Victorian Law Reform Commission Civil Justice Enquiry

Summary of draft civil justice reform proposals as at 28 June 2007
Exposure draft for comment

Executive overview

There are no simple solutions to the complex problems arising out of the high cost and often protracted delays characteristic of much modern civil litigation, particularly in the higher courts.

In many respects, judicial officers have been in the forefront of reform and innovation. Law reform bodies also have an important role to play. However, reforms often do not have the desired effect and may give rise to unintended adverse consequences.

In the course of its civil justice enquiry the Victorian Law Reform Commission has to date identified a number of areas where it is considered that reforms will have a major impact not only on the procedures for conducting civil litigation and on costs and delay, but also on the 'culture' of dispute resolution.

The draft reform proposals formulated to date encompass:

- new requirements for early communication and disclosure, prior to the commencement of proceedings, with a view to reducing the incidence of litigation
- new standards governing the conduct of participants in the civil litigation process
- more clearly defined 'dispute management' powers for courts
- additional alternative dispute resolution options and more clearly delineated judicial powers to facilitate and participate in ADR processes
- additional resources and educational programs to optimise the use of ADR processes
- a new framework for judicial control of expert evidence
- a new procedure to enable parties to obtain relevant information and to test the strength and weakness of the other parties case prior to trial
- a number of proposed changes designed to reduce the costs of litigation, to achieve greater determinacy and proportionality of costs, to reduce the cost and complexity of quantifying costs recoverable from the losing party and to facilitate protective costs orders in public interest litigation
- a new judicial power to allow the court to order *cy pres* or public interest distributions of unclaimed damages in class actions and
- a new self funding body to provide financial assistance in meritorious cases, including by way of indemnity in respect of adverse cost orders or orders for security for costs

In its report due in September 2007 the Commission will also be examining a number of other options for reform, including:

- additional enhanced case management powers and procedures
- means of providing assistance to self represented litigants
- procedures for the pre-trial disposal of unmeritorious claims and defences
- the harmonisation of existing rule making bodies and
- miscellaneous ad hoc reforms designed to remedy technical problems

Mindful of the difficulties of devising effective solutions to intractable problems the commission also proposes to recommend the establishment of a new body, the Civil Justice Council, to facilitate implementation of the proposed reforms, to monitor the impact of such reforms and the operation of the civil justice system generally and to consider further reforms. Comprised of representatives of various stakeholder groups, the role of the Civil Justice Council would be to continue to work with such stakeholders in the ongoing evaluation and civil justice reform process.

Summary and key policy objectives

In the first stage of the enquiry, for the 12 month period September 2006 to September 2007, 12 areas have been identified where it is proposed to make recommendations for reform in the report to be submitted to the Attorney General on 4 September 2007. This includes the topic of 'miscellaneous technical reforms' which encompasses a number of reforms dealing with specific ad hoc issues.

In stage 1 of the enquiry the major reform proposals address the following topics and have the policy objective(s) referred to below:

1. **STANDARDS OF CONDUCT**: One of the key policy objectives is to improve the standards of conduct of participants in the civil justice system so as to facilitate dispute resolution, narrow issues, reduce costs and delay. One proposed method is through the introduction of statutory 'Overriding Obligations'.

2. **DISCLOSURE OF INFORMATION AND CO-OPERATION BEFORE PROCEEDINGS ARE COMMENCED**: Another key policy objective is to accelerate disclosure of relevant information, and provide timeframes for communication and standards of sensible conduct *before* proceedings are commenced so as to avoid the necessity for litigation in many cases. This is proposed through the introduction of 'Pre-Action Protocols'.

3. **GETTING TO THE TRUTH BEFORE TRIAL**: Another objective is to simplify and accelerate the processes for obtaining relevant information and documents once proceedings have commenced but before trial, with minimal use of judicial resources and minimal cost. This is proposed through the introduction of a new pre-trial procedure for the oral examination of persons with information relevant to the dispute.

4. **ALTERNATIVE DISPUTE RESOLUTION**: Another key policy objective is to encourage the use of alternative dispute resolution and to empower courts to make more frequent and more efficient use of a wide variety of alternative dispute resolution mechanisms, even without the consent of parties. This is proposed through the introduction of more clearly defined statutory powers for courts and through various educational measures.

5. **EXPERT EVIDENCE**: A further key policy objective is to give the courts more clearly defined and comprehensive powers in relation to the use of expert evidence so as to facilitate less adversarial, more objective and less expensive evidence at trial. It is proposed that the procedures for expert witnesses recently introduced in New South Wales be adopted in Victoria with some modifications.

6. **CLASS ACTIONS AND PUBLIC INTEREST REMEDIES**: In addition to two other reforms designed to remove technical barriers to the conduct of some types of class actions (discussed below) it is proposed to confer on the Supreme Court power to order *cy pres* or public interest distribution of damages in class action proceedings where class members otherwise entitled to damages cannot be identified or where identification and proof of entitlement is not practicable or cost effective.

7. **ACCESS TO JUSTICE AND LITIGATION FUNDING**: In order to improve access to the courts it is proposed to introduce a new litigation funding mechanism, which would seek to be self- funding by deriving income by way of a share of the proceeds in funded cases. The proposed body would not only provide support for meritorious cases and public interest cases but would also provide an indemnity in respect of adverse costs and meet any orders for security for costs made against the assisted party.

8. **SELF REPRESENTED LITIGANTS**: The complementary policy objectives are to improve the assistance available to self- represented litigants with meritorious claims or defences and to provide a more effective mechanism to filter out at an early stage claims or defences without merit.

9. **COSTS**: In order to monitor the proposed reforms, to facilitate further reforms and to provide a mechanism for direct stakeholder participation in the ongoing review and reform process it is proposed to establish a new body (the Costs Council) which would operate as a division of the proposed Civil Justice Council (referred to below). Additional policy objectives of the proposed reforms in relation to costs are (a) to achieve greater proportionality and determinacy of legal costs, including through the introduction of fixed costs, and (b) to reduce the transaction costs, delays and unfairness in procedures and principles governing the recovery of costs by successful parties.

10. **CASE MANAGEMENT** : Apart from those areas of 'case management' falling under the other topics identified above, the commission is presently considering various means by which the courts may be given more clearly defined case management powers.

11. **ONGOING REVIEW AND CIVIL JUSTICE REFORM**: It is proposed to establish a new body (the Civil Justice Council), comprised of representatives of various stakeholder groups, which would have a major role in the ongoing review and reform of the civil justice system.

12. **MISCELLANEOUS TECHNICAL REFORMS**: Apart from the reform proposals referred to above, and explained in more detail below, in stage 1 of the civil justice enquiry the commission has identified a number of other specific ad hoc areas where law reform may be required.

Explanatory note: The following summary of the present *draft* proposals and the explanatory information does not incorporate the detailed background papers and research on the topics in question completed and considered by the commission to date. It also does not seek to identify all of the relevant legal or policy considerations. This documentary material is voluminous and an edited version will be incorporated in the report due to be completed in September 2007. That report will also summarise the submissions received by the commission to date. For present purposes, comments are being sought on the specific proposals outlined below. Comments received by **Friday 27 July 2007** will be considered by the commission before the proposals are finalised.

1. STANDARDS OF CONDUCT

It is proposed that new statutory provisions be introduced to (a) define the 'overriding obligations' of participants in civil proceedings and (b) to more clearly define the 'overriding purpose' sought to be achieved by the courts in civil proceedings.

1.1 Overriding obligations imposed on participants

It is proposed to specify various legal obligations and duties to regulate the manner in which civil proceedings are conducted in the Magistrates' Court, the County Court, the Supreme Court and the Court of Appeal. The obligations will be imposed on those who are involved in the civil justice system, including the parties, lawyers and various other 'participants'.

