Some perspectives on US litigation

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In both the United States and Australia commercial litigation is an exercise in strategy within a framework of procedural rules. But the litigation landscape in the United States is very different to that which exists in Australia, notwithstanding the shared historical origins of the two countries. Many aspects of American litigation are seen as anomalous to outsiders: the constitutional right to a jury trial for civil causes of action worth more than twenty dollars, the absence of a 'loser pays' fee shifting rule and the right to cross examine witnesses outside of the confines of a court are perhaps the best examples. This article outlines some of the author's personal observations about litigation in the Supreme Court of New York and the United States federal courts. It focuses upon those American procedural principles and practices that work well – and might be considered for Australia – and those that do not and ought to be vigorously resisted.

Volume of law

One of the most striking differences between the Australian and American legal systems is the sheer volume of American law. Three hundred million people in the US, living in a highly litigious society, overpopulated by lawyers in need of business, in which the right to one's day in court is an entrenched constitutional principle means that no legal stone is left unturned. The most narrowly tailored LexisNexis search for what one might consider to be an obscure legal concept often produces a vast number of results. One has the strong sense that there are few legal principles that have not been the subject of extensive judicial analysis. That, of course, means an authority may be found in support of most sensible propositions one could argue. The flip side, of course, is that there is invariably authority going the other way.

Pleadings

Civil procedure in federal district court is governed by the Federal Rules of Civil Procedure. Rule 1 of the Federal Rules of Civil Procedure, introduced in 1938, requires federal district courts to construe and administer the rules 'to secure the just, speedy, and inexpensive determination of every action'. There is, of course, an obvious parallel with s56 of the *Civil Procedure Act 2005* (NSW) which states that the 'overriding purpose' of the Act and Uniform Civil Procedure Rules is to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'. The technical rules of pleadings have been abandoned in the federal civil courts. The US Supreme Court has held that the Federal Rules of Civil Procedure 'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to outcome and accept the principle that purpose of pleading is to facilitate a proper decision on the merits'.[1] Under Rule 8(a) of the Federal Rules of Civil Procedure a complaint must contain 'a short and plain statement' of the grounds upon which the court's jurisdiction depends, a claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. The policy underlying Rule 8 is well established:

> The statement should be short because unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it, because they are forced to select the relevant material from a mass of verbiage. The statement should be plain because the principal function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial.[2]

Thus a complaint identifies the parties, the court's jurisdiction and then contains a chronological, narrative and often easily understandable description of the facts upon which the claims are based, followed by a summary of each of the different causes of action alleged.[3] This flexible approach to pleadings enables the parties to deal with the key issue presented at that stage – whether the facts alleged adequately state a cause of action upon which relief may be granted. If they do not, the complaint is liable to be dismissed.[4] Consequently, valuable time and effort is not wasted in debating compliance with technical pleading rules. Also importantly, business people who are the subject of factual allegations can readily understand the pleadings and assist counsel in preparing a defence.

Oral advocacy versus written submissions

As is well known, there is a greater emphasis on written submissions than oral advocacy in US courts than in Australian courts. In the US, written submissions (known as counsel's written 'brief' to the court) are extensive and oral argument is seen as the opportunity for the court to ask counsel questions that have arisen out of a close review of submissions.[5]

In the federal courts of appeal, it is generally assumed that the court will have read counsel's submissions and will be ready to address with counsel the critical issues in the case. Strict time limits on oral argument are rigorously maintained. The United States Supreme Court hears two arguments per day, at 10 and 11am, three days a week during the court term from September through April. Under Rule 28(3) of the Supreme Court Rules, counsel have half an hour for argument. The Rules specifically state that '[o]ral argument should emphasise and clarify the written arguments in the briefs on the merits. Counsel should assume that all justices have read the briefs before oral argument. Oral argument from a prepared text is not favoured'. Exceptions to the rule are unusual: under Rule 28(3) counsel seeking more time for argument must file a formal motion within 15 days of the filing of their written submissions setting out 'specifically and concisely why the case cannot be presented within

the half-hour limitation. Additional time is rarely accorded'. The time limit is strictly enforced by the marshal of the court who operates a light in front of counsel: red indicating time is up. The court issued instructions to counsel state '[w]hen the red light comes on, terminate your argument *immediately* and sit down'.[6]

A similar time limit exists in the New York Court of Appeal, which likewise limits oral argument to a maximum of 30 minutes per party and provides that 'counsel shall presume the court's familiarity with the facts, procedural history and legal issues the appeal presents'.[7]

Many trial court and appellate motions are decided on the basis of the written submissions alone. Whether to hear oral argument on a motion is generally a matter for the discretion of the trial judge in federal district court and state court proceedings. Counsel can request oral argument, but there is no guarantee the court will accede to the request. There is no right to oral argument on a motion seeking leave to appeal from the federal district court to the federal circuit courts of appeal.[8] Further, the federal courts of appeal have the right to deny appellants oral argument on an appeal if 'the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument'.[9] All petitions for a writ of certiorari to the United States Supreme Court (the mechanism by which permission to appeal is sought) are decided on the papers alone.[10]

As a result of their importance, written submissions in state and federal courts are often comprehensive and lengthy. Because of its brevity, oral argument cuts straight to the chase with little time (if any) for counsel to provide submissions on the background of the case or recount evidence – all of that information should be in counsel's submissions. In the Supreme Court counsel are specifically instructed: '*Merits briefs should contain a logical review of all issues in the case. Oral arguments are not designed to summarize briefs, but to present the opportunity to stress the main issues of the case that might persuade the court in your favor.*'[11]

In trial courts, the length of oral argument is primarily within the discretion of the trial judge, but it would be rare for argument in any case (at least in New York state courts and the federal courts) to extend beyond a matter of hours. Again, the emphasis is upon written submissions. It is becoming more common in interlocutory hearings in federal trial courts or in bench trials for the court to receive from counsel proposed findings of fact and law both pre and post hearing. The pre-hearing submissions outline the evidence obtained through documentary discovery, interrogatories and depositions. The post-hearing submissions concern the evidence adduced at the hearing. Those submissions are written in the terms counsel propose the court adopt and read exactly as the parties hope the judgment will. They also may include counsel's proposed judicial findings as to the credit of important witnesses. Obviously, such submissions are advocacy and do not limit the discretion of the judge one way or another, but they do appear to be popular as an efficient way of assisting the court to marshal the evidence in the case.

