

**Attorney-General's Department**

**ACCESS TO JUSTICE TASKFORCE**

**SUBMISSION BY IMF (AUSTRALIA) LTD**

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## EXECUTIVE SUMMARY

### Introduction

IMF (Australia) Ltd (“IMF”) is a listed public company which provides funding for 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 Securities Exchange. IMF’s market capitalisation is in excess of \$200 million. IMF’s web site may be found at [www.imf.com.au](http://www.imf.com.au).

IMF has facilitated access to the civil justice system in the State and Territory courts and in the Federal courts for about 30,000 claimants since listing in 2001. IMF has done so by addressing one of the principal barriers to access to justice in Australia – namely the high costs and financial risks faced by persons who wish to pursue their legal rights. In the cases it funds, IMF meets the claimants’ legal costs and disbursements, provides any required security for costs and covers any adverse cost risk. In return, IMF is reimbursed its outlays and receives a percentage of any damages or settlement if the claim is successfully resolved.

IMF is a significant funder of certain types of claims and litigation in the Australian civil justice system. IMF expends about \$2 million per month, primarily on the funding of large commercial, insolvency and group claims (including class actions). Many of these claims are pursued in the Federal Court, particularly in relation to insolvency-related matters, consumer claims alleging product liability or breaches of the competition and trade practices laws, equity and debt market protection law breaches and general commercial litigation.

As a result IMF is, for itself and on behalf of the claimants it funds, a consumer of what might broadly be termed “dispute resolution services” provided by the Federal Court of Australia. This covers the full range of options available to resolve disputes including court-ordered mediations, case managed proceedings, the Fast Track and, where necessary (but thankfully rarely) the exercise of the judicial power of the Commonwealth to conclusively resolve disputes.

IMF’s objectives are closely aligned with those of the claimants it funds: namely to achieve the just, quick, inexpensive and efficient resolution of claims. As such, IMF and its funded clients have a very real interest in the work of the Taskforce and IMF is grateful for the opportunity to make these submissions. IMF has limited its submissions to those recommendations on which it feels qualified to comment.

### Key Submissions – (1) Overarching Purpose

IMF’s principal submission is that fundamental reform to the civil justice system will involve cultural change within the system itself. This, in turn, will require the recognition that *all* participants in the civil justice system, including the judiciary, lawyers, funders and insurers as well as the litigants themselves, owe a duty to achieve an Overriding Purpose being (to adopt the wording of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009) the *just* resolution of disputes according to law as *quickly*, *inexpensively* and *efficiently* as possible.

In IMF’s submission, the Bill does not go far enough: in addition to an obligation being imposed on the *parties* to act consistently with the overarching purpose<sup>1</sup>, the parties’ legal representatives themselves should also owe the same statutory obligation which *must take priority over the lawyers’ fiduciary obligations to their clients*.<sup>2</sup> In the absence of such a reform, lawyers will plead that their fiduciary obligations require them to take steps in proceedings which are inconsistent with, or obstruct the achievement of, the Overriding Purpose. The same obligations should be imposed on third parties which fund or control litigation, including insurers and litigation funders. This will lead to new standards of behaviour by all participants in the civil justice system in the form of Overriding Obligations to the system and will require collecting, collating and analysing data on the performance

<sup>1</sup> See proposed s 37N.

<sup>2</sup> Under the proposed s 37N(2) in the Bill, the lawyer must, in the conduct of civil proceedings before the Court, “take account of the duty imposed on the party” and “assist the party to comply with the duty.” Under s 37N(4), the Court must take account of any failure by the lawyer to comply with this duty in exercising its discretion to award costs.

of the system and its participants so as to enable the government to assess the extent to which these standards and objectives are being achieved.<sup>3</sup>

In IMF's submission, the courts increasingly recognise the desirability of such a reform. In a decision of the Queensland Court of Appeal delivered on 10 November 2009, *Virgtel Ltd v Zabusky (No 2)* [2009] QCA 349, McMurdo P said at [30]:

*"The gargantuan amount of costs expended by the appellants in this matter before the action has even commenced (\$1.5 million at the time of the application before Daubney J) is concerning. It is a stark example of the unacceptable cost of access to justice in commercial matters. The former Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC, recently observed that the cost of legal services can be a practical barrier to access to civil justice. [footnote omitted] More affluent litigants can use it to oppress their opponents. Some litigants may wish to delay the final hearing of matters and to deliberately run up costs through tactical pre-trial applications. A more interventionist approach to the judicial management of cases is essential to ensure that the justice system operates with reasonable fairness, both to the litigants in the case and to other litigants who wish to use the courts' limited resources. The recent placement of this matter on the supervised case list will ensure it is now optimally case managed. But, in my view, the parties' lawyers also have an obligation, not just to their clients but also to the administration of justice, to do everything possible to ensure the matter is soon concluded in a timely and cost efficient way." (Emphasis added).*

In a similar vein, the Taskforce has noted in its report the High Court's decision in *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 in which "speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings".<sup>4</sup> Further, the Court observed that parties to litigation can no longer ignore the public interest in the efficient allocation of court resources. The Court will consider the potential impact of the parties' conduct on *other users* of the court system (in this case, a substantial amendment to the statement of claim was sought to be made on the third day of a four week trial).<sup>5</sup> Justice Heydon went further in his criticism:

*"The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives fails to do so. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another."*<sup>6</sup>

## (2) Reduction in Litigation Risks

Central to any reform is making the process and its outcomes more predictable from the outset, so far as is possible, in order to address Litigation Risks.