A statement of overriding obligations and duties (the 'overriding obligations') is proposed for imposition on:

- the parties to a civil proceeding;
- the lawyers or any other representatives acting on behalf of the parties;
- any law practice acting on behalf of a party to a civil proceeding; and
- any person providing any financial or other assistance to any party involved in a civil proceeding, including insurers or providers of funding or financial support, in so far as such person exercises any direct or indirect control or influence over the conduct of any party; and
- employees and agents of parties, lawyers, law practices and persons providing financial or other assistance through means which involve the exercise of any direct or indirect control or influence over the conduct of any party

(referred to collectively as the 'participants').[1]

It is proposed that these overriding obligations be imposed by statute and have priority over other obligations and duties which the participants may have, including any legal, ethical or contractual obligations.[2] To the extent of any inconsistency, the obligations will expressly override any duty that a legal practitioner or law practice may have to act in accordance with the instructions or wishes of the client.[3]

[1] Although it was originally envisaged that these provisions would also apply to any person who is a witness or potential witness, including an expert witness, who has knowledge or documents relevant to any aspect of a civil proceeding it is presently proposed to deal with witnesses or potential witnesses separately.
[2] See n 12 below.
[3] See s 345 (3) *Legal Profession Act 2004* (NSW).

The aim of the proposal is to create a 'model standard' for the behaviour of all who become involved in the civil justice system. The provision would restate and clarify existing obligations and duties, and impose new obligations and duties, with a view to improving standards of conduct within the civil justice system.

This proposal is a response to persistent concerns about the conduct of various participants in the civil justice system. It is also an attempt to provide an approach which is consistent across the system, rather than introducing piecemeal measures to rectify perceived problems in particular areas.

This approach is not entirely new. It is an extension of a trend of civil justice reforms in Australia and other common law jurisdictions. Many of these reforms have been directed to ameliorating the adversarial culture, in particular by emphasising 'cooperation, candidness and respect for truth'.[4]

The proposed overriding obligations are to be confined to conduct in relation to proceedings before a Victorian court. This includes the conduct or defence of any aspect of a civil proceeding, including any interlocutory proceeding and any appeal from any order or judgment in a civil proceeding. It is also intended to include any dispute resolution processes which are ancillary to court proceedings including negotiation and mediation.

It was originally proposed that the provision would also apply to civil disputes prior to the commencement of legal proceedings. It is now proposed that any obligations on persons in dispute prior to the commencement of litigation will be dealt with in the provisions relating to pre-action protocols and conduct (discussed below).

The proposed provision will impose a set of positive obligations and duties and hopefully curtail some negative aspects of 'adversarial' behaviour. It will commence with a statement of a paramount duty to the court in which the proceeding is commenced to further the administration of justice.

Whatever may be the rights and responsibilities of parties, lawyers and financial entities outside of the context of civil litigation, by invoking the processes of the courts for the purposes of dispute resolution litigants subject others to compulsory processes and expense, deploy publicly funded court facilities and judicial and other court resources and have an impact on the capacity of the legal system to deal with other cases. Accordingly, it is the commission's view that high standards of conduct are required on the part of all participants in the civil litigation process. Moreover, it is contended that such high standards of conduct are in the best interests of the parties to the dispute. To date, various governments and government instrumentalities have already adopted 'model litigant' guidelines. The proposal extends this concept to private litigants and others involved in the civil litigation process.

[4] Ross, *Ethics in Law: Lawyers' responsibility and accountability in Australia*, 2005, para 13.16

The content of the paramount duty of each of the participants to further the administration of justice will be elaborated upon to include 10 subsidiary duties. These duties are set in part 1.1.1 below.

This elaboration of the paramount duty has the principal function of informing participants about the manner in which a civil proceeding is to be conducted. Further, whilst the paramount duty is owed to the court some of the proposed subsidiary duties (for instance, to act in good faith), are also owed by the participants to each other.

It is also proposed that the parties to a proceeding be required to certify that they have read and understood the overriding obligations. They will also be required to verify the truthfulness of the facts in any court document. It is proposed that these requirements be implemented by way of rules of court. There will also be a rule requiring legal practitioners to certify that the legal and factual material provides a proper basis for the allegations and denials in any court document. The draft certification provisions are set out in part 1.1.3 below.

It is intended that such overriding obligations will bring about improvements in practices and the conduct of participants in the civil justice system. Thus, the primary objective is improve conduct rather than to punish misconduct. However, in order to ensure compliance it is also proposed to provide for a broad range of sanctions to be imposed for non-conforming behaviour. Some of these would be compensatory as well as punitive. They would include payment of legal costs, expenses or compensation, requiring that steps be taken to remedy the breach and precluding a party from taking certain steps in the proceeding etc.

Although it is proposed that the obligations would extend to employees and agents (as noted above) the sanctions would only be applicable to the primary participants in the civil litigation process, i.e. parties, lawyers, law practices and persons providing financial support (where there is direct or indirect influence or control over the conduct of a party).

It is envisaged that enforcement and sanctions may be initiated either by the court of its own initiative or by any party or any person with sufficient interest. Such application should be made in the court in which the proceeding is heard. The judicial officer most familiar with the proceeding will ideally be required to deal with the application, with the power for the court to order otherwise if necessary. This will largely be influenced by the complexity of the matters in dispute in the enforcement application. Time limits will also be imposed for the making of such an application. However, this will need to take account of the fact that adversely affected parties might not become aware of breaches of the obligations until after the event.

1.1.1 Draft Recommendations in relation to OVERRIDING OBLIGATIONS:

Overriding statutory obligations should be imposed on the participants in civil proceedings in Victorian courts. The draft legislative provisions[5] are as follows:

1. This part applies to the conduct or defence of any aspect of a civil proceeding, including any interlocutory proceeding, and any appeal from any order or judgment in a proceeding ('a civil proceeding') where such civil proceeding is in the Magistrates' Court, the County Court, the Supreme Court or the Court of Appeal (a 'Victorian Court').

   [1A: Query whether there should be an objects clause along the following lines: The objects of this part are to facilitate (a) co-operation between the participants in a civil proceeding, (b) candour and early disclosure of relevant information and (c) early resolution of the dispute, including by agreement of the parties or through alternative dispute resolution processes, at minimal cost to the parties.]

2. This part applies to:

   (a) any person who is a party to a civil proceeding;

   (b) any legal practitioner or other representative acting on behalf of a party to a civil proceeding;

   (c) any law practice acting on behalf of a party to a civil proceeding; and

   (d) any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, in so far as such person exercises any direct or indirect control or [significant?] influence over the conduct of any party in a civil proceeding.

   ('the participants').[6]

3. Each of the persons to whom this part applies has a paramount duty to the Court to further the administration of justice. Without limiting the

[5] This and the other draft provisions contained in this document are merely a first draft in order to identify the substance of the proposed provisions. A further draft will be prepared in the light of comments and suggestions.

[6] Note: although it was originally envisaged that these provisions would also apply to any person who is a **witness** or potential witness, including an expert witness, who has knowledge or documents relevant to any aspect of a civil proceeding it is presently proposed to deal with witnesses or potential witnesses separately. It was also originally proposed that the provisions would also apply to **civil disputes prior to the commencement of legal proceedings**. It is now proposed that any obligations on persons in dispute prior to the commencement of litigation will be dealt with in the provisions relating to pre-action protocols and conduct. Also, the **overriding obligations to be imposed on the court(s)** are proposed to be dealt with separately. This is discussed further below.

generality of this obligation, in respect of all aspects of the proceeding (including any ancillary processes such as negotiation and mediation), each of the participants:

(1) shall at all times **act honestly**;

(2) shall not make any claim or respond to any claim in the proceeding, or assist in the making of any claim or response to any claim in the proceeding, unless reasonably of the belief that the claim or response to any claim (as appropriate) has **merit.**[7]

(3) shall not take any step in the proceeding in connection with a claim or response to a claim, or assist in the taking of any step or response to any step, unless reasonably of the belief that such step is **reasonably necessary to facilitate the resolution or determination** of the real issues in dispute in the proceeding[8];

(4) has a duty to each of the other participants to **act** in **good faith**[9];

(5) has a duty not to (i) engage in conduct which is **misleading or deceptive**, or which is likely to mislead or deceive or (ii) knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive;

(6) shall use reasonable endeavours to **resolve the dispute by agreement** between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes;

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[7] See s 345 *Legal Profession Act 2004* (NSW) which is limited in its application to 'a claim or defence of a claim for damages' and imposes obligations to be satisfied about 'reasonable prospects of success' ..'on the basis of provable facts and a reasonably arguable view of the law'.