The heavy reliance upon extensive written submissions that is an integral part of New York state and federal court practice focuses counsel's oral argument on the critical strengths and weaknesses of the case and assists the court in doing the same. The key issue in the proceedings is front and centre at oral argument and little time is spent recounting background facts and evidence that can be outlined in detail in written submissions. That facilitates the efficient disposition of cases, particularly those in which the facts are reasonably straightforward or cases in which oral argument adds little to the content of written submissions. Last but not least, reliance on written submissions affords judges more time to prepare judgments.

Depositions in civil cases

Depositions in civil cases are an integral part of the discovery process in the US, together with documentary discovery and written interrogatories, which likewise may be administered as of right.[12] Under Rule 30 of the Federal Rules of Civil Procedure, like most state procedural rules, each party to civil litigation has the power to require a party opponent or potential witness to submit to oral questions outside the presence of the court.

Depositions are taken either during, or at the end of, documentary discovery. A litigant may depose a witness for the other side who seems likely to be knowledgeable about the issues in the case. Such witnesses may be identified through interrogatory requests served on the opposing party, requiring identification of individuals who are knowledgeable about particular factual aspects of the dispute. Alternatively, witnesses may be informally identified through co-operation between the parties.[13] Both sides exchange lists of witnesses considered knowledgeable on the subject matter and each side selects from the list individuals to be deposed.

While the court-sanctioned taking of witness evidence outside the courtroom may seem like an American anomaly, US litigators regard the entitlement to take civil depositions almost as their birthright. But there is a misconception outside the US that the use of civil depositions is subject to widespread abuse and that plaintiffs are able to use the deposition procedure as a litigation tactic to leverage a settlement by requiring hundreds of witnesses from opposing parties to be deposed, and that such depositions are oppressive and lengthy. While no system of discovery is free from potential abuse, in US federal civil litigation, as in many state jurisdictions, there are tight constraints on the use and availability of depositions that are designed to limit the potential for abuse. Most importantly, no more than ten depositions may be taken by each side absent the parties' agreement extending the number or the leave of the court.[14] There is, therefore, no strategic advantage to be gained in deposing a witness who has little or no knowledge concerning the facts of the dispute and wasting one of only ten available depositions.

Further, the limit for each deposition is seven hours and may only be extended with the leave of the court.[15] Opposing counsel defends the witness and may object, just as they would if the evidence were heard in court in front of a judge. If counsel defending the deposition objects, the witness must still answer the question, unless defending counsel instructs the witness not to answer, for example on the basis of a claim of legal professional privilege or because the question is oppressive, abusive or is otherwise intended to harass the witness. If counsel instructs a witness not to answer, it is possible to telephone a magistrate or judge to resolve the dispute at the time of the deposition.

Otherwise objections to the propriety of questions may be resolved at the trial or hearing. If an objection is sustained, the answer given at the deposition is not admitted into evidence. Consequently, there is also little advantage to asking improper questions, the answers to which will ultimately be inadmissible. A question that is purely intended to harass a witness will not be answered. In short, there is little if anything to be gained, and much to be lost, by deposing the wrong witnesses and asking irrelevant questions.

In addition, many depositions are now videotaped. If examining counsel does not treat the witness with respect and courtesy, then it will be evident at the trial or hearing, when relevant parts of the videotape are played to the court and/or jury.

There are significant advantages to pre-trial oral discovery. First, it reduces the length of trials and reduces the burden on the court system. In fact, civil depositions exist in part to ensure that there are not significant delays in the conduct of jury trials when new or unexpected evidence emerges during the proceedings. A party has the opportunity to cross-examine their opponent's witnesses prior to the trial for a prescribed period about the evidence obtained through documentary discovery or interrogatories and about the key issues in the case.

Once the deposition process is completed, the parties know the key evidence each witness is likely to provide to the court and/or jury. Opposing counsel can ask the witness in court the same questions asked in a deposition and expect to receive the same answers. If the answers at trial are different to those given at the witness' deposition, the witness can be impeached based on his or her prior statements. If a witness has been deposed for a full day, and opposing counsel knows the key evidence to be extracted on cross-examination, the examination will be far shorter and will use less of the court's time. In addition, 'designations' from the key parts of a witness' deposition may be introduced at the hearing as part of the opponent's case in chief (that is, as admissions of a party opponent). Of course, there is nothing to stop counsel asking questions that were not put to the witness in the deposition.

In some cases, litigants agree upon and supply to the court an edited version of a videotaped deposition containing the oral evidence to be proffered by each side at trial. In a bench trial or interlocutory hearing, the court can watch the videotape at its own convenience. In a jury trial, the videotape can be played at a convenient juncture in the trial. The videotape can make a powerful impression: where a witness contradicts earlier evidence given at a deposition, his or her prior inconsistent statements can be played back to the judge or jury in real-time.

Second, depositions enable the parties to more readily ascertain the merits of their respective cases, which enables counsel to give

focused, informed advice to clients on the likelihood of success in the case. Counsel also has the advantage of knowing how well particular witnesses (on both sides) can be expected to perform in court. For better or worse, that knowledge may facilitate the earlier settlement of litigation.

