

## **IMF SUBMISSION TO NADRAC INQUIRY INTO ADR AND CIVIL PROCEEDINGS**

### **1. Introduction**

IMF (Australia) Ltd (“**IMF**”) is a publicly listed company providing funding of legal claims and other related services where the claim size is over \$2 million. IMF is the largest litigation funder in Australia and the first to be listed on the Australian Stock Exchange. IMF’s web site may be found at [www.imf.com.au](http://www.imf.com.au)

IMF has funded access to the Supreme and Federal Courts for about 20,000 claimants since listing in 2001 and its capitalisation is in excess of \$200 million.

IMF is a systemic funder of litigation (about \$2 million per month) with objectives closely aligned to claimants; just, quick and cheap resolution of claims.

Accordingly, IMF’s assistance to your inquiry is from a commercial litigation consumer’s perspective.

ADR is relevant to IMF:

- (a) as a consumer of dispute resolution services provided by the Australian Civil Justice System (“the System”), particularly in respect of insolvency related matters, consumer claims alleging product liability, anti-competition, trade practice and equity and debt market protection law breaches and general commercial litigation; and
- (b) as a litigation funder.

IMF uses ADR techniques in many of the matters that it funds, particularly mediation.

IMF proposes to deal with the following issues that NADRAC is currently considering:

- (a) Changes to civil procedures and to costs structures;
- (b) Whether ADR techniques could be used to enhance court and tribunal processes; and
- (c) How to ensure the quality of these services.

IMF’s comments in relation to whether ADR techniques could be used to enhance court and tribunal processes have been incorporated under the headings ‘changes to civil procedure’ and ‘changes to costs structures’ (items 2 and 3 below).

## 2. Changes to civil procedures

IMF believes that ADR should form an integral part of the System and that the following strategies will facilitate relevant change.

### (a) The Overriding Purpose

Legislatures around Australia have been unequivocal that the Courts should identify on the real issues in legal proceedings as quickly as possible, and ensure the parties are able to minimise costs.

In Victoria, the *Supreme Court (General Civil Procedure) Rules 2005* provide that in exercising any power under the Rules, the Court:

*“shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined...”<sup>1</sup>*

While the Victorian Rules do not make reference to the “Overriding Purpose”, this rule is akin to the equivalent provision in New South Wales, whereby the “Overriding Purpose” of the *Civil Procedure Act 2005* is “to facilitate the just, quick and cheap resolution of the real issues in the proceedings”<sup>2</sup>.  
(the **Overriding Purpose**)

The courts of the other states are governed by similar principles.<sup>3</sup>

Meanwhile, the *Civil Procedure Rules 1998* (UK) were introduced following the publication of Lord Woolf’s final Access to Justice Report.<sup>4</sup>

Rule 1.1 provides the Overriding objective as follows:

*1.1 (1) These Rules are a new procedural code with the Overriding objective of enabling the court to deal with cases justly.*

*(2) Dealing with cases justly includes, so far as is practicable:*

.....

*“Dealing with the case in ways that are proportionate:*

- (i) to the amount of money involved;*
- (ii) to the importance of the case;*
- (iii) to the complexity of the issues; and*
- (iv) to the financial position of each party.”*

<sup>1</sup> Rule 1.14 (Exercise of Power ) of the Supreme Court (General Civil Procedure) Rules 2005.

<sup>2</sup> Section 56.

<sup>3</sup> See, for example, Order 1 Rule 4A of the Western Australian Supreme Court Rules.

<sup>4</sup> Lord Woolf, Master of the Rolls, Access to Justice, Final Report to the Lord Chancellor on the civil justice system in England and Wales, July 1996.

1. The focus of the System must be on achieving its Overriding Purpose. This will involve the parties (and their funders), judges and the legal profession overcoming entrenched cultural and structural obstacles that have, for many consumers of the System, resulted in the principles of “just, quick and cheap” resolution of disputes being illusory rather than a reality.

*Ensuring Parties, Lawyers and Funders (including Insurers) Assist the Court to Achieve the Overriding Purpose*

Insurers when managing claims by indemnified, defendant insureds are also in the business of providing litigation funding. Insurers, like funders, determine which claims are prosecuted and defended, choose the lawyers, instruct the lawyers and pay them and indemnify the insured in respect of adverse cost orders. None of these activities are currently regulated, leaving insurers, like funders, currently unaccountable for these activities.

