 586.

class, often to facilitate settlement, there is a need to process large numbers of claims from persons who seek to 'opt in'.

Where a settlement agreement is reached between the parties and approved by the court, there is often a need to devise and implement claims processing procedures to determine eligibility for payment and to quantify the amounts to be paid to large numbers of class members.

If the case is not settled and proceeds to trial, the judgment will usually only deal with the individual claim(s) of the lead plaintiff(s) and some or all of the issues common to the claims of the class members. If the lead plaintiff is successful, there will need to be judicial or administrative procedures implemented to deal with the 'individual' issues arising in each of the claims of the remaining class members. These judicial or administrative procedures may need to deal with issues of causation and reliance that may arise in product liability or shareholder class actions. Such procedures will also need to encompass methods of quantifying the economic value of large numbers of individual claims.

For example, in the current VW litigation in the Federal Court of Australia, the trial of the five class actions on behalf of consumers who purchased the vehicles in question will involve primarily the determination of the individual claims of the five lead applicants, together with a number of common questions applicable to the claims of the remaining class members. If the applicants are successful, a further 90,000 claims by class members will need to be resolved.

To date in Australia, in each of the abovementioned stages (namely, the commencement, conduct and conclusion of class action and mass tort litigation), considerably greater use of new and emerging technologies might have been employed to reduce transaction costs and to expedite the resolution of disputes and the implementation of settlements.

In the following part of the article, we provide some examples of how settlement administration and implementation might be improved in the future, drawing on a number of current or completed cases.

G *The Administration of Settlement Distribution Schemes*

In recent years, there has been ongoing controversy over the cost and delay associated with the implementation of class action settlements in Australia. This issue attracted considerable controversy in connection with the settlement of the Victorian bushfire litigation, which experienced substantial delays and large transaction costs. The problem was exacerbated by a decision not to make interim payments pending the evaluation of all claims. The delays and costs were due in large measure to the individualised assessment of each group member's claim by humans (including lawyers, loss adjusters and medical personnel). In part, this arose out of the volume and complexity of the claims, which encompassed claims arising from personal injuries, property damage and business losses. For example, the settlement of the Kinglake bushfire case involved around 1,800 personal injury claims and over 9,000 property damage and economic loss claims.

Until recently, a practice had developed whereby the solicitors conducting the class action proceedings sought to appoint themselves as the administrators of any settlement, a process which, at least until recently, had received judicial approval. In many cases, the evaluation and resolution of claims during the settlement process have been carried out by the same solicitors who acted for the class members in the litigation. Thus, lawyers acting as advocates for their clients one day become appointed as adjudicators of their clients' claim the next. This is often said to be justified by their familiarity with the issues in question, the adoption of independent review procedures and ongoing judicial scrutiny.

In some instances, this has been imposed as a term or condition of the proposed settlement. This has attracted some judicial comment.¹⁹⁶ There have also been recent recommendations for reform, including from the Australian Law Reform Commission, which has recommended that there should be a tender process so that any interested party may tender for such work, with a decision to be made by the court based on questions of costs and efficiency.¹⁹⁷

In the United States it has been customary for independent persons be appointed as trustees under judicial supervision to implement many class action, mass tort and bankruptcy settlements.¹⁹⁸ In some recent Australian class action settlements independent persons have been appointed to process claims and make payments, by agreement of the parties and with the approval of the court.¹⁹⁹ For present purposes we do not express a view as to *who* should administer settlements. However, we contend that there is room for improvement in *how* such settlements are implemented.

¹⁹⁶ In *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S and P Global Inc)* [2018] FCA 1289, [77], Lee J raised the prospect of tenders being sought for the purpose of administration of the settlement but permitted the solicitors to be appointed as administrators of the scheme, subject to external scrutiny of their costs.

¹⁹⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 132, 24 January 2019) 9 <<https://www.alrc.gov.au/publications/integrity-fairness-and-efficiency%E2%80%94inquiry-class-action-proceedings-and-third-party>>.