Third, if counsel suspects that critical documentary evidence exists but has not been produced by a party (either deliberately or through oversight), counsel has an opportunity in depositions to ask the witness under oath about the existence of such documents, which can in turn prompt their production. That reduces the likelihood that counsel will be taken by surprise by the discovery of missing evidence during the trial – and thus avoids any corresponding delays.

Fourth, the evidence obtained through depositions can be used as a basis for dispositive motions, most importantly, the motion for summary judgment which both sides usually make upon the completion of discovery.[16]

Fifth, depositions eliminate the need for witness statements, which are costly and time consuming to prepare. Moreover, through depositions, the evidence is presented in the witness's own words, and not those of the witness's lawyer.

Finally, expert witness depositions are of particular utility in narrowing the issues in the case. Prior to giving evidence at trial, each expert will have had the advantage of reading and considering the depositions of other experts in the case and will be in a position to agree or disagree with their conclusions. By the time the trial begins, the parties, the experts and the court know the areas in which the experts disagree and that is where the examination of each expert will start.

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In sum, the use of civil depositions in the US is a valuable mechanism for the efficient administration of justice. The advantages pre-trial oral discovery brings to litigation far outweigh its perceived disadvantages (the potential for abuse) and with proper controls and constraints, similar to those that exist in US federal civil litigation, provision for civil depositions could be an extremely valuable addition to the civil procedure framework in New South Wales.

Scope of documentary discovery

The scope and volume of documentary discovery in the US is, in many instances, astounding. Under Rule 26(B) of the Federal Rules of Civil Procedure, '[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.' That provision is interpreted broadly. In large scale litigation between equally well financed litigants, the volume of documents exchanged can number in the hundreds of thousands, if not millions. Discovery in large complex cases is primarily electronic, with multiple disks of documents exchanged between the parties, each of whom use search terms to review the other side's documents. Generally, litigants try to reach an agreement as to the scope of discovery sought and leave disputes to the court for resolution. In federal court, the judge will often refer discovery disputes to a magistrate, who will decide the matter based on the parties' written submissions.

Court-imposed sanctions for non-compliance with a party's discovery obligations, together with a desire to be 'beyond reproach', often prompt attorneys in commercial litigation to simply take an image of the entire 'hard-drive' of a designated group of individuals at the company, likely to have documents relevant to the dispute. The documents are compiled into a database and are then reviewed and produced by a team of junior lawyers working around the clock. Parties often request and the court has the power to order a party to restore, review and produce documents from network backup tapes that exist off-site and are maintained for the purpose of disaster recovery, not litigation.

E-mails can be, undoubtedly, a highly relevant source of evidence in a case. Frequently, they can shed light on the parties' true understanding as to how a contract operates, or the strategic purpose of a course of action that is the subject of litigation, well before litigation is contemplated. One only has to review *the New York Times* to see the number of high profile cases in which the content of e-mails is a key issue. In that sense, finding the critical documents and correspondence is imperative and it may be unsatisfying to rely upon the opponent's search for relevant documents. But the scope of discovery comes at a huge financial cost in the US, it is an inordinate drain on litigants' resources and inevitably brings about delay.

Securities fraud class action litigation

To a foreign lawyer (at least to this foreign lawyer), perhaps the most disturbing feature of the US civil justice system is the manner in which securities fraud class action claims are litigated. Following the stock market crash in 1929, the United States Congress passed investor protection statutes, namely the *Securities Act of 1933* and the *Securities Exchange Act of 1934*. Those acts and the rules promulgated thereunder, provide a cause of action for investors defrauded by corporations through, among other things, false and misleading public statements about the company's prospects.[17] The statutory regime effectively empowers plaintiffs and their lawyers to act as private attorneys-general, deputising them to seek out fraud cases that resource constrained regulators may not be able to bring.[18] Plaintiffs' attorneys are compensated primarily through contingency fees, usually in the range of 20-30 per cent of the amount recovered. In this regard, securities fraud actions can help deter corporate wrongdoing and can enable investors to collectively recover losses that are too small for individual plaintiffs to pursue, without the need for government action.

Under Rule 23(b) of the Federal Rules of Civil Procedure, a class of plaintiffs must be certified as a class before the action can proceed as a class action. The court must be satisfied that the individual plaintiffs constituting the class have suffered the same kind of injury as the absent class members and that liability and loss causation can be demonstrated by proof common to all class members. In addition, the class must be represented by named representative plaintiffs who are supposed to represent the interests of the class and to instruct the lawyers for the class. The proposed class representatives must pass an 'adequacy' test to determine whether they are sufficiently able to instruct their representatives. That is a low threshold.[19] A basic level of knowledge about the facts of the case and a preparedness to be available to provide high level instructions to lawyers is all that is required. Because the named class representatives often only have a small stake in the outcome of the case, there is little incentive for them to actively monitor their lawyers.[20] As a result, class action counsel frequently have significant – if not unfettered – discretion to run the case as they see fit.[21] High technology companies or bio-techs are often the target of such suits, because their share price is often sustained by predictions about the future value of their products.