After reciting that the Overriding Purpose of the Civil Procedure Act 2005 (NSW) is to facilitate the just, quick and cheap resolution of the real issues in proceedings (sub section 56(1)), the Act:

1. obliges the Court to seek to give effect to that Overriding Purpose when it exercises power or interprets any provision of the Act or Rules (sec 56(2));
2. obliges the parties to civil procedures to assist the Court to further that Overriding Purpose (sec 56(3)); and
3. prohibits lawyers from causing their clients to breach their duty to the Court (sec 56(4)).

Litigation funders, including insurers, have a greater capacity than most to systematically assist or retard the Court in achieving its Overriding Purpose.

Further, too many lawyers currently believe that their fiduciary and contractual duties to their clients take precedence over their duties to the Court.

2. Lawyers ought to owe a duty to the Court to assist it in achieving its Overriding Purpose and to the extent that client instructions are provided in unequivocal breach of the Overriding Purpose, lawyers must give precedence to the Overriding Purpose rather than their instructions.

3. Litigation funders and insurance companies should also be required to assist the court in achieving its Overriding Purpose by informing the Court, at the commencement of proceedings, of their identity and that the conduct of the case is to be funded, in whole or in part, by a third party.

Further, there is no specific public data available concerning lawyers, funders or insurer's claims management involvement in our civil justice system. Given the utilisation by funders and insurers of our subsidised system, and the systemic involvement of litigators, our legislature and Courts should consider collecting relevant data to ensure the lawyer/funder/insurer interface with our civil justice system is understood and appropriately regulated.

4. The Courts should commence collation of data including:

- (a) the number, type and value of claims managed by each law firm, funder and insurer;
- (b) the cost of the litigation to the funders, insurers and the Courts;
- (c) the levels at which the parties were prepared to settle the case;
- (d) the value of settlements or judgments; and
- (e) the time each proceeding took to resolve.

This data could provide some surprising statistics. For example, it is acknowledged by the insurance industry that about 75 cents in every dollar paid out by insurers on directors and officers policies goes in defending the claims, with only 25 cents going to the claimants. This type of statistical data was powerfully used in the recent tort reform debate and must be relevant in any policy considerations providing the foundation for future civil justice system reform.

Making lawyers, funders and insurers accountable for their involvement in the Court process in the same way as the parties themselves, seems an obvious means of better protecting and promoting the interests of the Courts as well as the interests of the consumers of the Courts' services.

(b) Creating a Less Adversarial System

By demanding procedures that are geared towards the hearing, which comes at the end of the dispute resolution process and is structured as a competition between adversaries, the System often prevents the quick and cheap resolution of the real issues in proceedings.

Geoff Davies, a former Judge of the Court of Appeal of Queensland, believes the procedures and practices which constitute the System assume two things: that proceedings, once commenced, will be resolved by trial and judgment; and that a contest between competing adversaries is the best way to resolve a dispute.<sup>5</sup>

Both are flawed assumptions. Davies says "trials would be cheaper, fairer between parties of unequal bargaining power and more objectively truthful if they were less adversarial."<sup>6</sup>

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<sup>5</sup> See Davies G, "Civil justice reform: Some common problems, some possible solutions", (2006) 16 *Journal of Judicial Administration* 5.

<sup>6</sup> *Ibid.*

Davies points to six harmful effects of the adversarial system:

- (a) it discourages the limiting of issues and disclosure of unfavourable information;
- (b) it obscures the advantages of an agreed solution;
- (c) it provides too few opportunities for adjudication otherwise than by a full trial;
- (d) it tends to make advocates of the witnesses;
- (e) it advantages the richer litigant; and
- (f) it permits the parties to dictate the pace and shape of the litigation.<sup>7</sup>

Davies notes that although many matters are settled outside the trial, after proceedings are filed, the parties embark on a series of procedures designed to facilitate a trial which are not necessarily designed to accelerate settlement. Moreover, the cost structures make the System overly labour intensive.

Consideration could be given to the Family Court of Australia's Less Adversarial Trial ('LAT') model, used in the Court's Children's Cases Program. As noted by Justice Stephen O'Ryan of the Family Court:

*"The Court...decided to consider adopting a significantly less adversarial approach to determine such cases. Crucial to the implementation of such an approach would be a model where the relevant issues were identified early by the trial judge and where the trial judge could ensure that the evidence was confined to such issues within a procedure where the best interests of the children were the focus rather than the dispute of the parents"*<sup>8</sup>.

Civil courts can learn from the approach of the Family Court.