[8] There needs to be a separate provision making it clear that these provisions do not apply to preliminary steps, preliminary legal work or preliminary financial or other assistance for the purpose of 'a proper and reasonable consideration of whether a claim, proceeding or defence of a claim or proceeding has reasonable prospects of success': see *s 346 Legal Profession Act 2004* (NSW).

[9] The commission is conscious that the notion of good faith is nebulous. However, it is an obligation which applies in other legal contexts and its parameters have been the subject of a considerable body of law. More recently, there have been a number of primary and appellate decisions concerned with the issue of whether or not parties to a contract are obliged to act in good faith. See, for example: *Rennard Constructions (ME Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Limited v Scarcella & Others* (1998) 44 NSWLR 349; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Vodafone Pacific Limited and Ors v Mobile Innovations Limited* [2004] NSWCA 15; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (Receivers and Managers Appointed) (Administrators Appointed)* [2005] VSCA 228; *Australian Mutual Provident Society v 400 St Kilda Road Pty Ltd* [1991] 2 VR 417; *Central Exchange Limited v Anaconda Nickel Limited* [2002] WASCA 94.
Also, various Commonwealth and State statutes impose obligations of good faith: See e.g. s 31 (1) *Native Title Act 1983* (Cth) discussed in *Western Australia v Taylor* (1996) 134 FLR 211; s 13 *Insurance Contracts Act 1984* (Cth) (utmost good faith); s 27 *Civil Procedure Act* 2005 (NSW); s 11 *Farm Debt Mediation Act* 1994 (NSW).

(7) where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to **narrow the real issues** remaining in dispute;

(8) shall use reasonable endeavours to ensure that the legal and other **costs i**ncurred in connection with the proceeding are minimized and proportionate to the complexity or importance of the issues and the amount in dispute;

(9) shall use reasonable endeavours to act promptly and to minimize **delay**;

(10) has a duty to **disclose**, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute the proceeding, other than any documents the existence of which is protected from disclosure (a) on the grounds of privilege[10] which has not been expressly or impliedly waived[11]or (b) under any other statute.

4. The obligations imposed by this part shall **override** any legal, ethical, contractual or other obligation which the person may have in so far as they are inconsistent with such obligations.[12] The obligations in this part apply to any legal practitioner engaged on behalf of a client in connection with a civil proceeding despite any obligation that the legal practitioner or law practice may have to act in accordance with the instructions or wishes of a client.[13]

PENALTY PROVISIONS

5. Where the court is satisfied, on the balance of probabilities, that a person to whom this part applies has failed to act in accordance with the

[10] In relation to self incrimination: see pp 195-196 of ALRC Issues Paper on '*Client Legal Privilege and Federal Investigatory Bodies,* April 2007.

[11] Query whether this should be subject to or limited by any applicable (a) pre-action protocol or (b) discovery order by the court, including pre-action discovery.

[12] Query whether an inconsistency may arise between this provision and obligations arising under federal law, such as to give rise to a possible constitutional challenge under s 109 of the Constitution. In particular, see the provisions of the *Insurance Contracts Act1984* (Cth) and the *Corporations Act 2001*(Cth).

[13] See s 345 (3) *Legal Profession Act 2004* (NSW).[See *Courts and Legal Services Act 1990* (Eng)]{Query whether it should be made clear that this would override any express or implied confidentiality agreement preventing disclosure of information obtained in the course of employment: see *AG Australia Holding Limited v Burton & Anor* [2002] NSWSC 170; [2002] NSWSC 454. There is no exemption relating to any obligation arising under the criminal law. It is difficult to see how any of these obligations could be contrary to any criminal law, except perhaps in relation to disclosure of any information where such disclosure may be a criminal offence. This needs further consideration.

obligations imposed by this part the court may, of its own motion or on the application of any party or person with a sufficient interest, in addition to any other order that the court has power to make, make such order as the court considers in the interests of justice, including:

(1) an order that the person pay some or all of the legal or other costs or expenses of any person arising out of the failure to act in accordance with the obligations imposed by this section;

(2) an order that the person compensate any person for any financial or other loss which was materially contributed to by the failure to act in accordance with the obligations imposed by this section, including an order for [penalty interest] in respect of any delay in the payment of any amount claimed in a civil proceeding or an order that there be no interest, or reduced interest, where there has been a failure on the part of any participant involved in the bringing of the claim;

(3) an order that the person take such steps in a civil proceeding as may be reasonably necessary to remedy any problem arising out of the failure to act in accordance with the obligations imposed by this section;

(4) an order that the person not be permitted to take specified steps in a civil proceeding;

(5) such order as the court considers to be in the interest of any person who has been prejudiced by the failure to act in accordance with the obligations imposed by this section;

(6) an order that the person pay into the [Access to Justice Fund] such amount as the court considers reasonable having regard to the time spent by the court as a result of:

(i) the failure to act in accordance with the obligations imposed by this section, or

(ii) any civil claim or civil proceeding arising out of the failure to act in accordance with the obligations imposed by this section, including an application for an order under this section;

6. Where an application is made under [section 5] such application shall be made in the court in which the proceeding is being heard or was heard[14] and, where practicable and without in any way limiting the discretion of the court to decide how and by whom such application should be

[14] It may be necessary to include a provision to the effect that a person against whom sanctions are sought cannot seek to disqualify the judicial officer most familiar with the proceedings on the grounds of reasonable apprehension of bias.

determined, such application may be dealt with initially by the judicial officer who is most familiar with the proceeding which gave rise to the application.

7. An application under [section 5] shall be made not later than 28 days from the date of final determination of the proceeding[15]. Where an order in respect of costs is made after the date of judgment or final determination of the proceeding the date of the making of the last of any such order shall be the date of final determination of the proceeding for the purposes of this section.

Overriding obligations: Matters requiring further consideration

Some of the matters which require further consideration include the following:

1. Query whether there should be provisions relating to **unprofessional conduct or professional misconduct** on the part of lawyers: see the provisions of the NSW Legal Profession Act.

2. There is to be a **separate provision**, which is discussed below, to be incorporated in a rule, rather than in statutory form, for the purpose of requiring the parties to (a) verify that any allegation of fact made in any pleading has merit and (b) acknowledge that they have read and understand the 'Overriding obligations'. Also, provisions 6 and 7 above could also be incorporated in rules rather than in statutory form.

3. Query whether there needs to be a specific provision dealing with how such (a) obligations and (b) sanctions would be applicable to **corporations**. For example: should the obligation extend to any director, servant or agent of the corporation acting within the scope of their actual or apparent authority. In so far as sanctions are concerned, does there need to be a provision deeming the conduct of any director, servant or agent (acting within the scope of their actual or apparent authority) to be conduct of the corporation (see e.g. the provisions of the *Crimes (Document Destruction Act) 2006* (Vic)).

4. As noted above, although the **obligations** would also extend to employees and servants of the participants in civil litigation it is presently proposed that the **sanctions** would only be able invoked against (a) parties, (b) law practices, (c) lawyers, and (d) providers of financial support who exercise any direct or indirect control or influence over the conduct of parties to the litigation. The drafting needs to be amended to clarify this. The participants would however be liable for the conduct of employees and agents.

[15] There may need to be a provision providing for extensions of time to deal with situations where the knowledge of the breach arises after the deadline for making an application.

5. It is intended that the more extreme sanctions should only be available in the case of particularly egregious or contumelious conduct. The drafting will require amendment to reflect this.