¹⁹⁸ There is a considerable body of literature dealing with claims resolution facilities established in connection with class actions, mass tort litigation and Chapter 11 bankruptcy proceedings in the United States; see, eg, Deborah R Hensler, 'Assessing Claims Resolution Facilities: What We Need to Know' (1990) 53(4) *Law and Contemporary Problems* 175; Deborah R Hensler, 'Alternative Courts? Litigation-Induced Claims Resolution Facilities' (2005) 57 *Stanford Law Review* 1429; Francis E McGovern, 'The What and Why of Claims Resolution Facilities' (2005) 57(5) *Stanford Law Review* 1361; Frances E McGovern, 'Second-Generation Dispute System Design Issues in Managing Settlements' (2008) 24(1) *Ohio State Journal on Dispute Resolution* 53; Frances E McGovern, 'Distribution of Funds in Class Actions - Claims Administration' (2009) 35(1) *Journal of Corporation Law* 123. Two examples of recently established claims resolution facilities include the facility established in 2015 pursuant to the Joint Chapter 11 Plan of Reorganisation of New England Pharmacy, Inc, the Tort Trust Agreement in respect of claims arising out of contaminated injections, and the claims resolution facility adopted as part of the plan of re-organisation of Garlock Sealing Technologies LLC et al in 2018 in connection with asbestos claims. Claims resolution facilities have also been set up in connection with international disputes; see, eg, Frances E McGovern, 'Dispute Systems Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 171.

¹⁹⁹ In the consumer class action in the Federal Court on behalf of purchasers of Nurofen, the settlement agreement provided for the appointment of an accounting firm as settlement administrator. The settlement was approved by Nicholas J in 2017; *Hardy v Reckitt Benckiser (Australia) Pty Ltd* [2017] FCA 341.

In particular, it is clear that settlements can be designed and implemented in a manner which makes greater use of new digital technologies which will expedite and reduce the cost of claims resolution. However, the use of digital technology in litigation has to be tailored to the substantive, doctrinal and evidentiary requirements for proof of both liability and damages. In the absence of agreement between the parties during the conduct of litigation, or an agreed and court-approved methodology (in the case of class actions) for resolving claims where there is a settlement, the parties and the court are constrained by the relevant substantive law and procedural rules applicable to the dispute.²⁰⁰ Even in the event of a settlement, strict legal and evidentiary rules may be required to be applied in the resolution of each individual claim. However, many if not most, settlements provide for some degree of relaxation of strict legal and evidentiary requirements in respect of both proof of eligibility for payment and the quantification of the amount(s) to be paid. Settlement distribution schemes usually seek to ‘achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible’.²⁰¹

As Gilsenan and Legg note, ‘settlement distributions need to balance fairness and precision with efficiency’.²⁰² They analyse a number of settlement distribution schemes adopted in a range of Australian class actions, encompassing shareholder claims,²⁰³ cartel cases,²⁰⁴ and mass tort and product liability proceedings.²⁰⁵ In their

²⁰⁰ In class actions, any settlement is required to obtain court approval and the court is required to be satisfied that the proposed settlement is fair and in the interests of the group members. In the Federal Court context, see *Federal Court of Australia Act 1976* (Cth) s 33V; Federal Court of Australia, *Practice Note GPN-CA: Class Actions Practice Note*, 25 October 2016, [14.1]–[14.6]. The court will also supervise the implementation of any settlement distribution scheme.

²⁰¹ *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468, [5] (Moshinsky J) citing *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204, [37]–[39] (*Mercieca*). In *Mercieca*, Emerton J approved a settlement notwithstanding the possibility that the claims assessment principles may be more generous in respect of some group members compared with others: at [38]. See also *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [118] (Wigney J).

²⁰² Rebecca Gilsenan and Michael Legg, ‘Australian Class Action Settlement Distribution Scheme Design’ (Research Report No 1, IMF Bentham Class Action Research Initiative, 1 June 2017) 4 <<http://www.cari.unsw.edu.au/sites/cari.unsw.edu.au/files/class-action-settlement-distribution-design-CARI-paper.pdf/>>.