In 1995, in response to the widely held view that securities fraud class actions were being abused by plaintiffs' lawyers filing non-meritorious lawsuits, Congress passed the Private Securities Litigation Reform Act[22] ('the PSLRA'). The aim of the PSLRA was to reduce the costs that securities fraud proceedings impose on capital markets by creating a series of procedural requirements to make it more difficult for plaintiffs' attorneys to commence and maintain non-meritorious proceedings. Congress wanted to curtail the 'race to the courthouse' whereby class actions were the inevitable result of a decline in a company's stock price with little pre-suit investigation into the merits of the claim.[23] In short, lawyer-driven litigation was supposed to be replaced by client-driven litigation.[24]

One of the principal reforms adopted by the PSLRA was the creation of new provisions for the appointment of lead plaintiffs and their counsel. Prior to the PSLRA, the lead plaintiff was selected on a first-come, first-served basis. Congress changed the law to require courts to appoint as lead plaintiff 'the most adequate plaintiff', which is (rebuttably) presumed to be the person or group of persons that 'has the largest financial interest in the relief sought by the class'.[25] It was thought that the person with the greatest financial interest in the litigation would act like a 'real client' and exert the greatest control over the lawyers.[26] The lead plaintiff is then supposed to choose counsel to represent the class,[27] but in reality, it is the lawyers that

have brought the lead plaintiff to court and so once selected, the lead plaintiff almost invariably nominates their counsel as lead counsel, subject to the court's approval. The position of lead counsel is highly sought after in any securities fraud class action because lead counsel effectively runs the litigation and is entitled to the biggest share of the financial recovery at the end. There may be more than one lead plaintiff and there may be joint lead counsel.[28]

The end result of the changes to lead plaintiff provisions of the PSLRA was probably not what Congress hoped or expected. The inevitable race to the courthouse was followed by a race among plaintiffs' attorneys to find the investor with the greatest financial interest in the litigation.

To a foreign lawyer (at least to this foreign lawyer), perhaps the most disturbing feature of the US civil justice system is the manner in which securities fraud class action claims are litigated.

The process is as follows. A company through its management makes a public statement about a product, either in a public filing with the Securities & Exchange Commission, or through other statements made by the company in a public forum. If the company's stock price suddenly and sharply declines, the plaintiff law firms go to work. They trawl through the company's prior securities filings and public statements to try to find any prior public statements that turn out to be wrong or a prediction that failed to materialise and they race to the courthouse. The first plaintiff law firm to find an investor who holds the relevant company's shares and draft a complaint will file a class action on behalf of the investor and those 'similarly situated.' The complaint will allege securities fraud and that the company's officers and directors 'knew or should have known' that the relevant prior public statements were false or misleading, and that the public statements artificially inflated the company's stock price. Then numerous other plaintiff law firms follow – frequently they literally copy the same originating complaint and file it in the name of another investor.[29] Then the quest among the plaintiffs firms to become lead counsel begins with the search to find an investor with the greatest shareholding (and potential losses). The firms advertise heavily the fact that they have commenced a suit and invite plaintiffs to contact the firm and participate in the action.

Each of the numerous (often almost identical) complaints will be consolidated into one court proceeding and the court will conduct a hearing to determine who the lead plaintiff and lead counsel should be. Defence counsel is generally not involved at that stage. The process was best described and explained by Federal District Judge Jed S Rakoff of the United States District Court for the Southern District of New York in 2001 in a case called *In Re Razorfish, Inc.*[30] Razorfish was a defendant in 13 separate securities fraud complaints 'transparently copied from one another' alleging that the company and its management made false and misleading statements concerning the company's operations that artificially inflated the price of its stock. Three competing motions were filed seeking to have the respective movants appointed as lead plaintiff and their respective counsel appointed as lead counsel, to conduct the consolidated class action litigation.

Rakoff J observed that 'a frequent accompaniment to the use of the securities class action device is lawyer-driven litigation by which counsel for the putative class seek to realise substantial recoveries for themselves'.[31] Further, his Honour said, 'the counsel who dominate the securities plaintiffs' bar have developed practices that effectively undercut the goals and purposes of the Reform Act [the PSLRA]'.[32] His Honour quoted at length the evidence given at the class certification hearing by counsel for one of the would-be lead plaintiffs concerning the commencement of suit and subsequent competition among plaintiffs' firms for lead counsel status:

> People run to the courthouse. They file a complaint. They then publish their notice, which we're allowed to do under the Act, that says our firm has filed a lawsuit, if you're interested in joining, please call us. The minions at the firms then stand by the fax machines and the computers waiting for an inquiry from somebody with a large loss, and when that comes across the wire they jump up and down, they run to the partner, and they say we've got somebody with seven hundred thousand, they look like an institution, they might be an institution, you know, we've got – somebody else over here has five hundred thousand.
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> So you then have people that think – you have law firms that think we've got a good plaintiff, and we may get control of this case. Then what happens is since everybody knows who the other players are in the game, the firms start to call one another, and then you have a game of chicken, because you have firms that say well, I've got seven hundred thousand, so I think I could beat you because you only have six hundred thousand, and the guy with six hundred says yeah, but I'm gonna go in with Firm C that has five hundred, that's going to give us a million one, so we're gonna beat your seven. And then the guy says well, but aggregation, maybe the judge won't like aggregation, so why don't we just all get together.
>
> And you heard Mr Barroway acknowledge that's really how it works. This is for the lawyers. It's not for the class.

After lead counsel is appointed, they file a consolidated amended complaint and the process of defending the action begins. The defendant will almost invariably file a motion to dismiss the claim contending that the complaint fails to state a cause of action based on the facts as pleaded, or based upon other defences available under the securities fraud legislation. In the event the motion to dismiss fails, discovery begins. The defendant then has the option of opposing certification of the action as a class action under Rule 23(B) of the Federal Rules of Civil Procedure. Finally, the defendant may file a motion for summary judgment, relying on the evidence obtained through discovery. If that is unsuccessful, the process of preparing a case for trial commences.

Defending securities class actions, in the author's experience, rarely has the feel of a quest for resolution of the plaintiff's claims on the merits at trial. Rather, it reflects the underlying quest by plaintiffs' counsel for a favourable pre-trial settlement for the class which secures for counsel the greatest possible recovery of attorney's fees. The conduct of the case is often controlled by plaintiff's counsel with little input or oversight from the client, with whom plaintiff's counsel

will often have sparse contact.[33] In those instances, the case becomes little more than a 'lawyer's playground.'[34] In cases of a defendant with limited assets, plaintiffs' counsel relentlessly pursue settlement before available insurance proceeds are depleted defending the action.