6. Although it is presently proposed that the overriding obligations would extend to settlement negotiations, mediation and other alternative dispute resolution processes which may be utilised by the parties to litigation, the issue of the confidentiality of such ancillary processes requires further consideration. This is discussed further below.

7. The issue of how the proposed overriding obligations would impact on self represented persons also requires further consideration.

8. It is to be hoped that parties will not abuse the process of applying for sanctions. The overriding obligations would apply to any person making any such application. A leave requirement could avoid or minimise this problem but may create its own problems if further judicial time and expense are incurred in connection with leave applications and if there is any provision for appeal from a refusal of leave.

9. Query what appeal rights should exist in relation to decisions concerning the application of sanctions?

10. Although not within the terms of reference of the current civil justice enquiry, a question arises as to whether the proposed overriding obligations should extend to tribunal proceedings, including before the VCAT, as well as court proceedings.

1.1.2 OVERRIDING OBLIGATION – Certification provision

In furtherance of the overriding obligations proposed to be incorporated in legislation both parties and lawyers should be required to certify the 'merit' of allegations and denials made in connection with the matters in dispute. A draft provision is as follows:

- Each *party* to a proceeding is required:
  - To personally certify that they have read and understood the overriding obligations. Such certification must be filed when the party files its first document in the proceeding.
  - when filing any pleading[16] (including any amendment of the pleading) , to certify on the pleading, or verify on affidavit or by statutory declaration, that:
    - as to any allegations of fact in the pleading, that the deponent believes that the allegations have merit;

[16] This requires re-consideration given the technical complications as to what is a 'pleading'.

- as to any allegations of fact that the pleading denies, that the deponent believes that the allegations do not have merit;
- as to any allegations of fact that the pleading does not admit, that after reasonable inquiry the deponent does not know whether or not the allegations have merit.

A determination of whether or not any allegation of fact has merit shall, in the case of a party, be based on a reasonable belief as to the truth of the allegation.

- *Legal practitioners* are required, when filing any statement of claim or other originating process, defence or further pleading[17] on behalf of a party, to certify on the document that:

  (a) each allegation in the document has merit; and
  (b) each denial in the document has merit; and
  (c) each non-admission in the document arises out of an inability to determine the merit of the allegation.

  A determination as to whether or not an allegation has merit shall, in the case of a legal practitioner, be based on (a) the available factual material and evidence[18] and (b) a reasonably arguable view of the law.

Where certification is made by a representative of a corporation or other entity the representative should be required to state that the representative has made all proper enquiries necessary to make the certification.

1.2 Overriding purpose

It is also proposed to complement the overriding obligation provisions applicable to 'participants' with a provision that states an 'overriding purpose' in relation to civil proceedings and specifies **duties of the court** in the conduct of such proceedings. The parties and the lawyers will also be required to assist the court to further this purpose. It is proposed that this provision appear in the same statute as the overriding obligation, albeit in a separate provision. A draft overriding purpose provision is set out in part 1.2.1 below.

This strategy of articulating key aims, objectives and principles for the operation of the civil justice system and the courts, often in statute or court rules, has been employed elsewhere, most notably in England as a result of the Woolf reforms and more recently in NSW and in other Australian jurisdictions. In Victoria there are provisions which incorporate some of these elements in the *Magistrates' Court (Civil Procedure) Rules 1999* and, to a lesser extent, in the *Magistrates'*

[17] See the note above. This similarly requires re-consideration.
[18] See s 345 *Legal Profession Act 2004* (NSW) which is limited in its application to 'a claim or defence of a claim for damages' and imposes obligations to be satisfied about 'reasonable prospects of success' ..'on the basis of provable facts and a reasonably arguable view of the law'.

Court Act 1989[19]. Such statements have been extended to impose obligations not only on the court but also the parties and the lawyers to assist in furthering the specified objectives.

A very limited and narrow version of this approach exists in the current Rule 1.14(a) of the Victorian *Supreme Court Rules* requires the court in exercising any power under the rules to endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined. In its submission to this review, the Supreme Court of Victoria indicated that it has considered whether Rule 1.14(a)

> ….might be expanded and strengthened to make explicit aspects of the Court's inherent power to control its own proceedings, to encourage proportionality, and to foster a culture of just and efficient dispute resolution.[20]

The submission continues that:

> [t]here is a view within the Court that an expanded version of Rule 1.14 would have a positive impact, particularly in stating the obligations of parties and their legal practitioners to conduct litigation with regard to the overriding objective. Such provisions may provide an appropriate preamble or 'objects clause' to the Rules, similar to those found in modern legislation.[21]

The Supreme Court submission notes that the above view is not universally held by the judges of the court. However, the Court provided a draft expanded version of Rule 1.14. This has been taken into account in preparing the overriding purpose draft provision set out below.

1.2.1 Draft recommendation in respect of OVERRIDING PURPOSE and duties of the Court

There should be a statutory provision setting out the overriding purpose of the legislation and rules governing the conduct of civil litigation and defining the duties of the court. A draft of the legislative provision is as follows:

Overriding purpose and the duties of the court

(1) The overriding purpose of this Act and the rules of court, in their application to civil proceedings, is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute by (i) the just determination of the proceeding by the court or (ii) the agreement of the parties [or (iii) an alternative dispute resolution process agreed to by the parties or ordered by the court].

[19] See s 1 *Magistrates' Court Act 1989* (Vic).
[20] Submission, Supreme Court of Victoria, p13
[21] Ibid.

(2) The Court must seek to give effect to the overriding purpose when it interprets or exercises any of its powers, whether derived from procedural rules or as part of its inherent, implied or statutory jurisdiction.

(3) A party to a civil proceeding is subject to the Overriding Obligations in section…and under a duty to the court to assist the court to further the overriding purpose.

(4) A legal practitioner or any other representative acting on behalf of a party is subject to the Overriding Obligations contained in section….and under a duty to the court to assist the court to further the overriding purpose and shall not by his or her conduct cause his or her client to be put in breach of paragraph (3) or the overriding obligations contained in section…

(5) The court may take into account any failure to comply with paragraph (3) or (4) in exercising any power, including its discretion with respect to costs.

(6) To further the overriding purpose, the court in making any order or giving any direction in a civil proceeding —

(a) shall have regard to the following objects:

(i) the just determination of the proceeding;

(ii) the public interest in the early settlement of disputes by agreement between the parties;

(iii) the efficient disposal of the business of the Court;

(iv) the efficient use of available judicial and administrative resources;

(v) the timely disposal of the proceeding; and

(v) dealing with the case in ways which are proportionate to:

- the amount of money involved;
- the importance and complexity of the issues;
- the financial position of each party.

(b) may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant:

(i) the extent to which the parties have complied with any pre-action procedural obligations or protocol applicable to the dispute;

(ii) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;

(iii) the degree of expedition with which the respective parties have approached the proceeding, including the degree to which they have been timely in their interlocutory steps;

(iv) the degree to which any lack of expedition in approaching the proceeding has arisen from circumstances beyond the control of the respective parties;

(v) the degree to which there has been compliance with the Overriding Obligations contained in section…and paragraphs (3) and (4) hereof; and

(vi) the degree of injustice that may be suffered by any party as a consequence of any order or direction under consideration; and

(c) should, in addition to any other matter, have regard to the objective of minimizing delay between the commencement of the civil proceeding and its listing for trial beyond that which is reasonably required for such interlocutory steps as are necessary for the fair and just determination of the real issues in dispute and the preparation of the case for trial.

Overriding purpose: Matters requiring further consideration

1. Query whether there should be an additional provision making it clear that the court is empowered to refer the matter to alternative dispute resolution, without the consent of the parties, including procedures such as arbitration which may result in a binding outcome?

2. Query whether the Overriding Purpose (or analogous provisions) should apply to alternative dispute resolution processes, including arbitration and mediation, etc, conducted before non judicial persons where such processes are ancillary to court proceedings and where such processes have been either agreed to by the parties or conducted pursuant to orders of the court?