²⁰³ See, eg, *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [20] (Stone J); *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801, [22] (Emmett J); *Inabu Pty Ltd v Leighton Holdings Ltd (No 2)* [2014] FCA 911, [13] (Jacobson J). In a more recent case, Murphy J approved of the loss assessment methodology proposed for the settlement distribution scheme in *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [100], [106].

²⁰⁴ See, eg, *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322 cited in Gilsenan and Legg (n 202) 11 nn 43; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] ATPR 42-361 cited in Gilsenan and Legg (n 202) 11 nn 43; *Wright Rubber Pty Ltd v Bayer AG (No 3)* [2011] FCA 1172 cited in Gilsenan and Legg (n 202) 11 nn 43; *De Brett Seafood Pty Ltd v Qantas Airways Limited* cited in Gilsenan and Legg (n 202) 11 nn 43. As Gilsenan and Legg note, the four class actions that settled had settlement distribution schemes that were structured along similar lines: at 12.

²⁰⁵ According to Gilsenan and Legg, the types of settlement schemes adopted in product liability and mass tort cases are varied: at 17–22. Some cases adopt global sum settlements with individualised distribution such as the Kilmore-East Kinglake bushfire class action in *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663. Others have adopted process settlements involving a two stage procedure for determining individual entitlement and assessment of quantum, such as in the LCS ® Duofix™ Femoral Components class action in respect of components of knee replacement implants, which was heard in *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370, and other Victorian bushfire cases, such as *Thomas v Powercor*

perceptive analysis, they also refer to matrix or grid settlements which are common in the United States but have only rarely been used in mass tort class actions in Australia.²⁰⁶

In the United States, claims resolution facilities have been developed not only in connection with the settlement of class actions, aggregated mass tort claims,²⁰⁷ and bankruptcy proceedings, but also for the resolution of claims which are not aggregated. As Dodge notes, many of the most innovative recent claims structures, including the BP Gulf Coast Claims Fund and the fund established in the aftermath of the Costa Concordia disaster, use a new ‘bottom-up’ model of ‘disaggregative’ mass claim resolution instead of the familiar ‘top-down’ model.²⁰⁸

Importantly, many claims resolution mechanisms have been implemented to resolve individual disputes in a manner which precludes their aggregation, such as mandatory individual arbitration clauses in consumer and employment contracts. Since these clauses are unilaterally drafted by corporations with a view to precluding class action litigation, questions have arisen as to their fairness and enforceability. To date, at least in the United States, they have received considerable judicial support, including from the Supreme Court of the United States.²⁰⁹

As one author has suggested, the rise of ‘private disaggregation’ has the potential to create a dramatic shift in the legal landscape given that this new approach to dispute resolution is driving many of the most innovative claims resolution mechanisms which are emerging. Such mechanisms often streamline procedures and the resolution of substantive issues or shift the cost to the defendants, thus facilitating the pursuit of claims that may otherwise not be pursued, at least outside of the context of class actions, because the transaction costs exceed the potential recovery.²¹⁰ This may also resolve claims that might not otherwise be certified as suitable for a class action and avoid the systemic costs and delays inherent in aggregate litigation.

Australia Ltd [2011] VSC 614, *Perry v Powercor Australia Ltd* [2012] VSC 113 and *Place v Powercor Australia Ltd* [2013] VSC 6.

²⁰⁶ Gilsean and Legg (n 202) 22–3. They refer to the United States silicone gel breast implant litigation and the national football league players’ concussion injury litigation: at 23. As they note, a matrix was used in *Amom v New South Wales* [2016] NSWSC 1900 a case involving the false imprisonment of young people. The matrix allocated compensation based on various factors such as false imprisonment, strip search, degree of humiliation, degree of discomfort and age. They also note that reference was made to a US grid style payment scheme in *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [105], [108]: at 22, nn 92.

²⁰⁷ Multi District Litigation (MDL) procedures provide for the transfer and consolidation of large numbers of cases filed in different federal courts to one judge for all pre-trial proceedings where the cases give rise to common issues (e.g. product liability claims involving the same product).

²⁰⁸ Jaime Dodge, ‘Disaggregative Mechanisms: Mass Claims Resolution without Class Actions’ (2014) 63(6) *Emory Law Journal* 1253, 1253.