On behalf of the defence, the process reflects a desire to rid the company of 'nuisance' litigation which may be perceived as unmeritorious but which, if things go wrong, could potentially bankrupt the company. The risk for the company of defending an action to a jury verdict may be huge and at the end of the day, management may have to decide, for example, whether to pay a $100 million settlement to the class, ($30 million of which may go to lead counsel), partly funded by insurance or risk a billion dollar verdict which it could not possibly pay.

One empirical study in 2003 concluded that the available evidence suggests that the PSLRA has not had the effect of decreasing the number of class actions brought, if anything there has been an increase.[35] Securities fraud proceedings remain, predominantly, lawyer driven and for the benefit of lawyers, notwithstanding congressional attempts to remedy the situation. In two very recent cases the US Supreme Court has curtailed the rights of investors to commence antitrust class actions against corporations and imposed a higher pleading standard for securities fraud claims. In *Credit Suisse Securities (USA) LLC v Billing* (18 June 2007) the court held that federal securities laws impliedly preclude the application of antitrust laws to investor lawsuits alleging anticompetitive conduct by underwriters participating in syndicates to execute initial public offerings for technology related companies. In *Tellabs, Inc. v Makor Issues & Rights Ltd*, (21 June 2007) the Supreme Court held that the evidence necessary to establish the requisite fraudulent intent in a securities fraud action must be 'cogent and at least as compelling as any opposing inference of nonfraudulent intent'. Justice Ginsburg, delivering the opinion of the court in *Tellabs* observed: 'Private securities fraud actions…if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law' (at 1).

The High Court of Australia's judgment in *Campbells Cash & Carry Pty Ltd v Fostif*,[36] gave the green light to litigation funders to pay for and assume control over litigation in which they have no pre-existing interest. Litigation funders in Australia are thus now likely to be in a similar position to US plaintiff law firms to fund and effectively control litigation. When control of litigation is ceded by real parties in interest to third parties and litigation becomes a business, the US example demonstrates the potential for abuse.

It is not that we should necessarily fear litigation funders suborning witnesses, inflating damages and suppressing evidence.[37] The potential for harm lies in the fact that litigation funders fight disputes with a profit motive and without regard to the traditional business considerations (reputational risks, for example) and commercial constraints that guide the strategy of a reluctant party to commercial litigation. The risk of losing and having to pay the other side's costs is not a sufficient constraint on the conduct of litigation funders: that risk is something that they must accept as part of the cost of doing business. It is hoped, as the High Court contemplated, that Australian principles governing abuse of process and lawyers' obligations to the court are sufficient to prevent the onset of the kind of abuse of court processes that are a feature of US securities fraud class action litigation.[38]

Jury trials in civil cases

The elephant in the room for most defence litigators in securities fraud actions, antitrust claims and many other types of lawsuit, is the prospect of a jury trial. Placing the fate of the company in the hands of a jury is a daunting prospect, particularly in jurisdictions recognised (based on their track records) as being unfriendly to defendants, where juries are willing to 'send a message' to corporate America through their verdicts. The notion of burdening jurors with complex commercial cases lasting several weeks if not months, when there may be a perfectly good judge with training and experience in fact-finding available to decide the matter, seems counter-intuitive. But it is the system in the US and it is entrenched by the federal Constitution.

Trial by jury was the only form of trial available in the courts of common law in England until 1854. After that, the law changed to allow litigants to elect to have their case tried by judge alone. Use of jury trials declined in England because litigants preferred to have civil cases decided by judges: in short, jury trials were not being requested.[39] By contrast, the availability of jury trials in the US has remained constant since the eighteenth century and has even increased since the advent of the Federal Rules of Civil Procedure in 1938. The difference between the US and English systems has been attributed to different perspectives in those countries on the concentration of government power. It has been said that '[t]he persistence of the civil jury in the United States reflects a distrust of concentrated governmental power'.[40] That distrust of government power harkens back to the eve of US independence, when 'juries had become a means of resisting the Crown's control over colonial affairs and British attempts to circumscribe jury powers were seen as a further cause of grievance'.[41]

The right to a jury trial in civil cases was added to the US Constitution by the Seventh Amendment as one of the Bill of Rights, ratified in 1791. The Seventh Amendment provides: '[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. Rule 38 of the Federal Rules of Civil Procedure states that '[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate'. Those provisions only apply in federal litigation, but the right to a jury in civil cases has been entrenched into the constitution of the states as well.[42]

The right to a jury trial encompasses more than the common law forms of action recognised in 1791. It includes 'suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone are recognised, and equitable remedies [are] administered'.[43] It covers all claims with the exception of those in admiralty and those in which purely equitable relief is sought. It also extends to statutory causes of action created by Congress.[44] To determine whether a jury trial may be demanded for a particular cause of action, a court must first examine whether the action is analogous to a suit available at common law in England in the eighteenth century, prior to the merger of the courts of law and equity (that is, whether the analogue would have given rise to a jury trial at that time or earlier). Second, the court examines the remedy sought in order to determine whether it is legal or equitable in nature.[45] While the former inquiry may seem out of place nowadays given how far removed the US legal system is from eighteenth century England, it is

one which the Supreme Court insists upon. Pragmatically, the second inquiry is more important than the first.[46]

The United States Supreme Court has pronounced, on more than one occasion, that '[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care'.[47] Surveys of attorneys, judges and the general public indicate that the civil jury maintains widespread support in the US. [48]

There also exists a cottage industry in jury consultants, often with training in psychology, who, for not-insignificant fees, will advise counsel as to the types of jurors counsel should want on the jury, in terms of their background, demographics and the like. They will also prophesise as to a jury's likely reaction to anything put before them in the case, ranging from expert evidence to the colour of counsel's suit in opening argument. For well-funded litigants, jury consultants will arrange mock juries in mock court rooms before a mock judge and counsel will prepare and conduct mock examinations of potential witnesses in the case to gauge the jury's reaction. The mock jurors possess hand response meters through which they record their reaction to the evidence in the case and that information is provided by the jury consultants, with analysis, to counsel in the case. In bench trials, some jury consultants will also offer a psychological appraisal of the judge hearing the case, based on his or her background, writings, and even demeanour in court.