The Litigation Risks IMF refers to are the risks confronted by claimants in:

- (i) not being able to obtain a reliable budget from their solicitor, let alone a set fee, for a piece of litigation;
- (ii) not being able to predict how long the litigation process will take with any degree of certainty;

<sup>3</sup> Refer to section 5 at pages 10 to 12. More vigour by the Courts is necessary in identifying tactics that deliberately cause delay and costs that ought to culminate in cost orders against the tacticians personally.

<sup>4</sup> At [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

<sup>5</sup> *Ibid* at [113].

<sup>6</sup> *Ibid* at [156] per Heydon J.

- (iii) facing a pricing policy by the lawyers which requires payment on an hourly rate basis;
- (iv) confronting well resourced defendants (often backed by an insurer) with the capacity to obtain the best legal and expert advice available;
- (v) facing the risk of having to meet substantial adverse costs orders if they are ultimately unsuccessful; and
- (vi) receiving legal advice they may find difficult to understand or which does not properly identify the liability, quantum, enforcement and other commercial risks attendant on the litigation, including just how much the potential adverse costs order may be in dollar terms.

The essential elements of achieving effective management of the Litigation Risks will include:

- (i) a pre-litigation regime involving early and effective disclosure,<sup>7</sup> the settlement of claims that can be settled and the setting of time lines and budgets for the litigation of claims that cannot be settled;<sup>8</sup>
- (ii) making the civil justice system less adversarial, with the adoption of alternative dispute resolution processes as early as possible;<sup>9</sup>
- (iii) cost orders, *prima-facie*, capped at the cost budgeted at or shortly after the initial pre-litigation conference, with increases to the cap only possible where it is shown to the Court that the party is justified in extending the scope of the proceedings from that which was envisaged in the original budget;<sup>10</sup>
- (iv) adequate funding;<sup>11</sup> and
- (v) active case management.

### (3) Class Action Reforms

The area of reform capable of achieving the most dramatic increase in the number of Australians gaining access to justice is in relation to the enforcement of statutory consumer rights through class actions.<sup>12</sup> Appropriate class action reform includes:

- (i) express statutory recognition of the current “opt in” arrangements for funded class actions – these arrangements have substantially facilitated access to justice for large numbers of shareholders and other claimants and should be expressly incorporated into Part IVA to preclude any further “satellite” litigation on the issue;
- (ii) Part IVA should be further amended to enact a specific power for the Federal Court to make orders, in appropriate cases, for a litigation funder’s outlays (including all of the representative’s funded legal fees and disbursements) and commission to be payable by all group members who stand to benefit from the outcome of the funded class action, whether the group members have entered into a funding agreement with the funder or not; and

<sup>7</sup> Which may require depositions (refer to section 3 at page 9).

<sup>8</sup> Refer to section 9 at pages 19 to 21.

<sup>9</sup> Refer to section 5 at pages 10 to 12.

<sup>10</sup> Refer to section 9.3 at page 20.

<sup>11</sup> This issue particularly implicates the availability of litigation funding for class actions – refer to section 7 at pages 12 to 18.

<sup>12</sup> Excessive costs and delays in class action litigation, together with funding constraints, has limited class actions achieving their dual purpose of being a deterrent to breaches of consumer protection laws and enabling compensation when they occur. Refer to section 7 at pages 12 to 18.

- (iii) the introduction of a judicial power to order *cy-près* type remedies where there would otherwise be unjust enrichment of the respondent, with the process of allocating the fund being taken outside the adversarial process.

#### **(4) Procedural and Court Reforms**

As explained below in this submission, IMF supports the Taskforce's recommendations in relation to:

- (i) data collection (recommendations 5.1 and 5.2);
- (ii) pre-action protocols (8.1);
- (iii) reducing the costs of discovery (8.2) but has reservations about requiring the requesting party to pay the estimated costs of discovery in advance (8.3);
- (iv) permitting judges to express their preliminary views on issues in proceedings (8.4);
- (v) case management and dispute resolution being central judicial functions (8.5, 8.6);
- (vi) encouraging wider use of the Fast Track (8.7);
- (vii) cost recovery in the federal courts (subject to some reservations – 9.1, 9.2); and
- (viii) the use of litigation budgets (9.3).

#### **(5) Federal Justice Roundtable**

Finally, IMF concurs with the establishment of a Civil Federal Justice Roundtable and again thanks the Attorney-General for the opportunity to be involved in this important reform initiative.

## **IMF's SUBMISSIONS**

IMF's submissions are made with reference to each relevant Taskforce recommendation as noted below.

### **1. Recommendations 5.1 and 5.2 – Data Collection**

IMF supports recommendations 5.1 and 5.2 and wishes to comment further on the necessity for the collection of data on the operation of the civil justice system.

There is currently a dearth of reliable, publicly-available information on key elements of the cost and performance of the civil justice system. IMF invests about \$24 million per year in funding of cases with all funders, including IMF, investing about \$40 million per annum in total. Whilst there is currently no specific public data available, insurers' defence management expenditure in our civil justice system would likely exceed \$1 billion per year. Given the utilisation by funders and insurers of the publicly subsidised civil justice system, the Productivity Commission and Attorney-General's Department should consider, in the context of the review of the efficiency of the civil justice system, the collection of data to ensure that the funders' and insurers' interface with the Australian civil justice system is fully understood and appropriately managed.

This data would include:

- (i) the number, type and value of claims funded by each funder and the number, type and value of defended claims funded by each insurer;
- (ii) the cost of the litigation to the funders, insurers and the Courts;
- (iii) the levels at which the parties were prepared to settle each case; and
- (iv) the value of settlements or judgments and the time each proceeding took to resolve.