²⁰⁹ See, eg, *AT&T Mobility LLC v Concepcion* 563 US 333 (2011). The Court held that federal arbitration legislation preempted a Californian state law that invalidated most class action waivers in consumer contracts on the grounds of unconscionability; see also the recent decision in *Epic Systems Corporation v Lewis* 584 US ___ (2018) where the Court (by a 5:4 majority) upheld a binding arbitration clause in an employment contract thus preventing collective class action litigation. For an examination of the status and enforceability of mandatory foreign arbitration clauses under Australian law, see Richard Garnett, ‘Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?’ (2017) 39(4) *Sydney Law Review* 569.

²¹⁰ Dodge (n 208) 1258.

Whether or not claims resolution mechanisms arise out of aggregated or disaggregated claims, individualised assessment of claims can be combined with a matrix or grid and standardised payments in designing claims resolution facilities. A good example of a 'hybrid' claims resolution mechanism that combined simplified and expedited claims resolution options with more traditional requirements to establish proof of eligibility for payment and quantify damages is the Claims Resolution Facility established by the Dalkon Shield Claimants Trust in the aftermath of the Dalkon Shield litigation in the United States.

H *Some Historical Lessons from the Dalkon Shield Litigation*

After approval of a Plan of Reorganisation by the United States Bankruptcy Court, the Dalkon Shield Claimants Trust was established to resolve over 300,000 claims by women worldwide for personal injuries and economic loss arising out of their use of the Dalkon Shield IUD.²¹¹

Claimants were given a *choice* of four options. Under Option 1, claimants could elect to receive an expedited payment of a fixed minimal amount simply by claiming that they had used the Dalkon Shield and had been injured by it. No proof was required of use of the device or of any injury suffered. Although the payment amount was modest, over 100,000 claimants chose this option.

Under Option 2, much higher fixed or lump sum amounts were payable according to the type of injury suffered. To be eligible for payment under this option, claimants had to submit documentary proof that they had used the Dalkon Shield IUD and medical records or other evidence to prove that they had suffered the particular injuries for which compensation was claimed. Importantly, it was not necessary to establish or prove any causal connection between the use of the IUD and the injuries suffered. Although reasonably substantial, the payments were standardised for each injury and were lower in amount than what the 'tort value' of the claim would be if the matter had been determined by a court. A very substantial number of the claimants elected this option.

Under Option 3, a claimant could seek payment of the full amount of the 'tort value' of the claim, which would be assessed by independent trustees. Claimants retained the right to have the amount determined by a court (or, alternatively, though binding arbitration) if the amount offered by the trustees was rejected. However, in order to obtain compensation under this option, claimants had to establish not only use of the IUD and proof of injury, but also a causal connection between use of the IUD and the injury in question on the basis of medical evidence.

Under Option 4, they could elect to defer resolution of their claim (for example, if it was not yet known whether they were permanently infertile or if medical or other evidence was in the process of being obtained).

²¹¹ The policies and procedures of the Dalkon Shield Claimants Trust are examined in detail by the chair of the trust: Georgene M Vairo, 'The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?' (1992) 61(3) *Fordham Law Review* 617. See also Kenneth R Feinberg, 'The Dalkon Shield Claimants Trust' (1990) 53(4) *Law and Contemporary Problems* 79.

One obvious advantage of this claims resolution methodology is that it provided claimants with options that could be chosen depending on the level of proof that they were able to provide. Whilst standardised or ‘cookie cutter’ amounts were payable under Options 1 and 2, claimants could elect to proceed under Option 3, which facilitated payment of the full *individualised* amount according to the nature and severity of the injuries suffered and the economic losses incurred. For present purposes, it is important to note that the scheme encompassed two options (Options 1 and 2) that were conducive to the use of electronic technology to process claims expeditiously and at minimal transaction cost to the parties, the Claimants Trust or the court. Most claims were resolved under these two options.

It is perhaps also important to note that the large amount of the fund established to provide for payments was non-reversionary. In other words, the defendant did not get any of the surplus funds if all claims were resolved and paid without exhausting the fund, which turned out to be the case. Any surplus was also paid to claimants, prorated on the amount of their first payment in lieu of any amount for exemplary or punitive damages (which were not payable, *per se*).