As noted by Cannon: "The adherence to the requirement that the facts be proved by oral evidence at a trial at the end of the process wastes many opportunities to decide facts that may be determinative of the case earlier and thereby avoid expensive efforts in marshalling evidence of facts that are collateral."<sup>9</sup>

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<sup>7</sup> Davies G, "A Blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale", (1996) 5 *Journal of Judicial Administration* 201 at 205.

<sup>8</sup> O'Ryan S, "A Significantly Less Adversarial Approach: the Family Court of Australia's Children Cases Program", speech to the 22<sup>nd</sup> AIJA Annual Conference, Sydney 17-19 September 2004.

<sup>9</sup> Cannon A, "Effective Fact Finding" *Civil Justice Quarterly* 25 (July) 2006 327.

For the 80% of cases that do not go to trial, Cannon argues that “many of these would benefit from a narrowing of the factual controversy early in the process. Even in those that go to trial a great deal of expensive effort is likely to be wasted to prove things that did not need to be proved.”<sup>10</sup>

5. Mandatory procedures should be created to facilitate the full and frank exchange of information between the parties, and hence identification of the real issues in the proceedings, at the earliest possible stage in the process.

#### (c) Case management

“Case management” is now commonplace in most Australian Courts. More active “management”, however, is needed to avoid delay and the incursion of unnecessary costs. The emphasis should be on more effective *planning* for the most effective way to resolve the dispute, rather than the simple management of proceedings where, at present, it is largely left to the parties to determine the process.

A number of jurisdictions, in Australia and abroad, have introduced “pre-action protocols” and “pre-trial conferences” to attempt to facilitate early resolution of matters before extensive costs are incurred.

However, despite significant reform of pre-trial case management techniques in recent years, not enough effort is being made to identify and dispose of preliminary issues. Many direction hearings and pre-trial conferences are still essentially about timetabling and setting milestone dates.

Identification and assessment of the Litigation Risks should be conducted at the earliest possible stage of the process and judges must become actively involved in this process.

Davies says: “Parties, and especially their legal advisers, are often reluctant to settle early if there is some realistic possibility that relevant information in the possession of other parties may materially affect the outcome of the case. So early mutual disclosure of relevant information is likely not only to make early settlement fairer but also to increase the rate of early settlement.”<sup>11</sup>

6. Civil Procedure Rules should be amended to introduce a system of Pre-Litigation Conferences which parties must attend before engaging in the System. A recent report of the Civil Justice Reform Working Group in Canada provides a model for consideration.

Before addressing the Canadian model (see below), recent developments in pre-action protocols and case management conferences are addressed.

<sup>10</sup> Ibid.

<sup>11</sup> See Davies G, “Civil justice reform: Some common problems, some possible solutions”, (2006) 16 *Journal of Judicial Administration* 5. Davies G, “A Blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale”, (1996) 5 *Journal of Judicial Administration* 201.

### *Pre-action protocols*

In the United Kingdom, the Civil Procedure Rules (CPR) contain pre-action protocols for certain types of action which outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim.

The objectives of pre-action protocols in the CPR are to:

- (a) encourage the exchange of early and full information about the prospective legal claim;
- (b) enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and
- (c) to support the efficient management of proceedings where litigation cannot be avoided.<sup>12</sup>

In Australia, the Family Court adopted a number of pre-action protocols in 2004. Rule 1.05 stipulates that *before* starting a case, each prospective party to the case must comply with certain pre-action procedures focused upon attempting to resolve the dispute. Parties are required to write to each other setting out the claim and exploring options for settlement; and to comply, so far as is practicable, with the duty of disclosure.

Queensland also has a pre-action procedure relating to personal injuries claims.<sup>13</sup>

### *Case management*

Case management has evolved over the last decade in Australian Courts in response to concerns about excessive costs and delay. As Spigelman CJ, said:

*“The objective of case management is to reduce delays and minimise the costs of litigation...Litigants who are dilatory in their preparation, or who otherwise take up too much of the court’s time, waste public resources and exacerbate the delays which other litigants have to suffer. It is perfectly appropriate for judges to take steps to ensure that litigation is conducted efficiently and expeditiously.”*<sup>14</sup>

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<sup>12</sup> Department for Constitutional Affairs, Civil Procedure Rules, ‘Practice direction – Protocols’ at paragraph 1.4.

<sup>13</sup> See here Goldschmid RM, ‘Discussion Paper: Major Themes of Civil Justice Reform’, prepared for BC Civil Justice Reform Working Group, January 2006 at par 6.1.2.