This data could produce some surprising statistics. For example, it is acknowledged by members of 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 tort reform debates a few years ago and must be relevant to civil justice reform focusing on access to justice.

Further, if the government was prepared to identify how many Australians could afford to meet the cost and assume the risks of medium to large scale civil litigation, IMF believes that the percentage would be found to be negligible.

In order for the Federal Courts to provide justice, they must be accessible or justice is denied. His Honour Wayne Martin, the Chief Justice of the Supreme Court of Western Australia, referred to his State's justice system as the:

*"Rolls Royce of justice systems in the sense that it is the best that money, a lot of money, can buy. But there isn't much point in owning a Rolls Royce if you can't afford the fuel to drive it where you want to go. You can polish it, admire it and take pride of ownership from it but it doesn't perform its basic function sitting in the garage."*

He went on to say:

*"It might be time to consider trading our Rolls Royce for a lighter, more contemporary and more fuel efficient vehicle which will get us where we need to go just as effectively and perhaps more quickly."*

Ever growing consumerism in our society will demand a more "fuel efficient" system accessible to most Australians to replace the current "Rolls Royce" system accessible by only Australians capable of affording the Rolls (or who fall into the small minority who can access civil legal aid).

## 2. Recommendation 8.1 – Pre-Action Protocols

### 2.1. Pre-Action Protocols

IMF supports the development and use of 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:

- (i) encourage the exchange of early and full information about the prospective legal claim;
- (ii) enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and
- (iii) support the efficient management of proceedings where litigation cannot be avoided.<sup>13</sup>

In Australia, the Family Court adopted a number of pre-action protocols in 2004. Rule 1.05 of the Family Law Rules 2004 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>14</sup>

IMF’s experience as a consumer of federal dispute resolution services suggests that despite the advances made by extensive case management in recent years, excessive costs and delays remain prevalent in the civil justice 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”. A 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 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>15</sup>*

<sup>13</sup> Department for Constitutional Affairs, Civil Procedure Rules, ‘Practice direction – Protocols’ at paragraph 1.4.

<sup>14</sup> See 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>15</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.

## 2.2. 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”).

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>16</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>17</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>18</sup>

The Canadian report says that:

- (i) *“Earlier understanding of the case and consideration of planning options will assist in achieving better resolutions for the parties”;*<sup>19</sup>
- (ii) *“While this process will require 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>20</sup> *and*
- (iii) *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;*
  - *the overall process costs to litigants are reduced to a level proportional to the value, complexity and importance of their dispute;*

<sup>16</sup> “Effective and Affordable Civil Justice”, Report of the Civil Justice Reform Working Group to the Justice Review Taskforce, British Columbia, Canada, November 2006 at page 11.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid at page 14.

<sup>19</sup> Ibid at page 15.

<sup>20</sup> Ibid at page 17.

- *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>21</sup>

IMF submits that the Australian federal civil justice 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. Recommendations 8.2 and 8.3 – Discovery**

Extensive discovery of documents by parties to litigation is a hallmark of our English-derived adversarial legal system. In some cases, obtaining access to a defendant's documents is essential if a claimant is to establish their case and the court is to determine the truth of the matter.

However, IMF agrees with the Taskforce that disproportionate costs (and delays) can be (and frequently are) associated with the provision of discovery and supports the proposal that the ALRC inquire into the effectiveness of different discovery orders in court proceedings.

In IMF's experience, limited, specific orders for discovery can be made at an early stage in proceedings (often in connection with a court-ordered mediation) which will result in at least the principal "high level" documents relating to the issues in the proceedings being disclosed to the parties. IMF commends the approach taken in the "Fast Track" which ordinarily limits discovery to documents on which a party intends to rely or that have a significant probative value adverse to a party's case and which have been located after a "good faith proportionate search".<sup>22</sup> Such orders have materially facilitated the conduct of mediations and have improved the parties' understanding of, and have narrowed, the issues in dispute. Another approach being adopted in litigation funded by IMF is to delay discovery until the parties have exchanged statements by their witnesses of fact and, through this means, have clarified the real issues in dispute.

As an alternative to the exchange of witness statements or the use of interrogatories, IMF submits that the Attorney-General should also consider whether the procedure in Order 24 of the Federal Court Rules, for the taking of depositions, should be employed to allow parties to examine key witnesses at an early stage so as to more clearly identify the issues in dispute and narrow any orders for discovery. A procedure for oral discovery is provided for under the rules of the Supreme Courts of the Northern Territory and Victoria as an alternative to written interrogatories, but the procedure is only available with the consent of the party who is to be examined.<sup>23</sup>

On the other hand, IMF cautions against the implementation of recommendation 8.3, that the court be empowered to order that the estimated cost of discovery requests should be paid for in advance by the requesting party. Unless very carefully managed by the court and subject to a right by the requesting party to oversee the discovery process, a measure along these lines could be open to abuse by defendants claiming or ensuring that prospective discovery will be hugely expensive, thereby effectively shutting out the claimant by means of a prohibitive costs order.

### **4. Recommendation 8.4 – Expression of Preliminary Views by the Judge**

IMF is not opposed to the proposal that a judge ought to be able to express a preliminary view on an issue in litigation without there being an apprehension of bias, as the expression of a preliminary view may significantly assist the parties to reach an early resolution of their dispute.

<sup>21</sup> Ibid.

<sup>22</sup> Federal Court, of Australia, Practice Note CM8, Fast Track, Part 7 – Discovery.

<sup>23</sup> Cairns B, Australian Civil Procedure (7th edition, 2007), 317-318.