This methodology of combining various options, which varied according to the level of proof required, and which can facilitate the resolution of most claims expeditiously and at minimal cost, can be adapted to other types of claims resolution. Importantly, it offers claimants options which *they* can choose.

I *Some Lessons from the Vioxx Case and Recent Class Action and Mass Tort Litigation in the United States*

The problem of establishing causation and quantifying damages for large numbers of claimants looms large in many if not most class action and mass tort litigation. In the *Vioxx* product liability litigation in the United States and Canada, innovative and interesting use was made of technology in connection with the processing of large numbers of personal injury claims following a US\$4.85 billion settlement of claims in the United States in 2007. An electronic damages calculator was established on a website which enabled individual claimants to input relevant data with a view to calculating their individual damages entitlement under the terms of the settlement.²¹²

A computer based questionnaire was used to enable the Claims Administrator to determine qualifying claimants’ ‘Basis Points’ (Step 1). Such basis points were based upon: (a) age at the time of injury from *Vioxx* use; (b) duration of *Vioxx* use and (c) the level and seriousness of the injury. Thereafter, at Step 2, there were adjustments depending on the timeframe and frequency of *Vioxx* use, leading to the calculation of a sub-total of ‘award’ points. Step 3 involved reductions based on risk factors, and Step 4 involved additional reductions for other significant risk factors.

Finally, the total number of award points was calculated. The Qualifying Claimant’s Total Award Point Estimate was only an estimate. The Total Award Points the Qualifying Claimant ultimately received was based solely upon a review of his or her medical records by an independent Claims Administrator. To the extent there were

²¹² The calculator was previously located at ‘Official *Vioxx* Settlement Calculator’, *Official Vioxx Settlement* (Web Page) <www.officialvioxxsettlement.com/calculator> but the domain website has since been listed for sale by the owner.

discrepancies between the information entered electronically and the Qualifying Claimant's medical records, the Qualifying Claimant's medical records took precedence.

Although the value of each Award Point could not be known until all claims participating in the Settlement Program were evaluated, an electronic calculator enabled the claimant to quantify the total dollar value of the claim based on a range of potential settlement values for the Qualifying Claimant's claim. The website settlement calculator was accessible online.

The deadline for registration of claims expired on 15 January 2008. Over 58,000 claims were registered. As of 29 February 2008, more than 44,000 of 47,000 eligible claimants had enrolled in the Program. This constituted over 93 percent of all eligible claimants. This enrolment percentage exceeded the 85% threshold established in the settlement agreement. The defendant retained a right to walk away from the Agreement unless 85 percent of eligible claimants alleging a heart attack, stroke, death, or more than 12 months Vioxx usage, enrolled in the Program. Eligible claimants were those who had filed a lawsuit as of 9 November 2007, alleging that they had suffered a heart attack or stroke as a result of ingesting Vioxx.

In order for an eligible claimant to qualify for an initial payment if their claim was determined to be compensable, that Claimant had to enrol his or her claim on or before 29 February 2008. Eligible claimants who enrolled as of 29 February 2008 had a 31-day grace period to submit to the Claims Administrator additional documentation, including properly executed releases and medical authorisation forms. All eligible claimants had to enrol before 1 May 2008, in order to participate in the Settlement Program.

Each enrolled claimant was required to submit a Claims Package before 1 July 2008. A claims package needed to include: (1) medical records as outlined in Exhibit 1.3.1 of the Settlement Agreement; (2) Plaintiff or Claimant Profile Form (and amendments); and (3) a claims form (to be completed online using a secure server).

As has been noted elsewhere, although the use of grids and formulas has been widespread in mass tort and class action settlements in the United States to address the tensions between collective and individual evaluation of claims, there are often practical information problems, including where exposed individuals may not have fully manifested problems or where there are inherently subjective claims for psychological injuries.²¹³ There has been critical scrutiny of settlement mechanisms in a number of the United States mass tort cases.²¹⁴

²¹³ American Law Institute, *Principles of the Law of Aggregate Litigation* (2010) 54 citing Paul H Edelman, Richard A. Nagareda and Charles Silver, 'The Allocation Problem in Multiple Claimant Representations' (2006) 14 *Supreme Court Economic Review* 95.