<sup>14</sup> Spigelman J, ‘Case management in New South Wales’, Address to the Annual Judges Conference, Kuala Lumpur, Malaysia, 22 August 2006.

He said one of the reasons that “managerial judging” had emerged was in response to market failure, caused by the disparity in knowledge between clients and lawyers in relation to the process of litigation, and went on to say:

*“The requirements of specialised skills and the complexity of the process of litigation are such that clients are not able to assess the quality of, or even the need for, a legal service before it is purchased.”<sup>15</sup>*

IMF submits it is critical that case management is taken to the next level. Judges need to be encouraged to flex their muscles to ensure litigation is being conducted efficiently and expeditiously. In this respect, section 3 below discusses the use of cost orders against parties who deliberately seek to obfuscate.

IMF’s experience as a consumer of the System suggests that despite the advances made by extensive case management in recent years, excessive costs and delays remain prevalent in the System. Case management, although going some way, has not yet achieved the Overriding Purpose.

IMF proposes a Pre-Litigation Conference (“PLC”) to encourage both parties to openly discuss the issues and anticipated process before a judge prior to commencing the long and expensive journey down the “litigation highway”. This model for a PLC is discussed in the next section.

Before turning to the perceived benefits of a PLC, a recent advance in Western Australia, to focus the parties’ attention on the real issues, should be noted. Martin CJ recently introduced a new list called the Commercial and Managed Cases List, which makes a specific reference in the Practice Direction to the goals of quickly narrowing issues in dispute, encouraging mediation and reducing time-consuming interlocutory disputes.

Martin CJ, in explaining his motivation for introducing such a list, said:

*“Prior to my appointment as Chief Justice, I had come to the view from long experience that perhaps the most effective way of improving access to justice in the longer term is by improving the processes and procedures of the Courts so that the real issues are identified and resolved earlier and with an absolute minimum of interlocutory processes.”<sup>16</sup>*

#### (d) Pre Litigation Conferences

In November 2006, the Civil Justice Reform Working Group in Canada released a report titled *Effective and Affordable Civil Justice* (“the Canadian report”) which set out a model for a Case Planning Conference (“CPC”).

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<sup>15</sup> Ibid.

<sup>16</sup> Martin W, “Access to Justice: A human right in principle, policy and practice in Western Australia”, John Huelin Memorial Human Rights Day Lecture, Perth, December 2006.

The Canadian report says that:

*“The litigation process must be streamlined through:*

- *early identification of issues and interests;*
- *ensuring that the amount of process is proportional to the value, complexity and importance of the case; and*
- *increasing judicial intervention to establish and enforce timelines for completing major litigation events.”<sup>17</sup>*

One of the challenges highlighted by the Canadian report was shifting the “ingrained cultural beliefs and practices” of the legal profession which “will require early and active judicial involvement in cases”.<sup>18</sup> It notes that the proposed CPC recognised there are many paths to resolution of a dispute, with a traditional trial at the end of a discovery process being just one spoke in a wheel. The CPC – which will be an extensive conference attended by the parties in person and their legal representatives *before* they actively engage with the system – sees a judge work with the parties to develop a plan which identifies, very early in the process, the other spokes that might result in a faster and cheaper resolution of the dispute.

The Canadian report suggests the judge presiding over the CPC should have extensive powers, including the ability to limit discovery, order summaries of the facts and issues, limit the time expended at various steps of the process, making directions with respect to the use of experts (including whether a joint expert should be used on a certain issue) and limiting the length of any trial. Indeed, the report says that the judge should have power to make “any other orders to produce an efficient and proportional resolution of the case”.<sup>19</sup>

The Canadian report says that:

- (a) *“Earlier understanding of the case and consideration of planning options will assist in achieving better resolutions for the parties”,<sup>20</sup>*
- (b) *while the process may result in “some front-end loading of time and cost, we believe that these costs will be outweighed by the benefits of an early and meaningful conference”,<sup>21</sup> and*
- (c) *the initiative should be considered a success if:*
  - *fewer parties refrain from commencing actions or abandon actions because of cost, complexity and delay;*
  - *more actions are resolved early and to the satisfaction of the litigants;*

<sup>17</sup> “Effective and Affordable Civil Justice”, a report by the Civil Justice Reform Working Group, Canada, November 2006 at page 11.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* at page 14.

<sup>20</sup> *Ibid* at page 15.