However, the precautions noted in the Taskforce's report at page 109, as expressed by the High Court in *Antoun v The Queen* [2006] HCA 2 (i.e. the view must be expressed tentatively and not suggest the judge has a closed mind on the ultimate issues and that argument must be heard before a final decision is made) must be observed, as should the parties' rights to natural justice in general.

The Judge should indicate to the parties that he or she is expressing a tentative view. The parties should have the right to request such a view if warranted to assist the parties to narrow the issues in dispute or more efficiently resolve their differences. In IMF's view, the professionalism of the federal judiciary and the public's perception of its unbiased conduct enables a relaxation of the rules on bias.

## 5. Recommendations 8.5 and 8.6 - Case Management and Dispute Resolution are Central Judicial Functions

### 5.1. Creating a Less Adversarial System

By employing 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 civil justice 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 civil justice 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>24</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>25</sup>

Davies points to six harmful effects of the adversarial system:

- (i) it discourages the limiting of issues and disclosure of unfavourable information;
- (ii) it obscures the advantages of an agreed solution;
- (iii) it provides too few opportunities for adjudication otherwise than by a full trial;
- (iv) it tends to make advocates of the witnesses;
- (v) it advantages the richer litigant; and
- (vi) it permits the parties to dictate the pace and shape of the litigation.<sup>26</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 civil justice 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*

<sup>24</sup> See Davies G, "Civil justice reform: Some common problems, some possible solutions", (2006) 16 *Journal of Judicial Administration* 5.

<sup>25</sup> *Ibid.*

<sup>26</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.

*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>27</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>28</sup>

## 5.2. Demotivating Costs and Delays

In addition to the matters previously addressed, it is imperative that incentives for the judiciary, parties, lawyers, funders and insurers to increase costs or cause delay, are minimised.

This would involve:

- (i) the judiciary acknowledging parties before the Court have legitimate consumer interests in the court achieving its Overriding Purpose;
- (ii) plaintiffs and defendants being penalised with cost orders for only offering to settle the claim at more than or less than any subsequent judgment;
- (iii) parties and their legal advisors being potentially subject personally to costs orders for failing to comply with the Overriding Purpose;
- (iv) lawyers having to obtain court approval for payment of fees above their initial budgets;
- (v) funders and insurers being directly liable for adverse cost orders and the terms of any funding or insurance being disclosed to the other parties and the court; and
- (vi) defendants and insurers being liable to pay the claimant:
  - (1) the return they made on investing the judgment proceeds; and
  - (2) half of any tax deduction obtained for their defence expenses where the claimant's expenses are not tax deductible.

## 5.3. Case Management

"Case management" is now commonplace in most Australian Courts. More active "management", however, is needed to avoid delay and the incurring 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, as has been referred to.

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 directions hearings and pre-trial conferences are still essentially about timetabling and setting milestone dates.

<sup>27</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>28</sup> Cannon A, "Effective Fact Finding", *Civil Justice Quarterly* 25 (July) 2006, 327.

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>29</sup>

#### 5.4. Judicial Appointments and Judicial Education

The creation of a less adversarial system and enhancement of case management regimes will require Judicial appointments and education to be targeted towards the acceptance by the judiciary that it is providing a service and not merely making judgments in respect of parties' rights and obligations.

### 6. Recommendation 8.7 – Fast Track

The Federal Court is to be congratulated on the design and implementation of the Fast Track process<sup>30</sup> and, in particular, in respect of the methodology for dealing with discovery.<sup>31</sup> Demand for the process will grow as it expands throughout Australia, hopefully with the support of all of the judiciary. The Rocket Docket procedure is consistent with Martin CJ's remark that:

*"It might be time to consider trading our Rolls Royce [civil justice system] for a light, more contemporary and more fuel efficient vehicle which will get us where we need to go just as effectively and perhaps more quickly."<sup>32</sup>*

However, there are two limitations on the Fast Track being more widely used:

- (i) matters must currently have an estimated trial length of no more than 8 days to be eligible for inclusion on the list (this restriction needs to be dropped); and
- (ii) lawyers need to be protected from being sued by their clients if they have adequately disclosed the risks of the Fast Track as not being equivalent to the normal "Rolls Royce" civil procedure and have then taken informed instructions to proceed on the Fast Track.

### 7. Recommendation 8.11 – Class Actions

#### 7.1. Introduction

IMF considers that, in general, a viable regime for class actions has developed in Australia since the introduction of Part IVA of the Federal Court of Australia Act 1976 (Cth) in 1992. IMF submits that the foundation policies which lay behind the enactment of Part IVA, particularly in ensuring access to justice for multiple claimants with small individual claims (as noted in the Taskforce's Report<sup>33</sup>), are increasingly being met.

<sup>29</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.

<sup>30</sup> Federal Court of Australia, Practice Note CM 8, Fast Track (25 September 2009).

<sup>31</sup> Spigelman CJ of the said in a widely publicised speech in March 2007 said: "*in the area of commercial disputation, the costs of discovery are more than the commercial community is prepared to tolerate. When senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often over \$2 million, the position is simply not sustainable.*"

<sup>32</sup> Transcript of Proceedings, Welcome to the Honourable Chief Justice Martin to the Supreme Court of Western Australia, 1 May 2006.

<sup>33</sup> At page 114, namely "to promote the efficient use of public and private resources in resolving disputes and enhance access to justice by providing a means by which similar claims which, by themselves, might be too small to be worth pursuing, could be considered together."