²¹⁴ For example, for a critique of the settlement in the diet drug product liability litigation, see Alexandra D Lahav, 'The Law and Large Numbers: Preserving Adjudication in Complex Litigation' (2007) 59(2) *Florida Law Review* 383 ('The Law and Large Numbers'). See also Deborah R Hensler, 'Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation' (2001) 11(2) *Duke Journal of Comparative and International Law* 179.

Some courts have attempted to circumvent the conundrum of a choice between individualised and mass tort resolution of claims by adopting statistical sampling techniques or the judicial determination of bellwether cases.²¹⁵ In the Vioxx litigation, the values adopted in the settlement matrix were derived from a series of bellwether cases conducted over several years.²¹⁶ In some instances, judges have proposed non-binding bellwether cases for informational purposes.²¹⁷

Undoubtedly, economic losses by shareholders are more easily calculable than personal injury claims in mass tort litigation. However, even in shareholder class action settlements, settlement distribution schemes usually need to utilise complex statistical methods for determining the ‘inflated’ price paid by those claiming loss. The challenge is to disentangle, using multivariate statistical techniques such as regression analysis, the loss said to be due to culpable conduct from other market factors having an impact on share price.²¹⁸ In the settlement of the shareholder litigation against Merck,²¹⁹ the Settlement Notice set out a Plan of Allocation which incorporated various tables, accessible online, to enable calculations of losses.²²⁰

Similarly, financial losses by consumers or businesses arising out of commercial computerised transactions are often readily calculable by electronic means. For example, sophisticated computer-based claims processing methods have been developed by a commercial service provider in connection with the recent US\$6 billion-plus settlement in the class action arising out of claims that merchants paid excessive fees to accept Visa and Mastercard credit cards in violation of antitrust laws in the United States.²²¹ This was designed to allow merchants to provide information to expedite claims processing. Twenty-one million settlement notices were sent out. The Class Administrator proposes to provide class members with the ability to access the claims website, with a unique code to permit them to view the manner in which their claim value is calculated. Class members may accept or disagree with data on the claim form or the website. The claim form and website will also explain how to challenge the data. The fairness hearing is scheduled for 7 November 2019, but, at the time of writing, the settlement is on appeal. Curiously, persons wishing to opt out can only do so by letter sent in the post and not by email or online.

In a recent pharmaceutical mass tort settlement in the United States, a commercial service provider developed an electronic ‘Claims Facilitator’ that calculated monetary amounts for individual claimants based on an award matrix that took account of the age of the claimants and the severity of their injuries.²²² Through a secure website, Special Masters appointed by the court had unrestricted access to claimant data, whereas plaintiff law firms were limited to viewing data on their clients and to limited data fields. An interactive online claims submission platform was implemented for use

²¹⁵ A number of examples are cited in Lahav, ‘The Law and Large Numbers’ (n 214) 609–12.

²¹⁶ Alexandra D Lahav, ‘The Case for “Trial by Formula”’ (2012) 90(3) *Texas Law Review* 571, 592 (‘The Case for “Trial by Formula”’); see generally Howard M Erichson and Benjamin C Zipursky, ‘Consent Versus Closure’ (2011) 96(2) *Cornell Law Review* 265, 277–80.

²¹⁷ Lahav, ‘The Case for “Trial by Formula”’ (n 216) 609.

²¹⁸ These methods are discussed in Gilsenan and Legg (n 202) 7–9.

²¹⁹ *In re Merck & Co Inc Vioxx Securities Litigation* MDL 1658 (SRC, 2003).

²²⁰ ‘In re Merck & Co., Inc. Vioxx Securities Litigation’, *Merck Vioxx Securities Litigation* (Web Page, 10 January 2019) <<https://www.merckvioxxsecuritieslitigation.com/>>.

²²¹ *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* MDL 1720 (DEDNY, 2005)

²²² ‘Epiq Results’, *Epiq* (Web Page) <<https://www.epiqglobal.com/en-au/results>>.

by claimants and their lawyers. This facilitated the electronic submission of medical records and other data.