<sup>21</sup> *Ibid* at page 17.

- *the overall process costs to litigants are reduced to a level proportional to the value, complexity and importance of their dispute;*
- *the number and length of contested chamber applications is reduced;*
- *the process is sufficiently affordable that there are an increased number of trials for those matters that need an adjudication, and*
- *trials are scheduled earlier, take less time and are more focused.*<sup>22</sup>

IMF submits that the System, would benefit greatly from a similar mechanism which will allow parties to better understand and assess the Litigation Risks and then, with the Court, be able to make informed decisions.

### 3. Cost

#### (a) Compulsory provision of litigation budgets and timelines

7. Disclosure by lawyers to clients about liability and quantum alone is not sufficient; advice about the litigious process is necessary. Budgets and timelines for any litigation should be provided to each party, the Court and the opposing party at or shortly after the pre litigation conference.

The provision of cost estimates does not assist clients who use the Courts rarely and seek to determine whether the expected expenditure is *commercially viable* given the nature of the claim and the quantum of damages being sought.

Moreover, in a system where the loser pays the other side's costs, probably the biggest risk in embarking on litigation is assuming the risk of paying the other side's costs if you are unsuccessful. As Zuckerman has observed, "A litigant's worst nightmare is that he will have to pay the other party's costs as well as his own"<sup>23</sup>.

It is critical that policy makers act to make costs and the time involved in the process more predictable at the outset of the process.

As noted by Peysner (referring to developments in the UK):

*"The traditional response is to compare litigation to war: Bloody and expensive but above all unpredictable. More recently under the influence of the CPR and case management it has become clear that litigation can be more prospectively managed and, indeed many clients demand that their own side's strategy and costs are extensively planned so that both their solicitor's final bill and their demands for interim payments are predicable."*<sup>24</sup>

<sup>22</sup> Ibid.

<sup>23</sup> Zuckerman A, "Cost capping orders in CFA cases improve costs control but raise questions about the CFA legislation and its compatibility with Art 6 of the European Convention on Human Rights", *Civil Justice Quarterly*, 2005 XXXX

<sup>24</sup> Peysner J, "Predictability and Budgeting", *Civil Justice Quarterly* 23(Jan) 2004 15.

The formulation of budgets must be sufficiently flexible to recognise that litigation is inherently uncertain and that there will be issues that arise during a project that cannot be foreseen, or foreseeable, at the outset of the project. Nevertheless, the vast majority of costs can be estimated in advance, as much of the work – taking statements, drafting affidavits, preparing for trial – is common to all cases, even though some cases are more complicated than others.

This increased transparency regarding expected costs would benefit the Courts, the parties and the parties' lawyers.

### *The Courts*

Provision of budgets will allow the Courts to:

- (a) monitor excessive costing and determine that anticipated expenditure is proportional;
- (b) monitor excessive timelines to ensure that cases are brought on expeditiously without unnecessary delay;
- (c) better facilitate case management by allowing proceedings to be monitored by reference to timelines and expected expenditure;
- (d) allow the Court to refer to budgets rather than time costing when reviewing lawyers' claims for solicitor/client costs; and
- (e) quantify party/party adverse cost orders more efficiently than through taxation or assessment.

The Court's oversight of budgets is vital and the parties should be encouraged not to spend more than is proportional to the nature of the dispute. By monitoring budgets, the Court will act to motivate the parties to achieve the Overriding Purpose and de-motivate delay and expense.

### *The Parties*

The provision of budgets will also assist the parties to determine the likely expenditure at each critical stage of the litigation, thereby enabling cash flow management. It also allows for quantification of their exposure to adverse costs in advance of the project commencing.

This submission argues that adverse cost orders should be capped at a level set at the PLC by the Court having regards to the budgets of the parties, their respective openly stated valuations of the claim and the objective of the Court to achieve quick and effective resolution of the claim, rather than being assessed on the basis of time costing.

Certainty about expenditure and likely adverse costs would allow for an informed decision as to whether to proceed with the litigation if settlement prior to litigation cannot be achieved. This compares favorably to the current situation where the uncertainty concerning predicting adverse costs is a material barrier to entry to the System.

### *The Lawyers*

This proposed disclosure will also benefit the legal representatives of the parties in that they will be better able to seek to deliver resolution of the claims in accordance with their client's expectations concerning cost and time.