The range of issues raised by the class action procedure is nevertheless wide and IMF recognises that controversy exists around a number of aspects of class actions, including whether claimants need to have a claim against all defendants, whether class actions engender excessive “satellite litigation” and whether class actions should be purely of an “opt out” nature (at present a class action can be validly commenced on either an opt in basis or as an opt out proceeding). The full range of issues cannot be addressed in these submissions. IMF will be happy to contribute in detail to any review of the Part IVA class action provisions which the Taskforce recommends be commissioned by the Attorney-General.

At this time, however, IMF records its strong support of the current opt-in arrangements for class actions funded by litigation funders as being both consistent with the terms of the legislation itself and as necessary to achieve the legislature’s primary objective of ensuring access to justice for as many victims of large-scale misconduct as is practically possible.

It is a truism that class actions have to be paid for. IMF has funded many of the key shareholder class actions commenced in the Federal Court and often commercial litigation funding is the only realistic means available to claimants to meet the high costs and risks of such actions.

This will remain the case in the absence of significant public funding for class actions (such as the creation of the “Justice Fund” recommended by the Victorian Law Reform Commission, which seems unlikely in the current economic climate) or much greater activity by regulators using their powers to recover compensation for those harmed by breaches of the market protection laws (which is also unlikely given the regulators’ stretched budgets and prosecutorial priorities). The only other substantial source of funding for class actions are the “no win, no fee” arrangements offered by those few law firms with the capacity to fund large-scale litigation, but their financial means are limited.

However, the viability of litigation funding for class actions was uncertain until the decision of the Full Federal Court in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200 (“*Multiplex*”).

In *Multiplex* the Court held that it is permissible under Part IVA to define the group by reference to those claimants who have entered into a litigation funding agreement with a particular funder. The Court’s decision recognised the express use of the words in section 33C(1) of the Federal Court of Australia Act 1976 which permit a class action to be brought by a representative on behalf of “some or all” of the persons affected by the impugned conduct. This decision ensures that it is economically rational for a funder to meet the substantial costs of a class action as the funder will be entitled to fund proceedings limited to claimants who have agreed to contribute to the funder’s costs and commission.

The Full Federal Court thus averted a potentially serious “free rider” problem which had developed under the Federal Court’s earlier decision in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394. In *Dorajay* Stone J ruled as impermissible a criterion restricting group membership to clients of a particular law firm, Maurice Blackburn Cashman (which, in turn, was funded by IMF). Stone J considered that the law firm criterion was inconsistent with what her Honour perceived was a legislative preference for “open class” or “opt out” proceedings under Part IVA.

This approach exposed the funder to the risk that the funder’s costs could not be recovered from the entire class which had benefited from the funder’s investment, as explained further below. If *Dorajay* had prevailed, it is likely that litigation funders would have withdrawn from funding Part IVA proceedings.

## 7.2. Summary of IMF’s Class Action Submissions

In summary, in relation to the particular issues raised in this part of the Report, IMF submits that:

- (i) IMF considers that the current “opt-in” arrangements for class actions funded by litigation funders, as interpreted by the Full Federal Court in *Multiplex*, are appropriate

and further notes that broader issues relating to the regulation of litigation funders by the Australian Securities and Investments Commission are currently under review by the Australian Government. Issues relating specifically to the activities of funders, and which are not limited to class actions *per se*, should be addressed in the context of that review and not as part of the Access to Justice Taskforce;

- (ii) Part IVA should be further amended to enact a specific power for the Federal Court to make orders, in appropriate cases, for a litigation funder's outlays (including all of the representative's funded legal fees and disbursements) and commission to be payable by all group members who stand to benefit from the outcome of the funded class action, whether the group members have entered into a funding agreement with the funder or not;
- (iii) the problem of excessive, opportunistic and deliberately wasteful "satellite litigation" at the interlocutory stage in proceedings is not unique to class actions and has to be addressed through broader reforms to the civil justice system (principally through increased active case management);
- (iv) it does not consider that the Federal Court's currently wide powers to terminate or "declass" a class action proceeding ought to be limited or removed as these powers are preferable to instituting a class certification procedure which would lead to an undesirable "race to the courthouse" by plaintiffs' counsel as occurs in the US and engender excessive litigation before the proceedings can begin in earnest;
- (v) an effective class action regime is of paramount importance to the effective enforcement of market protection legislation in Australia and any review should pay close attention to the "behaviour modification aspects" of class actions; and
- (vi) it supports the introduction of Cy-Près remedies but doubts whether in practical terms regulatory agencies are likely to become more involved in the initiation and prosecution of class actions for the recovery for damages for victims of market misconduct.

IMF expands on its submissions below.

### 7.3. Market Protections Need to be Enforceable

Unless the law can actually protect, and ultimately provide compensation to, victims of illegal conduct the market protection regime established by the Corporations Act 2001, the Trade Practices Act 1974 and related legislation risks becoming illusory or, worse, an irrelevancy. If the laws are not enforceable, then one of the main tools for preventing market misbehaviour is severely restricted.

Very few cases alleging breaches of continuous disclosure have been brought, either by the corporate regulator or by investors.<sup>34</sup> The dearth of private actions is *not* illustrative of few companies acting in breach of the market protection regulations, but rather is due to the access to justice barriers inherent in the class action regime and more broadly in the civil justice system.

