

Justice and Efficiency in Mega-Litigation

Anna Olijnyk

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ABSTRACT

This thesis asks how Australian judges reconcile the demands of efficiency and justice in extremely long-running, complex civil litigation – sometimes known as ‘mega-litigation’. The thesis combines doctrinal and theoretical analysis with qualitative research based on a series of interviews with judges who have presided over mega-litigation.

Mega-litigation places enormous burdens on the justice system, requiring large amounts of court resources to be devoted to a small number of cases. A central theme of the thesis is the need for civil procedure to be directed to multiple aims: efficiency as well as justice, and the interests of the public as well as those of the parties to litigation. It is therefore crucial for courts, when managing mega-litigation, to seek to improve efficiency and to have regard to the interests of the public. At times, there will be tension between these objectives and the objective of doing justice between the parties to the case.

This thesis examines the ways in which the challenge of reconciling justice and efficiency in civil procedure has been approached by scholars and courts. Against this background, qualitative interview data is used to examine how judges approach this challenge in mega-litigation. Ultimately, the thesis identifies three ways in which judges reconcile justice and efficiency in mega-litigation: first, by seeking innovative ways to improve efficiency without compromising justice; secondly, by taking control of the litigation from the parties and ensuring that there is a sharp focus on the real issues in dispute; and thirdly, by relying on highly informed expert intuition. All three conclusions rely heavily on the skill, personality and background of the individual judge.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide.

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I was extremely fortunate to have two excellent supervisors. My primary supervisor, Professor John Williams, constantly kept my eye on the big picture, pushed me to make my work stronger and more original, and fostered my academic career beyond the thesis. My co-supervisor, the Honourable David Bleby QC, provided invaluable help with developing the qualitative interviews and approaching potential interviewees. His ability to (gently) point out the weakness in an argument was a skill that transferred successfully from the role of judge to that of supervisor.

The judges who participated in interviews for this thesis were extremely busy individuals who were asked to give up their time to help a PhD student who (with one exception) was a stranger to them. They all did so with enthusiasm and genuine commitment to the exercise. Their generosity is a credit to the profession.

My family, especially my mother Sarah Olijnyk, were an unfailing source of support. As challenging as the PhD was for me, at times it must have been more challenging for those around me.

I was accompanied throughout the PhD 'journey' (a word used a lot by postgraduate students who have watched too much reality television) by the most wonderful cohort of PhD students at Adelaide Law School. They read my drafts, alerted me to relevant resources, baked for me, listened to my whinging and provided distraction when needed (and sometimes when not needed).

Various members of the academic and professional staff at Adelaide Law School provided practical and emotional help and inspiration. Special thanks go to Gabrielle Appleby, Sheena Beaven, Peter Burdon, Cheryl Chapman, Moira Groves, Suzanne Le Mire and the Law Library staff. I could not have wished for a more supportive research environment.

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Finally, I would like to thank Justice Paul Finn for his timely and incisive comments at an early stage of the project.

NOTE ON REFERENCING CONVENTIONS

Interviews

For the purposes of this project, I conducted a series of interviews with current and former judges with experience in mega-litigation. The methodology of those interviews is explained in the Appendix.

Interview participants were offered the option of anonymity. Half the participants (8 out of 16) took up this option. Those participants who requested anonymity have been allocated a letter at random, and are referred to throughout the thesis as, for example, 'Participant A'. No location of interview has been given for these participants. Due to the small number of potential participants, and the fact that the interviews took place in each participant's home city, location would tend to reveal identity. For the same reason, no date of interview is given: as interviews in each city were conducted within a short period of time (for example a week in Sydney) date would tend to reveal location.

For those participants who did not request anonymity, the interviews are referenced in accordance with rule 6.13.1 of the *Australian Guide to Legal Citation*. In the text of the thesis, I have adopted the following convention: the first time an interview participant is referred to in the text of a chapter, they are referred to by their full name and title at the time of interview. In subsequent references in the same chapter, they are referred to by their first name and surname only.

The *Bell Group* Judgment

This thesis contains many references to Owen J's judgment in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*. The judgment has the medium-neutral citation [2008] WASC 239. An abridged version of the judgment appears in the Western Australian Reports with the citation (2008) 39 WAR 1. I have adopted the following conventions when citing this judgment:

- When referring to a paragraph of the judgment that appears in the Western Australian Reports, I have used only the reported citation, and referred to both the paragraph number and the page number of the WAR.
- When referring to a paragraph of the judgment that does not appear in the WAR, I have used both the reported and medium-neutral citations, and referred to the relevant paragraph number.