It is also important that the client and the lawyer are on the same page with respect to budgets. The *quid pro quo* of being provided with an affordable budget is the recognition by a client that it will not sue the lawyer in negligence for failure to investigate every possible legal remedy. It is the trade off for obtaining a more contemporary and more fuel efficient vehicle than the Rolls Royce.

The provision of budgets and timelines, agreed at the PLC, would go some way to addressing the current situation expressed by Gleeson CJ that the System is not one where the judges, parties and their lawyers work towards common objectives.<sup>25</sup>

IMF understands the New South Wales Cabinet has considered the issue of compulsory budgets and timelines and agreed with most of the recommendations of the Legal Fees Review Panel Report.<sup>26</sup> A Bill was drafted to implement the Report but the issue has now been subsumed into the Federal Uniform Court Rule process.

### (b) Possible amendment to the Legal Profession Act (NSW) by way of example

If the retainer is not for a fixed fee:

- (a) Section 175(2)(b) of the Legal Profession Act simply requires disclosure of the basis of calculating costs;
- (b) Section 177(1) requires an estimate of the likely costs; but
- (c) Section 180 relieves the lawyer of this obligation when it would not be reasonable to require an estimate; and
- (d) Section 181(b) was utilised by The Council of the Law Society of New South Wales on 4 December 1997 to resolve that the grounds that it would not be reasonable to require disclosure include, but are not limited to, those circumstances:

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<sup>25</sup> At the National Access to Justice and Pro Bono Conference in Melbourne in 2006 Gleeson CJ stated "*To think that a Judge, the parties and their lawyers are all working towards a common objective would be naïve.*"

<sup>26</sup> Legal Fees Review Panel Report, "Legal Costs in New South Wales", published December 2005. The Panel comprised Mr Laurie Glanfield, Director General of the Attorney General's Department; Mr Ian Harrison SC, President, NSW Bar Association; Mr Gordon Salier, President, Law Society of NSW; and Mr Steve Mark, Legal Services Commissioner.

*“when the calculation or estimation of the total costs of anticipated legal services are contingent on facts or events, not presently ascertainable, but the practitioner discloses the amount, or an estimate of the amount, of the total costs to be charged as soon as it is practicable to do so.”*

Unfortunately, within IMF’s area of experience, reliance upon section 180 and section 181 is the norm rather than the exception and too often clients lose control of the process to their lawyers due to not being informed of material cost issues.

In IMF’s opinion, it is not reasonable for a practitioner to advise that proceedings be commenced or defended until they are in a position to disclose an estimate of the cost of the proceedings to their client.

8. NADRAC ought to comment upon the adequacy of cost disclosures pursuant to the Legal Professions Act and the Law Society Guideline.

(c) Fixing recoverable costs

It is not only the quantum of costs that concerns consumers of the System but the unpredictability of those costs. The lack of any objective criteria concerning the level of costs that should be reasonable given a case of a particular complexity makes assessment of costs even more difficult, especially to someone with little experience of litigation.

While fears of adverse costs acts as a deterrent to bringing an action, once it becomes clear that an action will go all the way to trial, the indemnity principle erodes sensitivity to increased costs because litigants know that success will result in the recovery of costs paid and increased spending may increase the chances of success. The other party will typically respond and also increase their stakes, and the costs snowball, thereby increasing risks to all parties.

Bret Walker SC, in his article “Proportionality and Cost-shifting”, argues that central to his proposal to assess the amount a loser has to pay a winning party in litigation “is to transform the qualitative and rhetorical nature of ‘proportionality’ into an overtly precise matter of measurable sums of money” and the “object of the exercise is to permit ascertainment sooner rather than later of the amount of costs the loser will have to pay the winner”.<sup>27</sup> Mr Walker continues:

*“This should enhance decision-making, whether to fight or settle. It is also intended to deprive a deep-pockets litigant of some of the advantage money can buy, by denying the possibility of manoeuvres, complexity and elaboration initiated or provoked by that richer party augmenting the costs payable to that party even if it wins. It ought to tend against the currently perverse incentive by which time-based charges by lawyers reward slowness. It is also hoped that such an approach would reduce the transaction costs as between parties*

<sup>27</sup> Walker B, ‘Proportionality and cost shifting’, 27(1) UNSW Law Journal 214 at 217.