2. DISCLOSURE OF INFORMATION AND CO-OPERATION BEFORE CIVIL PROCEEDINGS ARE COMMENCED

Draft Recommendations:

2.1 **Pre-action protocols** should be introduced for the purpose of setting out codes of 'sensible conduct' which persons in dispute are expected to follow when there is a prospect of litigation.

2.2 The objectives of the protocols would be:

- to specify the nature of the information required to be disclosed to enable the persons in dispute to consider an appropriate settlement;
- to provide model precedent letters and forms;
- to provide a time frame for the exchange of information and settlement proposals;
- to require parties in dispute to endeavour to resolve the dispute without proceeding to litigation; and
- to limit the issues in dispute if litigation is unavoidable so as to reduce costs and delay.

Although information and documentation about the merits and or quantum of the claim and defence would be available for use in any subsequent litigation, offers of settlement made at the pre-action stage would be on a without prejudice basis but would be able to be disclosed, following the resolution of the dispute after the commencement of proceedings, and would be taken into account by the court in determining costs.

2.3 The *general* standards of pre-action conduct expected of persons in dispute would be incorporated in **statutory guidelines**. Each person in a dispute and legal representative of such person would be required to bring to the attention of each other person who is a party or potential party to the dispute the general standards of pre-action conduct and any specific pre-action protocols applicable to the type of dispute in question (insofar as such other person is not aware of such protocol(s).

2.4 *Specific* pre-action protocols applicable to particular types of dispute would be developed by the **Civil Justice Council** in conjunction with representatives of stakeholder groups in each relevant area (for example, commercial disputes, building disputes, medical negligence, general personal injury, etc).

2.5 Where a specific pre-action protocol is developed for a particular type of dispute it would be referred to the **[Uniform?] Rules Committee** for approval and implementation by way of **Practice Note** in each of the Magistrates Court, the County Court and the Supreme Court, with such modifications as may be appropriate in each of the three jurisdictions.

2.6 Except in (defined) exceptional circumstances, compliance with the requirements of the Practice Notes would be a condition precedent to the commencement of proceedings in each of the three courts. The obligation to comply with the requirements of applicable Practice Notes would be statutory. A person seeking to formally commence a legal proceeding should be required to certify whether the pre-action protocol requirements have been complied with and where they have not, to set out the reasons for such non compliance.

Because it would not be practicable for court registry staff to determine whether or not there had been compliance with the pre-action protocol requirements or to evaluate the adequacy of the reasons for non compliance, the court would not have power to decline to allow proceedings to be commenced because of non compliance. However, where the pre-action protocol requirements have not been complied with the court could, in appropriate cases, order a stay of proceedings pending compliance with such requirements.

2.7 The **'exceptional' circumstances** where compliance with any pre-action protocol requirements would not be mandatory would include situations where:

- a limitation period may be about to expire and a cause of action would be statute barred if legal proceedings are not commenced forthwith;
- an important test case or public interest issue requires judicial determination;
- there is a significant risk that a party to a dispute will suffer prejudice if legal proceedings are not commenced in circumstances where advance notification of the prospect of proceedings may result in conduct causing such prejudice (e.g. the dissipation of assets or destruction of evidence etc);
- there is a reasonable basis for a person in dispute to conclude that the dispute is intractable;
- the legal proceeding does not arise out of a dispute
- the parties have agreed to dispense with compliance with the requirements of the protocol.

2.8 Unreasonable **failure to comply** with an applicable protocol or the general standards or pre-action conduct should be taken into account by the court, for example in determining costs, in making orders in respect of the procedural obligations of parties to litigation, in the awarding of interest on damages, etc. This should include a presumption that a person in dispute who unreasonably fails to comply with the pre-action requirements (a) would not be entitled to recover any costs at the conclusion of litigation even if the person is successful, unless the court orders otherwise, (b) would be ordered to pay the costs of the other party on an indemnity basis if unsuccessful, unless the courts orders otherwise.

2.9 The operation of the protocols and general standard of pre-action conduct should be **monitored** by the Civil Justice Council, in consultation with representatives of relevant stakeholder groups, so that any modifications considered necessary in the light of practical experience can be implemented.

2.10 There should be an entitlement to recover **costs** for work done in compliance with the pre-action protocol requirements in cases which proceed to litigation. In preparing specific pre-action protocols an attempt should be made to specify the amount of costs recoverable, on a party-party basis, for carrying out the work encompassed by the protocols. Similar to the present position in relation to the TAC protocols in Victoria, such costs should be either fixed (with allowance for an increase to take account of inflation) or calculated in a determinate manner (for example like the fixed costs payable in respect of certain types of simple cases in England & Wales whereby costs are calculated based on a fixed base amount plus an additional amount calculated as a percentage of the amount claimed). In preparing specific pre-action protocols consideration should be given to whether or not such protocols should incorporate a procedure for mandatory pre-trial offers which would be later taken into account by the court on the question of costs at the conclusion of any legal proceedings.

Where the parties to a dispute have agreed to settle the dispute prior to the commencement of proceedings but have not reached agreement on (a) who is to pay the costs of and incidental to the dispute or (b) the amount of the costs of an incidental to the dispute[22], and there is no pre-action protocol which makes provision for such costs, any party to the dispute may apply to the court for leave to make an application for (i) an order for the costs of and incidental to the dispute to be taxed or assessed or ; (ii) an order awarding costs to or against any party to the dispute; or (iii) an order awarding costs against a person who is not a party to the dispute, if the court is satisfied that it is in the interests of justice to do so. Where the costs of an incidental to the dispute are [relatively modest in amount?] there should be a presumption that each party to the dispute will bear its own costs of resolving the dispute. The court should have power to (a) determine the application for leave (i) on the basis of written submissions from the parties to the dispute, without a hearing and (ii) without having to give reasons, or (b) refer the matter to mediation or other form of alternative dispute resolution.

[22] In Hong Kong, the *Civil Justice (Miscellaneous Amendments) Bill 2007* (HK) makes provision for 'costs only proceedings' including where a dispute is settled before proceedings are commenced and where the parties have agreed on who is to pay the costs of and incidental to the proceedings but have not agreed on the amount of such costs (s 52B(1).)

Pre-action protocols: Matters requiring further consideration

1. The situation where a defendant only agrees to settle a case, prior to commencement of proceedings, without payment of any costs and on condition that the other party *not* seek an order for costs, may require further consideration.

2. A provision may be required to protect the information and documents provided in accordance with the protocol to ensure that they are not used for a purpose other than in connection with the resolution of the dispute between the parties. This might be in the form of an implied undertaking similar to the position in respect of documents produced on discovery in litigation. Query whether there should be some form of qualified privilege?

3. The issue of how such protocols would apply to self represented 'litigants' is to be considered further.

4. The basis upon which costs can be awarded by the court in circumstances where the dispute has settled without proceedings being commenced requires further consideration. Should such costs be on the scale which would have been applicable in the event that proceedings had been commenced? This may be problematic as it may not be clear which could the proceedings might have been commenced in, particularly given the overlapping jurisdictions of the civil courts.

3. GETTING TO THE TRUTH *BEFORE* TRIAL

3.1 Pre–Trial Examinations to Obtain Information

Provision should be made for 'Pre–Trial Examinations to Obtain Information' in civil proceedings in Victoria. The rules at present permit the taking of evidence before trial in relation to proceedings in the Supreme and the County Court in limited circumstances (Order 41). There are also provisions relating to subpoenas to give evidence otherwise than at trial (Order 42). The proposed arrangement is designed to overcome the limitations of the existing rules, and to reduce both the costs and the need for judicial involvement. However, the court would have the power to control or limit the use of the procedure to prevent abuse.

The primary objective of the 'new' procedure is to facilitate the early gathering of relevant information (including from persons who may not otherwise be able to disclose information, other than at trial, including because of confidentiality constraints) and therefore early resolution of the dispute *without* proceeding to trial. The procedure will facilitate the legal representatives of the parties getting together in an informal setting at a mutually convenient time and place and this is likely to facilitate resolution, particularly given that the examination process will assist in assessing the strengths and weaknesses of the parties' cases.