No empirical analysis has been published as to how often jury consultants' predictions are accurate or their recommendations useful. The fact that they continue to earn a healthy living in the US could be a measure of the value of their advice or it could be a product of the fact that some litigants will spend whatever they can to try to gain an advantage, no matter how small, over their opponents. The jury is still out, so to speak.

For as long as the right to a jury trial remains entrenched in the Constitution, the prospect of delivering a complex civil case into the hands of a jury will remain a fundamental consideration in counsel's litigation strategy. No matter how powerful a party's case, the client can best be served with a timely reminder that their fate is to be decided by a group of strangers, the collective wisdom of whom is impossible to predict and that their rights to appeal the verdict (especially on liability), are extremely circumscribed. Upon hearing that advice once again on the eve of trial, the faint-hearted litigant will look for the nearest exit strategy.

The absence of the rule in Browne v Dunn

The rule in *Browne v Dunn*[49] does not appear to have made it across the Atlantic from England.[50] There exists in some jurisdictions a limited obligation on counsel to impeach a witness with prior inconsistent statements (particularly in criminal trials) but there is no general rule of fairness requiring a witness to be impeached in the way the rule exists here and in England. Instead, counsel may avoid asking impeaching questions of witnesses and can simply ask the finder of fact to disbelieve the witness' evidence based on other evidence adduced in the trial or inconsistencies in the witness' evidence, without giving the witness an opportunity to respond. The absence of such a rule places a heavy onus on counsel to address on re-examination points that opposing counsel has 'set up' but not put to the witness on cross-examination. The Australian and English rule is inherently fairer to the witness and ensures genuine explanations for seeming inconsistencies in a witness' evidence are not lost because the witness is never given an opportunity to explain them.

The absence of fee shifting

The traditional English and Australian 'loser pays' rule for the costs of litigation does not exist in the US. It was abandoned by the US Supreme Court in 1796 in favour of what is now known as the American rule, by which each party to a lawsuit pays its own attorneys' fees, irrespective of the result.[51] The American rule was reaffirmed in 1977.[52] There are some exceptions, namely where a fee-shifting statute permits a prevailing plaintiff to recover reasonable attorneys fees. The best known example is s4 of US Clayton Act,[53] which permits plaintiffs in antitrust treble damages claims under the Sherman Act[54] to recover such fees.[55] In 1994 the Supreme Court reaffirmed that the American rule applies absent express statutory authorisation of an award of attorneys fees.[56]

A prevailing defendant usually only recovers attorneys fees from a losing plaintiff when the plaintiff's case is 'frivolous, unreasonable, or without foundation.'[57] In addition, Rule 11 of the Federal Rules of Civil Procedure, authorises fee shifting and sanctions against attorneys for commencing and maintaining frivolous litigation or otherwise acting in bad faith.[58]

The difference in treatment of plaintiffs and defendants stems from the theory that awarding attorney's fees to winning plaintiffs encourages individuals to seek relief from the courts when their rights have been violated, compared to a defendant whose rights have not been infringed.[59] Further, many fee-shifting statutes were enacted to encourage litigation that pursues the substantive goals underlying statutes, including civil rights and environmental laws.[60] More broadly, the American rule is a manifestation of what is recognised in the US as a 'deep rooted historic tradition that everyone should have his own day in court'.[61]

The net result is that lawsuits in the US are 'easy to maintain and tolerable to lose'.[62] It seems likely fewer lawsuits would be commenced in the US if the plaintiff risked having to pay the attorney fees of the prevailing defendant. The American rule seems appropriate and may be justified where the lawsuit concerns the enforcement of individual rights. But in other instances, such as securities fraud cases, the risk of having to pay attorney's fees may make class members and lead plaintiffs focus on the merits of the claim and cause them to exercise proper oversight over the litigation. There also seems little policy

justification for the application of the American rule when one well financed corporation has sued another and lost. Why should the shareholders of the winning company have to pay what may be the substantial costs of defending unmeritorious litigation?

The absence of an independent Bar

Finally, as is also well known, there is no independent bar in the US. One could spend considerable time discussing the virtues of the Australian/English system versus that of the United States, but it suffices for present purposes to simply convey some American attitudes the author encountered towards our system. There is bewilderment by some, but perhaps envy among others, about barristers' courtroom attire. American attorneys also find it perplexing that a solicitor who has worked up a case from its inception, and gone through the pain of discovery, would then hand the most interesting parts of the case (advocacy) to independent counsel. But more importantly for Australian barristers working with American attorneys, there is a perception among many US lawyers who have worked with barristers in the past (in England, primarily) that they are unreceptive to strategic input from American instructing attorneys. That is particularly problematic given American attorneys are unused to relinquishing any control over the case to independent counsel.

Conclusion

Notwithstanding their shared history, the civil justice systems of the US and Australia have developed along markedly different tracks. Many of the American procedural and substantive rules discussed above are unique products of America's history and are unlikely ever to descend upon our shores. The advent of a securities fraud bar of the kind that exists in the US ought to be vigorously resisted.