*and their own lawyers, by eliminating to a large degree the need for detailed bills of costs to be prepared for presentation to the losing party for payment to the winner. Finally, it may be that, if the figures are appropriate and market conditions permit, the idea would provide a moderate downwards pressure on the charge-out rates for relatively straight-forward litigation work. Above all, the aspects of the proposal which may conduce to some or all of these happy outcomes should also involve a general disincentive on both sides to complicate the litigation more than a case really requires.”<sup>28</sup>*

Mr Walker notes that his proposed approach “owes a deal to some German procedures, but is by no means closely modelled upon them”. Nevertheless, it is worth examining the scheme that has been adopted in Germany and another adopted by New Zealand to make costs more predictable.

In Germany, as in Australia, a successful litigant is normally entitled to recover the litigation costs from the unsuccessful opponent.

But unlike Australia, the law in Germany known as the RVG regulates the amount of recoverable costs<sup>29</sup>.

Under the RVG, recoverable lawyers’ fees are fixed by law as a small percentage of the value of the claim, which declines as the value of the claim increases. The fee for a claim of £100,000 would be in the region of £5,000. Cannon says that parties are reluctant to pay in legal fees more than they can expect to recover from the other side.<sup>30</sup>

There are a number of benefits of the German system, as noted by Zuckerman:

*“The German system has several advantages. First, it removes the incentive to exaggerate the value of claims, because the court fee and the lawyer’s fee are related to the value of the claim and because recovery of costs is in proportion to the sum awarded. Secondly, litigation costs are moderate, and far lower than in England. Thirdly, since litigation costs are predictable there is a thriving market for litigation cost insurance. Most household insurance policies provide cover for litigation costs, so relatively few citizens feel shut out of court.”<sup>31</sup>*

The costs discretion in New Zealand provides a formulaic approach, allowing clients to be informed in advance of what the likely costs – of success or failure – will be. The Rules<sup>32</sup> ensure that costs are determined by having regard to a proceedings complexity and significance.

<sup>28</sup> Ibid.

<sup>29</sup> See here, and for more detail on the RVG, Cannon A, “Alternatives to Activity Based Costing”, a paper delivered to the 24<sup>th</sup> AIJA Conference, Adelaide 16-17 September 2006. The RVG recently replaced a similar basis of costing in the German Civil Code known as the BRAGO.

<sup>30</sup> Ibid.

<sup>31</sup> Zuckerman A, “Court Adjudication of Civil Disputes: A public service that needs to be delivered with proportionate resources within a reasonable time and at reasonable cost”, a paper delivered to the 24<sup>th</sup> AIJA Conference, Adelaide 16-17 September 2006.

<sup>32</sup> New Zealand High Court Rules, which took effect on 1 January 2000.

As Beck notes, "Instead of relying almost entirely on a general discretion to achieve appropriate awards, it was seen as important to make costs predictable and relatively simple to determine."<sup>33</sup>

One of the five overriding principles (set out in Rule 47) of the New Zealand regime is the "determination of costs should be predictable and expeditious".<sup>34</sup>

In summary, the rules limit the recoverable costs which can be awarded to a successful party by conducting a systematic assessment process, whereby the Court classifies proceedings according to their complexity, and the time which ought to be expended on a particular step.

Importantly, the determination does not depend on the actual counsel or time involved but rather is an objective approach which seeks to determine the costs that ought to be considered appropriate given a particular proceeding's level of complexity.

The rules also make specific provision for situations in which increased costs (including indemnity costs) and decreased costs may be awarded and the rules are subject to an overriding discretion of the court.<sup>35</sup>

Over the last three years, the UK Courts have responded to concerns about cost and delay, in spite of the introduction of the new Civil Procedure Rules, in part by recognising a broad power to impose limits on the claimant's recoverable costs.

The theoretical basis for cost capping is the doctrine of proportionality and the test for whether a cost cap should be imposed is whether there is a real and substantial risk that without a cap, costs could be disproportionate or unreasonably incurred and this risk could not be controlled by case management or post case detailed assessment.<sup>36</sup>

9. Amendment to Civil procedure rule should be made so that orders should be, *prima-facie*, capped at the cost budgeted at or shortly after the initial PLC, with increases to the cap only possible where it is shown to the Court that the opposing party extended the project from that which was envisaged in the original budget.

10. Additionally, where solicitor client costs are in issue, the same cap should be imposed, except where the client declines protection at the PLC, with an entitlement for the lawyers to seek an increase from the Court.

<sup>33</sup> Beck A, "The costs discretion", *New Zealand Law Journal*, November 2001 at 425.