3.1.1 Objects of the procedure

The provisions relating to Pre–Trial Examinations should incorporate an objects clause stating that their primary purpose is not preparation for trial, but rather:

- to facilitate the pre–trial disclosure of relevant information;
- to assist the parties to obtain a better understanding of, and therefore to limit, the real issues in dispute;
- to facilitate settlement; and
- to restrict or eliminate the need to call or test particular evidence if the matter proceeds to hearing.

The provisions should make it clear that requiring a person to submit to a Pre–Trial Examination should be regarded as a step of last resort, to be taken only when less formal, co–operative means of obtaining information from relevant persons have failed. The requirement that the parties seek to exchange information in a non–adversarial manner prior to initiating a Pre–Trial Examination should be expressed in a manner conformable with the Overriding Obligation.

3.1.2 Nature of the proposed procedure.

The parties should be entitled to examine *any person* on oath or affirmation, subject to the overriding power of the Court to limit the use of Pre–Trial

Examinations in a particular case (see below at point 7). A Pre–Trial Examination would be initiated through the service of notice upon the person to be examined and all other parties to the litigation. The notice should contain details of:

- the time, place and expected duration of the Pre–Trial Examination. Where practicable, the Examination should be held at a time and a place convenient to the person to be examined;

- the reasonable travel and out–of–pocket expenses to which the person to be examined is entitled (to be borne, at least initially, by the litigant initiating the Examination);

- the expected subject–matter of the Examination, in general terms;

- all documents that the examinee will be required to produce at the Examination;

- where the person to be examined is a corporation, the proposed framework for agreeing upon the individual/s to be examined, and notice of the duty of such individual/s to inform themselves as to relevant matters prior to their examination (see below at point 5); and

- the legal obligations of the person to be examined, including those arising under the Overriding Obligation if the person is a person to whom such obligations are applicable.

1. A litigant should be precluded from examining a natural person more than once, unless leave of the Court is given or the examinee consents.

2. Where the person to be examined is a corporation, the examining party and the corporation must endeavour to reach agreement as to the person or persons most appropriate to be examined upon the matters specified in the notice. Where agreement cannot be reached, the court should appoint a person or persons to be examined on the corporation's behalf. A person being examined on behalf of a corporation should be under an obligation to inform him or herself as to the matters specified in the notice prior to the examination.[23]

3. Unless the parties otherwise agree, the litigant who initiates an examination should be responsible for making appropriate arrangements with respect to: (a) a suitable venue for the Examination; (b) the time and date of the Examination; (c) the travel and out–of–pocket expenses of the examinee; (d) ensuring that the Examination is recorded, and that a record of the examination is served on all parties in an appropriate form. Normally it would be expected that a video recording, with sound, would be made of the Examination.

[23] Subject to any division of responsibilities between examinees, as agreed or directed by the Court.

4. The Court should be empowered to give such directions as it thinks appropriate as to the conduct of Pre–Trial Examinations in a particular case at any time, either of its own motion or upon application of one of the parties or an examinee. Such directions could include: (a) a direction limiting the number of examinations able to be initiated by a party; (b) a direction limiting the duration of an examination, or examinations in a matter in general; (c) a direction precluding the examination of a named person; (d) a direction precluding a particular litigant from participating in a specific examination; (e) a direction restricting the subject–matter of a particular examination; (f) a direction as to the time or place at which particular examinations must take place; or (g) a direction that specified persons be examined concurrently.

5. The provisions should require all participants in a Pre–Trial Examination, including the parties, their legal representatives, and the examinee him or herself, to endeavour, in good faith, to:

- minimise the amount of time required for the Examination;
- act in a collaborative manner, and minimise adversarial conduct;
- avoid needless formalities;
- avoid repetition and other oppressive behaviour; and
- confine the Examination to matters that are relevant to the issue in dispute.

These requirements should be expressed in terms conformable with the Overriding Obligation.

6. The parties should be permitted to waive or modify any requirement in relation to Pre–Trial Examinations by express agreement.

7. All parties to the action should be permitted to be present and/or represented at the examination, and to ask questions of the examinee.

8. Examinees should be required to answer all questions put to them whilst under examination, consistent with the Overriding Obligation. However, examinees should be protected against the disclosure or future use of self–incriminating information revealed in response to a question.

9. Objections to particular questions asked during the course of an examination should be noted on the record for determination by the court in the event that the answer is sought to be introduced into evidence. No objection should be permitted as to the form of questions, except where a question is misleading.

10. The court should consider whether or not it can facilitate the provision of urgent telephone directions as to the conduct of an Examination upon request. This could be done either through the judge presiding over the proceeding (if one has been allocated) or through any other officer of the

court, such as a Registrar or Master, empowered to give directions. If this is impracticable, provision should be made for the adjournment of Examinations for the purposes of obtaining directions. This may give rise to an order for costs.

11. Sanctions in respect of obstructive, repetitive, unreasonable or oppressive examination conduct should be able to be imposed on all participants in the examination process, including the parties, their legal representatives and the examinee him or herself. Sanctions should include costs orders, and such other orders as the court considers appropriate.

12. Interrogatories should not be permitted to be served upon a person who has been the subject of an examination by a litigant who initiated or participated in that examination, unless the court gives leave.

13. Where a person served with a notice for oral examination objects to the Examination taking place, s/he should be able to lodge a notice of objection (within certain confined categories, similar to those applicable to the setting aside of subpoenas [but not permitting objection merely because the person believes that the proposed examination is merely fishing]). Upon receipt of a notice of objection the party seeking the examination should have to obtain an order of the court to proceed with the Examination. [Should the court have power to order costs against the proposed examinee where there is no basis for objection to the Examination and the court allows it to proceed?].

Query whether the proposed procedure should also be available where a case has been referred by the court to mediation or some other alternative dispute resolution procedure, including arbitration?

3.1.3 Examinations prior to the commencement of legal proceedings

Prospective litigants should be permitted to conduct examinations prior to commencing proceedings, but only with leave of the court.

3.1.4 Use of Information Obtained at Examination

Information obtained through a Pre–Trial Examination should be able to be used at trial in four circumstances:

- to impeach the testimony of a witness who has provided evidence at trial that is inconsistent with information he or she provided under examination (that is, as evidence of a prior inconsistent statement);

- where the examinee has died, or otherwise become unfit to give evidence, or where it is impracticable to secure his or her presence at trial;

- where all parties to the litigation consent; or

- where the Court gives leave.

Where information comprising part of the transcript of an examination is admitted on the application of one of the parties, any other party can seek to have admitted any other part of the transcript.

3.1.5 Costs

The reasonable costs incurred in respect of preparation for and the conduct of examinations should be recoverable as costs of the proceeding, subject to the discretion of the court. However, each litigant should be limited to recovering the costs of engaging one legal practitioner per examination. The Costs Council should seek to develop a scale of fixed costs for the conduct of Examinations.

3.1.6 Application

The provisions in respect of examinations should, at least initially, be applicable only to proceedings in the Supreme and County Courts.

3.1.7 Role of the Civil Justice Council

The Civil Justice Council should, in conjunction with the courts, the Law Institute and the Bar Council:

- develop a general code of conduct in respect of examination conduct;
- develop codes of practice to govern the use of Pre–Trial Examinations in particular litigation contexts;
- oversee the establishment of education and training programmes to assist practitioners to develop good examination practices; and
- review the provisions relating to Pre–Trial Examinations after twelve months of operation, with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The Council should also consider and make recommendation upon the question of whether or not Pre–Trial Examinations should be permissible in matters within the jurisdiction of the Magistrate's Court, and if so, whether any modifications to the general scheme are required in relation to such matters.

Pre-trial examinations: Matters requiring further consideration

1. Who ought to be permitted to administer the oath or affirmation?

2. Ought separate provision to be made in respect of the participation of self–represented litigants in Pre–Trial Examinations?