These relatively sophisticated, reasonably expeditious and (comparatively) inexpensive claims resolution methodologies stand in marked contrast to some of the labour intensive, expensive and protracted mechanisms used in resolving many Australian class actions to date. However, claims resolution methodologies need to be tailored to the nature of the disputes in question. In many cases, the preferable option is to incorporate various options that may be chosen by the class members themselves rather than those designing or implementing settlements. This would enable the claimants to choose between 'standardised' and 'individualised' methods. Some recent class action settlements in Australia have incorporated this methodology.

The only advantage (at least from the perspective of the legal profession) of traditional claims processing procedures primarily reliant on human resources is that they generate substantial legal fees. Where such fees are deducted from settlement amounts otherwise payable to claimants, this gives rise to obvious concern. To some extent, this revenue generator has been an impediment to the deployment of more cost effective digital solutions.

However, commercial service providers who have been involved in the adoption of innovative digital technologies and processes in United States' class action and mass tort litigation have recently become involved in the Australian market. Thus, there have been some Australian cases in which advanced computer based technology has been used in the administration of settlements.

III CONCLUSIONS

At each end of the civil justice spectrum, traditional methods for the resolution of civil disputes through the courts are not readily capable of facilitating the resolution of such matters in a quick, just and inexpensive manner.

As with ODR platforms used for the resolution of minor civil disputes referred to in the first part of this article, the resolution of mass claims through claims resolution facilities established at the conclusion of class action or mass tort litigation should also seek to facilitate access to justice in an economical, expeditious, transparent and fair manner.

Recently deployed ODR methodologies for dealing with minor civil disputes may be adapted for resolving mass claims in class actions. Similarly, claims resolution methods adopted in recent mass tort and class action litigation can be adapted for resolving high-volume but small value individual claims outside the class action context.

There is no one-size-fits-all ODR model. Each is required to be tailored and modified to the specific and idiosyncratic features of the disputes in question and the characteristics of the parties to such disputes. This requires not only technological innovation and creative thinking from the outset, including in the design of ODR platforms and procedures, but also user feedback and evaluation methodologies that will facilitate ongoing iterative adjustment in the light of practical experience and insight. However, digital technology is not a panacea at either end of the civil claims

spectrum. There may be increased commercial costs associated with a number of digital innovations. There is an ongoing need for creative thinking and both qualitative and quantitative empirical research. Transaction costs, timeliness, and consumer satisfaction are important variables that need to be evaluated as an integral part of civil justice reform.²²³ Although guiding principles have been adopted in legislation and procedural rules in various jurisdictions with a view to achieving the just, expeditious and inexpensive resolution of civil litigation, cost and delay continue to loom large in most if not all class action proceedings. It is not unusual for cases to take more than 5 years to resolve even prior to settlement administration and for legal costs to be in the tens of millions of dollars.

In the design and implementation of claims settlement procedures, rigidly adhering to the requirements of due process and the application of the substantive law in the resolution of multiple individual claims will exacerbate the problems of delay and cost. On the other hand, a preoccupation with efficiency and expedited claims processing may give rise to inequality and rough justice.²²⁴

One method of circumventing these extremes is to avoid a binary choice between individualised and mass claims resolution methodologies, and to incorporate various options in the claims resolution process that vary the level of proof with the quantum and speed of payment so as to give the claimants a choice as to which to elect. Whichever approach is to be adopted, the tension between the desire for individual justice and the need to resolve disputes quickly, efficiently and economically needs to be creatively resolved. In doing so, procedural due process considerations need to be accommodated if technological innovation is going to be able to bring about digital justice.

²²³ As Justice Vickery has observed, there are some fundamental design parameters for courts adopting technology and designing workable systems which he describes at the '*Surfer*' principles: simplicity in operation; user consultation; reliability; flexibility; efficiency and robust security and back-up systems; Justice Vickery, 'New Horizons for the Bar' (n 160) 2–3.

²²⁴ The competing demands between compensation on the merits or rough justice are discussed by Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89.