<sup>34</sup> A detailed description of the Rules is outside the scope of these submissions but contained in a paper by The Hon Justice Venning titled "Alternatives to Activity Based Costing: the New Zealand Approach", which was delivered to the 24<sup>th</sup> AIJA Annual Conference, Adelaide, September 2006.

<sup>35</sup> That said, the Court of Appeal has found that the discretion should be viewed in the context of specific rules and is not unfettered: *Body Corporate 97010 v Auckland City Council* CA 234/00 (30 August 2001).

<sup>36</sup> *Smarty v East Cheshire NHS Trust* [2003] EWHC 2806 (QB).

(d) Discouraging Cost and Delay through Cost Orders

The objective of the Commercial and Managed Cases List in Western Australia is to “bring cases to the point where they can be resolved by mediation or tried in the quickest, most cost effective way, consistent with the need to provide a just outcome.” The practice direction requires judges overseeing the new list to discourage interlocutory disputes with all means at the Court’s disposal, “including costs orders in appropriate cases”.<sup>37</sup>

Judges seem to be increasingly willing to consider penalising law firms for time wasting. In December 2006, in two cases being funded by IMF, two judges independently confirmed they would make cost orders against defendant solicitors if they wasted court time in putting a liquidator to proof on debts incurred in an insolvent trading claim and if they continued to cause non compliance with directions, respectively.

Chief Justice Young in the Equity Division of the NSW Supreme Court has said that the Court should only order a legal practitioner to pay the costs of legal proceedings in respect of which he or she provided legal services in clear cases of misconduct and mostly it is difficult to assess whether the solicitor or client that was the real cause of the problem. Nevertheless, His Honour noted that:

*“If in a future case, the facts clearly showed that a solicitor had given very bad advice to an unsophisticated client who had accepted it without question with the result that the company concerned had incurred substantial legal costs, that may well be a case where the court would, after giving the solicitor due notice to explain, make an order that the solicitor pay the costs personally.”*<sup>38</sup>

11. Orders to pay costs against parties and / or their agents for not assisting in the achievement of the Overriding Purpose of the Court would change behavior and make significant inroads to eradicating the attitude held by some lawyers that litigation is a game, and tactics which deliberately prolong the proceedings or their cost, or both, are part of the game.

(e) Offers of Compromise

Offers of compromise are currently the only way parties can, unilaterally, seek to manage their cost exposure.

This enables control of adverse cost order exposure along the way provided each party has all material relevant information and a capacity and willingness to proceed to judgment.

These elements are not always existent.

12. Open offers ought to be required to be made at or shortly after the Pre Litigation Conference (when disclosure of material information has been made), which should not only have cost consequences but also be relevant to the project line and budgets either agreed or set by the Court.

<sup>37</sup> Supreme Court of Western Australia, Practice Direction 4 of 2006.

<sup>38</sup> *Re the Black Stump Enterprises Pty Ltd and Associated Companies (No 2)* [2006] NSWCA 60.

This procedure would enhance proportionality, enable the parties to reality test their positions and provide material data for the Court in exercising its case management and cost allocation functions.

#### **4. How to ensure the quality of ADR service.**

Regulatory intervention has limited capacity to assist in the provision of quality ADR services other than through Civil Justice reform taking away the structural motivations for the provision of adversarial services.

The quality of ADR services will inevitably be determined by the market.

The ADR market needs to be nurtured through macro strategic policy, but will not, once nurtured, need regulation to “ensure quality”.

The market will, once enabled to compete on a level playing field, provide appropriate provision of ADR services.

Reforms to the adversarial civil justice system enabling ADR to compete will be the only necessary mechanism to ensure the nurturing of an ADR market that provides competitive services.

Competition in a vibrant ADR market created by the reforms contemplated by IMF’s submissions will be the best mechanism to ensure the quality of ADR services to be provided in the future.

Measurement and publication of key indicia of the productivity of the Civil Justice System including ADR, is essential in providing necessary information for all stakeholders, including policy makers, service providers and consumers.

If ADR is to be incorporated into the System, IMF suggests that the Courts should commence collation of data, including:

- (i) the number, type and value of claims by each systemic litigant and managed by each law firm, funder and insurer;
- (ii) the estimated costs of each stage in the litigation to the litigants and the Court;
- (iii) the actual cost of each stage in the litigation to the litigants and the Court;
- (iv) the levels at which the parties were prepared to settle the case;
- (v) the value of settlements or judgments;
- (vi) the time each proceeding took to resolve; and
- (vii) data relevant to productivity enhancements created by the introduction of ADR into the civil justice system.