On the other hand, at least two procedural rules are worthy of consideration. First, the relaxed pleading standard focuses the court and the parties' efforts on whether the statement of claim adequately states a cause of action, rather than whether the pleading complies with formalistic rules. It saves costs and time. Second, and most importantly, civil depositions are a highly effective mechanism for the efficient resolution of proceedings that benefits both litigants and the court alike. Subject to the implementation of rules to avoid their abuse (as exist under the Federal Rules of Civil Procedure), it is hoped that consideration will be given to their introduction in New South Wales.

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1 *Conley v Gibson* (1957) 355 US 41.

2 *Blakely v Wells*, 209 Fed. Appx. 18; 2006 US App LEXIS 31031 (2nd Cir. 2006) (citations omitted).

3 Under Rule 8(b) defences should consist of a 'short and plain' statement of a party's defences to each claim asserted and an admission or denial of the allegations, or a statement that the party has insufficient knowledge to admit or deny an allegation.

4 Rule 12(B)(6) Federal Rules of Civil Procedure.

5 The local rules of different state jurisdictions impose page limits on briefs which vary depending on the type of brief being filed and are too numerous to set out here. In federal district court, page limits are usually found in each individual judge's rules. They can vary, but are typically 35 pages for the moving and opposition briefs and 10 pages for the reply. Page limits can be extended with the leave of the court. Pre and post-hearing briefs often have no page limit. See for example, the local rules of Judge Lewis A. Kaplan, Southern District of New York, at http://www1.nysd.uscourts.gov/cases/show.php?db=judge_info&id=121. For appeals to the federal circuit courts of appeal, the page limit is 30 pages for moving and opposition briefs and 15 for the reply. See Rule 32, Federal Rules of Appellate Procedure.

6 United States Supreme Court, *Guide for Counsel* at 5, available at www.supremecourtsus.gov/casehand/guideforcounsel.pdf

7 Rule 500.18, Court of Appeals State of New York Rules of Practice (22 NYCRR Part 500).

8 Rule 5(b)(3), Federal Rules of Appellate Procedure.

9 Rule 34(a)(2), Federal Rules of Appellate Procedure.

10 Rule 16, Supreme Court Rules.

11 United States Supreme Court, *Guide for Counsel*, op cit n6 at 8 (emphasis in original).

12 Rule 33 of the Federal Rules of Civil Procedure provides that each party to litigation may serve written interrogatories, no more than 25 in number, on another party to litigation, without the leave of the court. Subject to objections, answers to interrogatories must be provided in writing under oath.

13 Rule 30(b)(6), Federal Rules of Civil Procedure.

14 Rule 30(2)(A), Federal Rules of Civil Procedure.

15 Rule 30(d)(2), Federal Rules of Civil Procedure.

16 Summary judgment is available under Rule 56 of the Federal Rules of Civil Procedure 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In federal civil litigation, there is a policy in favour of summary judgment in appropriate cases, where the requirements of Rule 56 are satisfied. See e.g., *Freeman v Continental Gin Co.*, 381 F 2d 459 (5th Cir. 1967).

17 The private damages action for securities fraud has been implied by the courts from § 10(b) of the *Securities Exchange Act of 1934* (15 USCS § 78j(b)) and Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5). The basic elements of a private federal securities fraud action for publicly traded securities include: (1) a material misrepresentation (or omission); (2) scienter, i.e., a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as transaction causation; (5) economic loss, 15 USCS. § 78u-4(b)(4); and (6) loss causation, i.e., a causal connection between the material misrepresentation and the loss. See *Dura Pharmaceuticals, Inc v Broudo et al*, 544 US 366 (2005).

18 M A Perino, *Did the Private Securities Litigation Reform Act Work?* 2003 U Ill L Rev 913 at 918.

19 The named plaintiff and the attorneys who seek to represent absent class members or shareholders must also demonstrate that: (a) the named plaintiff's claims are 'typical' of the claims of the absent class members or shareholders; (b) the named plaintiff has no interest in the outcome of the action that is antagonistic to, or in conflict with, the interests of the absent class members or shareholders; (c) the named plaintiff is not subject to unique defences that could become the focus of the litigation to the detriment of the absent class members or shareholders; and (d) the named plaintiff's attorneys will be able to fairly and adequately represent the interests of the absent class members or shareholders. The court's determination that a lawsuit may proceed as a class action or shareholder derivative action is referred to as the 'certification' of the action.

20 See generally J R Macey and G P Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U Chi L Rev 1 (1991).

[21] It has also long been suspected that certain lead plaintiffs participating in class actions were receiving from plaintiff law firms special payments for agreeing to serve as class representatives (such payments are illegal under New York law) or otherwise had special relationships with plaintiff firms which created disincentives for them to actively monitor their attorneys. On 18 May, 2006, the leader of the plaintiffs' bar, Milberg Weiss Bershad Schulman LLP and two of its name partners were indicted for paying undisclosed 'kickbacks' to individuals from 1981-2005, in return for their agreement to act as lead plaintiffs. Milberg Weiss was charged with obstructing justice, perjury, bribery and fraud.

See indictment at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/clssactns/usmlbrg51806ind.pdf

[22] 15 USC § 78u-4(a)(3)

[23] M A Perino, op cit, n. 18 at 915

[24] *Aronson v McKesson HBOC, Inc.* 79 F Supp 2d 1146, 1152-54 (ND Cal 1999)

[25] 15 USC § 78u-4(a)(3)(B)(iii)(1)

[26] *In Re Razorfish, Inc. Securities Litigation*, 143 F. Supp 2d 304 (SDNY 2001)

[27] 15 USC § 78u-4(a)(3)(B)(iii)(II)(v)

[28] *Weltz v Lee*, 199 F.R.D. 129, 2001 WL 228412 at *4 (S.D.N.Y. 2001)

[29] In 2002 Milberg Weiss Bershad Hynes & Lerach LLP began asserting copyright over its complaints so that they would not be copied verbatim and filed by the firm's competitors for lead counsel status in the same proceedings. Milberg Weiss reportedly sent cease-and-desist letters to firms it says copied its complaints and threatened litigation on account of losing lead counsel status to copycat firms. See B H Kobayashi and L E Ribstein, *Class Action Lawyers as Lawmakers*, (2004) 46 Ariz. L. Rev. 733 at 738.