3. Should there be a special procedure where a person sought to be examined is 'vulnerable' (e.g. a child, a mentally ill or incapacitated person etc). For example, in such instances should an independent Examiner be required (similar to the procedure for taking evidence prior to trial)? Should a 'vulnerable' examinee also be permitted to be accompanied by a person such as a relative, friend or legal representative? Such a provision could be along the following lines:

'Where the proposed examinee is a person under a disability [within the meaning of Order 15] at the date of the proposed examination, the examination may only be conducted under the supervision of an independent Examiner or a judge or judicial officer of the court in which the proceeding is pending. An independent Examiner must be a lawyer practising or entitled to practise in Victoria or such other person as may be approved by the court. The cost of the independent Examiner must be paid by the party seeking to conduct the examination. Subject to the discretion of the court, at any stage of the proceeding such cost may be ordered to be paid by any other party. At any examination before an independent Examiner a person under a disability may be accompanied by another person with an interest in the welfare of the person under a disability'.

4. Ought specific provision to be made for an examinee to 'undertake' to provide information at a later stage where he or she can obtain access to it?

5. It is necessary to also have a provision providing that the information and any documents obtained during the course of the examination cannot be used for any purpose other than in connection with the resolution of the dispute between the parties. This should also extend to any information derived from the documents/information disclosed during the Examination.

6. Should the provisions in relation to the selection of an examinee to appear on behalf of a corporation also be applicable to, for example, the Crown, a partnership, unincorporated associations etc?

7. Should examinees who are not parties be entitled to be compensated for loss of earnings or other reasonable expenses incurred in connection with an examination?

4. ALTERNATIVE DISPUTE RESOLUTION

A number of the proposals referred to above are intended to facilitate resolution of some or all of the issues in dispute by agreement between the parties or through alternative dispute resolution processes. Additional recommendations in relation to alternative dispute resolution are set out below.

4.1 Introduce more ADR options

Further ADR options would assist the courts to more efficiently and effectively manage the diverse types of disputes in the court system. A wider range of ADR processes should be available to the courts, including:

1. early neutral evaluation;
2. case appraisal;
3. mini trial/case presentation – private mini trial and judicial mini trial;
4. the appointment of special masters;[24]
5. court annexed arbitration – similar rules for court annexed arbitration found in the NSW UCPR should be introduced;[25]
6. conciliation; and
7. conferencing.

Some of these processes will be more appropriate in the higher courts, for example, special masters and court annexed arbitration.

4.2 More effective use of industry dispute resolutions schemes

Industry dispute resolution schemes provide a cost-free, accessible and effective process for the resolution of disputes. These schemes, if utilised more, would leave the courts with additional time and resources to deal with other cases. One problem is that the terms of reference or rules of the schemes usually prohibit a scheme from dealing with consumer complaints where legal proceedings have been issued.

More effective use should be made of industry dispute resolution schemes. There should be no impediment to the use of such schemes merely because legal proceedings have been commenced. Such schemes may be particularly appropriate for cases where one of the parties is a self-represented litigant, given that the schemes actively investigate and seek to resolve complaints.

[24] For example as used in US Federal District Courts for complex commercial disputes and class actions.

[25] It is a more flexible procedure than arbitration under the *Commercial Arbitration Act* - if one of the parties is not satisfied with the award, leave to appeal the decision is not required – an application for a rehearing is all that is required. Also, as the court provides the venue and some administrative support, the costs are reduced. Court annexed arbitration could be of benefit for personal injury matters and smaller commercial disputes where the arbitration could be over within 1 or 2 days.

4.3 Collaborative law should extend beyond family law to other types of civil disputes.

The key characteristics of a collaborative approach are:

- The clients and lawyers sign a contract agreeing to negotiate in good faith to resolve a dispute without resorting to litigation
- If the dispute is unable to be resolved by negotiation the lawyers acting for all parties will withdraw and not act for their clients in any litigation proceedings.
- The negotiation process consists of a number of four-way meetings involving the parties and their lawyers working together.

While the use of collaborative law in Victoria has largely been confined to family law matters, it is a process that could be applied to all kinds of civil disputes. It could be used in wills disputes, property disputes and other types of disputes, particularly where the parties have a relationship that they wish to continue.

4.4 Education

There should be more education of lawyers, judicial officers and court officers about the different types of ADR and in what circumstances different ADR processes will be appropriate. The Judicial College of Victoria could provide education programs regarding the ADR processes.

4.5 Judicial mediation

Court conducted mediation is to be encouraged but in view of limited court and judicial resources it might be preferable for courts to deal mainly with cases where private mediation is unsuitable or unavailable, such as:

- where one of the parties is in financial hardship and/or where one of the parties is self-represented;
- where the parties are unable to agree on a choice of mediator;
- where there has already been an unsuccessful external mediation;
- where the case is of public interest or is highly complex and could benefit from a mediator with court authority.

If a judge has conducted a mediation that fails to resolve the matter there should be a presumption against that judge presiding over the hearing of the matter. However, if the parties consent, the judge should be able to hear the matter.

4.6 Compulsory referral to ADR

The courts should have the power to order partiers to ADR, in appropriate circumstances,[26] with or without the parties' consent. However, now that the Human Rights Charter is operating in Victoria, it is of interest to note the UK Court of Appeal decision in *Halsey*.[27] In that case, the Court held: "…*it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6* [of the Human Rights Act 1998]."

> "*If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process".*

Notwithstanding the decision in *Halsey*, the courts should have power to order ADR (including arbitration) except in so far as the outcome of the process (e.g. arbitration) would be binding other than with the consent of the parties.

Query whether there should be power to refer to ADR procedures which have a binding outcome where the parties in dispute are corporations and therefore no 'human rights' issues arise.

4.7 Overriding obligations

As presently proposed the abovementioned overriding obligations would apply in the context of negotiations and alternative dispute resolution processes, including mediation, such that a party who had acted in bad faith, for example, might be subject to sanctions (including costs) or a private remedy for breach.

It has been suggested that where there is a confidentiality agreement or other legal constraint on the disclosure of information concerning (a) the conduct of participants in such processes or (b) settlement offers, the confidentiality of what happens should be preserved. In this event the application of sanctions for breach of the overriding obligations may be problematic in some situations. Confidentiality constraints may preclude disclosure of offending conduct in a subsequent action or application relating to sanctions or other remedies.

The alternative is to allow for exceptions to the protection of confidentiality in certain circumstances. In reality, communications in the course of settlement negotiations are not protected by absolute confidentiality. At present there are exceptions and limitations to the protection. Presumably the court may already take into account the conduct of parties, for example, in either refusing to participate in ADR or failing to respond within a reasonable time to an offer to

[26] For example, it may not be appropriate to refer a matter to ADR when it is a public interest case that requires a formal public binding determination, perhaps with an authoritative application of statute or case law.

[27] *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576.

mediate, when determining costs. In some circumstances at present 'without prejudice' settlement offers may be subsequently disclosed in the context of applications for costs at the conclusion of legal proceedings.

In circumstances where a person has engaged in fraudulent or misleading and deceptive conduct in the course of such processes and a party has been detrimentally affected there are good policy grounds for not exempting such conduct from disclosure, including in connection with an application for sanctions or remedies or in professional disciplinary proceedings.[28] The mere fact that such conduct may be disclosed should operate as an incentive to appropriate conduct.

However, there are equally compelling reasons why the confidentiality of the negotiation and alternative dispute resolution processes should be protected. The prospect of conduct in settlement negotiations or a mediation being scrutinised by the courts raises a range of issues. For example:

- It may inhibit the process of settlement negotiations or mediation in that parties may be reluctant to expose themselves to the risk of public disclosure;

- It creates the potential for re-ventilating in court what happened during the course of settlement negotiations or a mediation;

- It raises the possibility of mediators being called to give evidence about what transpired at a mediation.