### 7.4. The Importance of Encouraging Self Regulation

Compensatory enforcement of statutory market protections cannot be left to regulators alone as regulatory budgets are limited and regulators have diverse policy considerations that cause the limited actions that are taken to be in respect of a small proportion of the breaches in our markets. Moreover, any actions that are taken by regulators are not focused on compensating

<sup>34</sup> There are only three Court decisions on continuous disclosure of any substance. *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* [2003] FCA 1369 and *Australian Securities and Investments Commission, in the matter of Chemeq Limited v Chemeq Limited* [2006] FCA 936 were actions brought by the Australian Securities and Investments Commission; *Kim Riley in his capacity as trustee of the KER Trust v Jubilee Mines* [2006] WASC 199 was brought by a shareholder (who successfully recovered damages).

investors, but on recovering “civil penalties” (namely fines that are paid to the Treasury).

Consumers, shareholders and lenders who are active in the markets are more capable than regulators of determining which breaches of the market protection laws are significant. Commenting on the identification of cartel offences in the United States, William E Kovacic, general counsel of the Federal Trade Commission, said:

*“Private participation in monitoring the behaviour of actors subject to the law can provide more effective detection of violations when the private monitor is closer than a public inspector to the relevant information.”<sup>35</sup>*

Regulators in Australia have also recognised the utility of private investors seeking to enforce the corporate and trade practices laws. This recognition is based on the premise that a positive public good is achieved when a private litigant enforces a publicly endorsed standard contained in a statute. Moreover, there is no evidence to suggest the public good is harmed when a private action is unsuccessful, because it is that person, or their funder, who bears the costs of the unsuccessful litigation, not the public regulators.

The chairman of the Australian Competition and Consumer Commission, Graeme Samuel, said in 2005:

*“There seems to be a growing recognition by victims of cartels that they are entitled to seek redress. This coincides with an increased interest from private legal firms (and litigation funders) to pursue such private claims. Compensating victims in private damages actions has been the norm in North America for some time. My expectation is that compensation is set to become more common in Australia too, and this will surely act as a further deterrent.”<sup>36</sup>*

Finkelstein J in *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 noted the role of representative proceedings in acting as a deterrent when contemplating the scenario of the representative proceeding ceasing and each group member being left to assert his or her rights alone and said:

*“Most will be forced to give up. That result is unfair for two reasons. It is unfair for those group members who will not be able to pursue any claim at all. It is also unfair because it would undermine the deterrent effect of the existence of sanctions for contraventions of the law regulating securities.”<sup>37</sup>*

## 7.5. Ensuring Viable Class Actions – Excluding “Free Riders”

Litigation funders enable representatives to assume the Litigation Risks principally by agreeing to pay the costs and disbursements in respect of the litigation and any adverse costs that may become payable should the litigation be unsuccessful.<sup>38</sup>

However, in order for funding to be made available on an equitable basis, the funder’s outlays and fees must be spread across all members of the represented group. This raises two separate options. Either funding is made available only when each person seeking to litigate has agreed contractually with the funder to pay the costs of the funding (including the funder’s fees) from sums recovered and so the class is restricted to the funder’s clients. Alternatively, if an open class is desired, then the Court needs to have the power to order that a funder’s costs and return are recoverable from the class as a whole and are not restricted to those group members who have entered into a litigation funding agreement with the funder.

<sup>35</sup> Kovacic W, “Private Participation in the Enforcement of Public Competition Laws”, speech to Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue, May 2003.

<sup>36</sup> Samuel G, “The enforcement priorities of the ACCC”, speech to Competition Law Conference, 12<sup>th</sup> November 2005 at page 26.

<sup>37</sup> At [54].

<sup>38</sup> The UK Civil Justice Council in its July paper; “Improved Access to Justice – Funding Options and Proportionate Costs – The Future of Funding of Litigation – Alternate Funding Structures”, stated (at page 70), “funding was the greatest barrier to bringing legitimate multi-party consumer redress claims”.

This issue highlights the free rider issue which, if allowed free rein, will diminish the willingness of funders to meet the costs of class actions and hence will limit the capital available to fund litigation.

Justice Finkelstein identified the practical reasons in favour of excluding free riders in *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 where his Honour said:

*“... the only persons excluded from the group are free riders, that is persons who make no direct or indirect contribution towards the costs of the action. In my opinion this is not inconsistent with Part IVA... a group that excludes free riders cannot be criticised. On the contrary, there are economically rational reasons to establish such a group. The most obvious is that it provides each potential group members with an incentive to agree to contribute. It also keeps the cost or the burden of purchasing the costs down for each individual. There are other advantages in keeping group numbers down. For one thing, it is probably easier to settle a smaller claim. For another, there is a greater prospect of obtaining a higher percentage of the amount claimed by way of compromise. Even respondents may benefit from the prospect of a smaller payout. Indeed, it is odd to hear a complaint from a defendant that there are too few plaintiffs.”*<sup>39</sup>

Section 33C of both the Victorian and Federal class action regimes provides that a proceeding may be brought on behalf of “some or all” of the claimants. As noted by Morabito, this demonstrates that:

*“...there is no requirement to the effect that a class proceeding needs to be brought on behalf of each and every person whose claim satisfies the three commencement prerequisites. On the contrary, we have an express legislative conferral, upon class representatives, of the discretion to exclude from the ambit of class proceedings some of the potential claimants.”*<sup>40</sup>

As discussed, despite this provision Stone J of the Federal Court has found that:

*“...the requirement that group members opt in to the proceeding to be inconsistent with the terms and policies of Part IVA.”*<sup>41</sup>

The practical effect of this decision was that litigation funders became unwilling to provide funding for proceedings brought under Part IVA of the *Federal Court of Australia Act* (or Part 4A of the *Victorian Supreme Court Act*).