[30] *Securities Litigation* 143 F Supp 2d 304 (2001).

[31] *Razorfish*, 143 F Supp 2d at 306.

[32] *Razorfish*, 143 F Supp 2d at 309-10.

[33] The degree of contact between plaintiff's counsel and the lead plaintiff may be ascertained through the class certification process under Rule 23(B) of the Federal Rules of Civil Procedure. The lead plaintiff must demonstrate their preparedness to oversee the litigation, which may have been going for a long time before the certification process starts. The proposed lead plaintiff may be asked under oath about their level of oversight at the class certification deposition and plaintiff's counsel may be required to produce a log of privileged communications between counsel and the client.

[34] *Razorfish*, 143 F Supp 2d at 311.

[35] M A Perino, *op cit*, n18 at 913.

[36] (2006) 229 ALR 58.

[37] See discussion in *Fostif* (2006) 229 ALR at 82 [93] per Gummow, Hayne and Crennan JJ.

[38] ibid.

[39] R L Marcus, *Putting American Procedural Exceptionalism in a Globalized Context* (2005) 53 Am J Comp L 709 at 712-13.

[40] Yeazell, *The New Jury and the Ancient Jury Conflict*, (1990) U Chi Law Forum 87, 106.

[41] O G Chase, *American 'Exceptionalism' and Comparative Procedure*, 50 Am. J. Comp. L. 277 at 290 (citing Jeffrey Abramson, *We, the Jury* (1994) at 57-95).

[42] For the state of New York, see *New York Constitution*, Article I, section 2 and *McGurty v Delaware*, 158 NY Supp. 285 at 287 (4th Dept 1916) (the Constitution of the State of New York 'preserves in the parties a right to trial by jury in each instance where such right existed prior to the adoption of the Constitution. (Const. art. 1, § 2.) This right still obtains, and there is no power in the Legislature to take it away.'

[43] *Parsons v Bedford*, 3 Pet. 433, 447 (1830).

[44] *Tull v United States*, 481 U.S. 412, 417 (1987).

[45] *Pernell v Southall Realty*, 416 U.S. 363, 378 (1974); *Tull v United States*, 481 U.S. 412 at 417-18 (1987).

[46] *Granfinanciera, SA v Nordberg*, 492 U.S. 33, 42 (1989), n4.

[47] See *Dimick v Schiedt*, 293 U.S. 474, 486 (1935); *Beacon Theatres Inc v Westover*, 359 US 500, 501 (1959) and *Chauffeurs ,Teamsters and Helpers Local No 391 v Terry*, 494 US 558 (1990).

[48] See collection of surveys discussed in Hans, 'Attitudes Toward the Civil Jury: A Crisis of Confidence?' in *Verdict,* (Robert E. Litan ed., 1993) at 248. See also G L Priest, 'Justifying the Civil Jury' in *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* at 20-21 ('Among the various mechanisms and institutions of American democracy, there are two it seems unthinkable to criticize: the right to vote and the system of trial by jury, both civil and criminal').

[49] (1893) 6 R 67.

[50] There appears to be only one reported case in which the rule in *Browne v Dunn* was applied in the U.S. It was a 1914 decision of the Surrogate's Court of New York, New York County and concerned the disputed will of a testator who perished on the Titanic. *In Re Smart*, 84 Misc. 336 (1914).

[51] *Arcambel v Wiseman*, 3 US 306 (1796) is frequently cited as the first case to recognise the general rule that attorney fees are not recoverable absent specific legislation permitting an award. See R. Stanley, *Buckhannon Board and Care Home, Inc. v West Virginia Dept. of Health and Human Resources: To the Prevailing Party Goes the Spoils and the Attorney's Fees!* (2003) 36 Akron L. Rev. 363; Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 9, 11 (1984).

[52] *Alyeska Pipeline Serv. Co. v Wilderness Society*, 421 US 240 (1975).

[53] 15 USC § 15.

[54] 15 USCS § 1.

[55] See also, e.g., *Civil Rights Attorney's Fees Act (1976)*, 42 USC § 1988 and Fair Housing Act (1990) 42 USC 12101.

[56] *Key Tronic Corp. v United States*, 511 US 809 (1994).

[57] *Christiansburg Garment Co. v EEOC*, 434 US 412 (1977).

[58] Rule 11, which came into force in 1983 in response to widespread concern about the problem of frivolous litigation, requires attorneys to refrain from commencing litigation for improper purposes, to be candid with the court and to perform a reasonable investigation of the law and facts regarding all papers submitted to the court. Sanctions are mandated if those obligations are not met.

[59] Because costs do not follow the event under the American rule, there is no equivalent to the security for costs rule in New South Wales under UCPR, r 42.21. In some states and federal jurisdictions, local court rules provide for the payment of security for the defendant's costs and expenses, including attorney fees, where there is a good chance that the defendant will ultimately succeed in proving that the plaintiff is prosecuting action in bad faith and that the defendant will be unable to recover expenses for bad faith prosecution against a non state resident plaintiff. See e.g., *A. & M. Gregos, Inc. v Robertory* 70 FRD 321 (1976, ED Pa).

[60] R Stanley, *op cit*, n51 at 363.

[61] *Martin v Wilks*, 490 US 755, 762 (1989).

[62] N H Klausner, *The Dynamics of Rule 11: Preventing Frivolous Litigation By Demanding Professional Responsibility* (1986) 61 NYUL Rev 300 at 302.