Morabito notes it is “troubling” that the drafters of the Federal Court Act failed “to provide aspiring class representatives with the financial tools required to meet the significant costs entailed in instituting and running a class proceeding that is governed by an opt out device”.<sup>42</sup> He says prohibiting the proceedings from being brought on behalf of some persons (those that wish to have the claims pursued on their behalf) would “constitute a myopic approach as it would entail dealing with the symptom rather than the cause of the problem”. He concludes that the rejection of a mechanism that restricts the class to persons who wish to have claims pursued on their behalf “on the basis that it prevents a significant proportion of claimants from gaining access to justice, represents a self-defeating exercise if it results in access to justice becoming an unattainable goal for all claimants”.<sup>43</sup>

As discussed above, these issues have now been satisfactorily resolved by the Full Federal Court in *Multiplex*. The Full Federal Court’s decision ought to be expressly recognised by an amendment to Part IVA such that the Act makes clear that the statutory class action procedure is able to be utilised by a group or groups of individuals who are aggregated together, including where such individuals or entities consent to the pursuit of proceedings on their

<sup>39</sup> At [48].

<sup>40</sup> Morabito V, “Class Actions Instituted only for the Benefit of the Clients of the Class Representative’s Solicitors”, 29 *Sydney Law Review* 5 (2007) at 13.

<sup>41</sup> *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 1483 at [125].

<sup>42</sup> Morabito, n 40 at 38.

<sup>43</sup> *Ibid* at 40.

behalf. A clearly expressed amendment to the Part IVA regime entitling representatives to exclude free riders and only include people willing to share the cost of the proceedings ought to be considered.<sup>44</sup>

This would be a partial step in making representative proceedings fulfil their objectives, including providing a remedy in favour of persons who may not have the funds to bring a separate action or who may not bring an action because the cost of litigation is disproportionate to the value of the claim.

#### 7.6. Additional Reform – “Common Fund” Orders

Part IVA should be further amended to enact a specific power for the Federal Court to make orders, in appropriate cases, for a litigation funder’s outlays (including all of the representative’s funded legal fees and disbursements) and commission to be payable by all group members who stand to benefit from the outcome of the funded class action, whether the group members have entered into a funding agreement with the funder or not.

This reform would enable the class action regime to become fully effective for both “opt in” and “opt out” class actions and would maximise the funded class action’s capacity to provide access to justice for the greatest number of claimants. This is particularly the case where the respondent’s misconduct has caused widespread losses, such that it is very difficult or expensive to locate all of the affected victims.

The funder’s position in relation to an “open class” proceeding, in which not all of the claimants who stand to benefit from the funded litigation have contractually agreed to contribute to the costs of bringing it, is analogous to the position faced by the claimant lawyers in the GIO shareholder class action, Maurice Blackburn Cashman (“MBC”). MBC conducted the GIO proceedings on a “no win, no fee” basis. GIO sought to settle directly with group members, which included both GIO investors who had retained MBC as their solicitors and investors who had not done so. In these circumstances, Moore J observed:

*“If there are individual settlements, the benefit derived by any unrepresented shareholder from a settlement would have flowed, in part, from the prosecution of the representative proceeding by Mr King [the representative] effectively underwritten by MBC. It may ultimately be appropriate to ensure that any unrepresented shareholder who does settle, contributes to the costs of prosecuting the representative proceeding. If they do not, there is a real possibility that the remaining members of the representative group will have to bear, proportionally, a greater share of the costs of maintaining the proceeding in the event the proceeding is ultimately settled on some collective basis either before or after the adjudication of any issues. If an individual shareholder who settles has to contribute to the costs of prosecuting the representative proceeding, it would be analogous to the process contemplated by s 33ZJ.”<sup>45</sup>*

His Honour did not consider it necessary to finally decide the point, but went on to say:

*“In my opinion, if offers of settlement are ultimately made by GIO to unrepresented shareholders, it would be appropriate to consider establishing (and I presently think it probably would be appropriate), by direction of the Court, a scheme in which some portion of any amount offered to settle a particular individual claim was reserved so the Court could, if settlement was effected, later consider whether all or any of the sum should be applied to satisfy the solicitor client costs of Mr King as the representative party.”<sup>46</sup>*

<sup>44</sup> This would create certainty and reduce satellite litigation given that the Full Court did not overrule *Dorajay* and the *Multiplex* decision itself might be challenged on appeal in unrelated proceedings.

<sup>45</sup> *King v AG Australia Holdings Limited (formerly GIO Australia Holdings Limited)* [2002] FCA 872 at [59].

<sup>46</sup> *Ibid* at [60].

Ultimately, the proceedings were settled on the basis that the respondent would pay the entire costs incurred by the representative in the litigation. The Court approved this settlement.<sup>47</sup>

The legal position is far less clear for funders than it is for the class representative's solicitors. Part IVA contains an express provision, in s 33ZJ, which authorises the Court to make an order permitting the payment, out of any damages award, of a successful representative's reasonable costs which are not recovered from the respondent. The Court also has general powers in relation to the payment of legal costs. These do not extend to litigation funders' fees.

In IMF's submission the position should be made clear by amending legislation and the Court should be authorised to make orders that a funder's costs and commission be paid out of the any damages or approved settlement payable in respect of the class as a whole and not just those members of it who have signed a funding agreement.

### 7.7. Enabling *Cy-Près* Orders

Federal Parliament ought to consider the introduction of a new judicial power (or the Judiciary may consider clarification of existing powers) to order *cy-près* type remedies (i.e. an order that the respondent pay a lump sum calculated by reference to the benefit obtained by the respondent resulting from the contravention) in class action proceedings where:

- (i) there has been a proven contravention of the law;
- (ii) a financial or other pecuniary advantage ('unjust enrichment') has accrued to the respondent as a result of such contravention;
- (iii) loss suffered by others is able to be quantified; and
- (iv) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.

Enabling Courts to make *cy-près* orders in these circumstances will make consumer protection laws more enforceable.

Parliament has passed consumer protection laws (e.g. the continuous disclosure provisions in the *Corporations Act* and the anti-cartel provisions in the *Trade Practices Act*) to protect the fair operation of markets. However, if the laws are practically unenforceable due to the Litigation Risks, the protections do not serve their purpose.

Representative proceedings could be made to serve their purpose, as consumer protection laws could be made to serve their purpose, by enabling the Court to order the creation of a *cy-près* fund from which compensation could be distributed by Court order, outside the adversarial process.

Maurice Blackburn has noted that "*This reform would reduce the cost and complexity of representative proceedings litigation, result in the modernisation and simplification of the rules in civil procedure, and promote fairness and access to justice*".<sup>48</sup>

It is also the inevitable route down which the Courts will proceed for small claims if the concept of proportionality is to be embraced. Otherwise, small consumer claims will waste, leaving defendants unjustly enriched and the consumer protection regimes failing to fulfil their policy objectives.

<sup>47</sup> Cashman P, *Class Action Law and Practice* (Federation Press, 2007), page 432.

<sup>48</sup> Refer to paragraphs 43-71 in the submission by Maurice Blackburn Cashman Pty Ltd to the Victorian Law Reform Commission Civil Justice Review.

## 8. Recommendations 9.1 and 9.2 – Cost Recovery

While IMF broadly concurs with these recommendations (particularly 9.2 in relation to the pricing of “long hearings” – which will need to be defined), IMF makes the following observations.

First, increased cost recovery, unless carefully targeted, risks becoming a barrier to justice in itself.

Second, cost recovery measures are intended to send appropriate pricing signals to litigants, especially well-resourced ones who tie up court resources with “mega-litigation”. Increased cost recovery might result in a tendency to curb such litigants’ use of taxpayer-funded facilities. But presumably the wealthy litigants who are the source of the mischief are least likely to be influenced by higher costs and charges.

Third, if users of the court system are expected to foot a higher proportion of the costs of running that system, they may also expect higher standards of service delivery and outcomes from the courts themselves. This expectation, and the courts’ response to it, may assist the achievement of the Taskforce’s broader aims.

Fourth, as the Taskforce correctly recognises, unless any cost recovery measures are applied consistently across the Federal and the State and Territory court systems, competition will inevitably develop (or intensify) between the Federal and State systems. Again, this may be advantageous to the improved performance of the civil justice system generally.

## 9. Recommendation 9.3 – Litigation Budgets

### 9.1. Introduction

The provision of cost estimates by lawyers 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>49</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>50</sup>

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 are 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.

<sup>49</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.

<sup>50</sup> Peysner J, “Predictability and Budgeting”, *Civil Justice Quarterly* 23(Jan) 2004 15.

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

## 9.2. The Courts

Provision of litigation budgets will allow the Courts to:

- (i) monitor excessive costing and determine that anticipated expenditure is proportional;
- (ii) monitor excessive timelines to ensure that cases are brought on expeditiously and without unnecessary delay;
- (iii) better facilitate case management by allowing proceedings to be monitored by reference to timelines and expected expenditure;
- (iv) allow the Court to refer to budgets rather than time costing when reviewing lawyers' claims for solicitor/client costs; and
- (v) 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 motivate the parties to achieve the Overriding Purpose and de-motivate delay and expense.

## 9.3. 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 litigation commencing.

This submission argues that adverse cost orders should be capped at a level set at the PLC by the Court having regard 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 favourably to the current situation where the uncertainty concerning predicting adverse costs is a material barrier to entry to the civil justice system.

## 9.4. The Lawyers

This proposed disclosure will also benefit the legal representatives of the parties in that they will be better able 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. This is the trade off for obtaining a more contemporary and more fuel efficient vehicle than the current 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 civil justice system is not one where the judges, parties and their lawyers work towards common objectives.<sup>51</sup>

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<sup>51</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."

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>52</sup> A Bill was drafted to implement the Report but the issue has now been subsumed into the Federal Uniform Court Rule process.

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.

#### **10. Recommendation 12.4 – Federal Justice Roundtable**

IMF supports the proposal that the Attorney-General's Department should convene a Federal Justice Roundtable to comprise members of the judiciary, court administrators and what might be termed representatives of "major users" of the civil justice system. IMF submits that the litigation funding industry could usefully contribute to the deliberations of such a committee, given the increasing use of litigation funding in Australia and the funders' in-depth experience in the federal court system.

IMF has worked closely with the Civil Justice Council in the United Kingdom for many years. The Civil Justice Council is referred to in the Report as an overseas' example of a broadly-based consultative group. IMF has provided assistance, submissions and information to the Civil Justice Council in respect of a number of its inquiries, principally on improving access to justice through collective actions (including funding options and proportionate costs), the regulation of third party litigation funders in the UK and in connection with the inquiry chaired by Lord Justice Jackson on the Review of Civil Litigation Costs. IMF has found the Civil Justice Council to be an effective law reform body through its diverse membership, practice of widely consulting the community on proposed law reform and production of expert reports and recommendations.

IMF believes that the proposed Federal Justice Roundtable in Australia could provide an equally effective forum to bring the courts and the major users of the courts' services together in a way that facilitates effective and practical law reform.

#### **IMF (Australia) Ltd**

Dated: November 2009

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<sup>52</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.