ADR and the overriding obligations: Matters requiring further consideration

This issue is being further examined by the commission. The commission is interested in comments on how best to reconcile these competing and conflicting policy considerations:

1. On the one hand, the imposition of statutory standards of conduct in negotiations and mediations (including requirements to act honestly, in good faith and not to mislead or deceive) may only be effective if there are mechanisms for enforcement and sanctions for non compliance;

2. On the other hand, given concerns about the need for confidentiality and constraints on the admissibility of evidence about what transpired in negotiations or at a mediation (or other forms of ADR), in what circumstances, if any, and by what evidentiary means should the court be able to ascertain whether there has been breach of such standards in a subsequent application relating to sanctions or other remedies?

[28] See e.g. the recent Queensland case: *Legal Services Commissioner v Mullins*

4.8 Court assistance with ADR

The courts should be adequately resourced to appoint or designate persons with responsibility to recommend suitable forms of ADR and to provide assistance to parties in arranging ADR providers and facilities. There should also be a panel of suitably qualified and experienced dispute resolution practitioners available to undertake ADR processes.

4.9 The effectiveness of ADR

There is a lack of empirical data on the effectiveness of court-ordered mediation in Victoria, including the cost effectiveness. There is a need for more research on the effectiveness, including the cost effectiveness, of mediation/ADR in Victoria. The Department of Justice - Civil Law Policy Unit is undertaking a review of the effectiveness, including the cost effectiveness, of mediation in the higher courts. A review of the Magistrates' Court mediation program would also be useful.

The Civil Justice Council should be responsible for the ongoing review of ADR processes in all three courts.

4.10 ADR Reports

Reports should be required to be submitted by the parties to the court at the conclusion of any ADR process. Such reports should also provide an assessment of the person conducting the ADR process.

5. EXPERT EVIDENCE

Draft Recommendations in relation to Expert Evidence

5.1 Expert evidence has recently been the subject of extensive enquiry and reports by the NSW Law Reform Commission and the NSW Attorney Generals Civil Procedure Working Party, chaired by Hamilton J. This has culminated in new procedural rules, and a revised Code of Conduct for Expert Witnesses, which came into force recently in New South Wales.

5.2 The NSW Law Reform Commission and the Working Party differed on some issues. Several of these are dealt with below.

5.3 In view of the extensive review and consultation carried out in NSW and given the desirability of increased harmonisation in procedural rules both within and between jurisdictions, it is recommended that the recently introduced NSW provisions should be adopted in Victoria, with some minor modifications as set out below.

5.4 The commission is mindful that the issue of 'court appointed' experts remains controversial, including in New South Wales[29].

5.4 The differences between the existing Victorian provisions and the recently introduced NSW provisions may be summarised as follows:

Victoria
Rules regarding **expert evidence** are found in Order 44 of the Supreme and County Court Rules & Order 19 of the Magistrates' Court Rules.

Rules regarding **medical examinations and reports** are found in Order 33 of the Supreme and County Court Rules & Order 19A of the Magistrates' Court Rules.

NSW
Rules regarding **expert evidence** and **medical examinations and reports** – are found in Part 31, Division 2 – Provisions applicable to expert evidence generally.[30]

Differences between the Rules
The following is a summary of the NSW rules for which there are no equivalent rules in Victoria:

Main purposes of division: r 31.17 – the main purposes of the expert evidence rules are to ensure the Court has control over the giving of expert evidence, to restrict expert evidence to that which is reasonably

[29] See e.g. the discussion in the paper *Expert Witnesses in Proceedings in the Administrative Appeals Tribunal* by Justice Garry Downes AM presented to a conference of the NSW Bar Association, Administrative Law Section, 22 March 2006.
[30] *Uniform Civil Procedure Rules* 2005 (NSW)

required, to avoid unnecessary costs associated with retaining experts, to enable a single expert to be engaged by the parties or appointed by the Court and to declare the duty of an expert witness.

Court may give directions regarding expert witnesses: r 31.20 – provides an extensive list of the directions the court may make regarding expert witnesses, for example, a direction requiring experts in relation to a specified issue to confer.[31]

(NB there is a rule in the County Court Rules where the Court may give directions regarding expert reports – however it is regarding expert reports only, not expert witnesses more generally and it is not a detailed rule[32]).

Disclosure of Fees: r 31.22 – an expert witness must provide details of contingency fees or deferred payment arrangements.

Conference between expert witnesses: rr 31.24 – 31.26 are more detailed rules regarding conferences between expert witnesses including that that the court may direct witnesses to endeavour to reach agreement on any matters in issue[33]; that instructions that can be made to expert witnesses by the Court before a report is prepared[34] and the matters that are to be included in a joint report arising from a conference between expert witnesses.[35]

Opinion evidence by expert witnesses (hot tubbing): r 31.35 – the Court may give detailed directions to facilitate concurrent expert evidence (or 'hot-tubbing').

Single Joint Experts: rr 31.37 to 31.45 deal with the selection and engagement of the parties' single expert[36]; instructions to the parties' single expert[37]; that the parties' single expert may apply to the Court for directions[38]; that the parties' single expert report is to be sent to the parties [39]; that the parties may seek clarification of single expert's report[40]; the tendering of parties' single expert report and answers to questions[41]; the cross-examination of the parties' single expert[42]; the prohibition of

[31] Paragraph h.
[32] See rule 34A.19.1.
[33] Rule 31.24(1)(b).
[34] Rule 31.25.
[35] Rule 31.26.
[36] Rule 31.37.
[37] Rule 31.38.
[38] Rule 31.39.
[39] Rule 31.40.
[40] Rule 31.41.
[41] Rule 31.42.
[42] Rule 31.43.

other expert evidence where parties appoint a single expert[43]; and the remuneration of the parties' single expert[44].

Expert witness code: Schedule 7 sets out two new duties:

1. A duty of the expert witness to comply with a direction of the Court;[45] and
2. A duty of expert witnesses to work co-operatively with other expert witnesses.[46]

Schedule 7 also lists what must be included in an expert's report.[47] What is required is more extensive than what is required for an expert's report in Victoria.[48]

Sanctions – rule 42.3 provides that costs orders cannot be made against non-parties, subject to rule 42.27 which deals with costs where there is a failure to comply with an order to attend court.

Service of medical reports – the Victorian rules provide that where a plaintiff is examined at the request of a defendant, the defendant must serve a copy of the medical report forthwith.[49] There is no equivalent provision in the NSW rules as such – the NSW rules provide that each party must serve experts' reports and hospital reports on each other active party in accordance with any order of the court; or any practice note if there is no such order; or not later than 28 days before the hearing at which the report is to be used.[50]

There are separate provisions in the Victorian rules regarding the service of reports that the parties intend to rely upon at trial[51], however, these provisions do not negate the requirement for the defendant to serve a copy of a medical report in circumstances where the defendant has requested that the plaintiff be examined.

5. There are two areas where it is proposed that Victoria depart from the NSW model and one further area where further clarity is required:

   (a) on the issue of **sanctions** the NSWLRC was of the view that there is at present power to order costs against experts and recommended that in the Code of Conduct experts be made

[43] Rule 31.43.
[44] Rule 31.45.
[45] Clause 3.
[46] Clause 4.
[47] See Clause 5.
[48] See rule 44.01(3) of the *Supreme Court (General Civil Procedure) Rules* 2005 and rule 44.01(3) of the *County Court Rules of Procedure in Civil Proceedings* 1999. There is no code of conduct in the *Magistrates' Court Civil Procedure Rules* 1999.
[49] Rules 33.04 & 33.06 of the Supreme and County Court Rules Vic.
[50] Rule 31.28 NSW UCPR.
[51] Rule 33.07 & 33.08 of the Supreme and County Court Rules Vic.

aware of this possible sanction. The Working Party concluded that there is no power in the court to order costs against experts and was not in favour of sanctions or in any form of 'warning' that might have a chilling affect on the willingness of experts to give evidence. Thus, the NSW model follows the Working Party and does not implement the NSWLRC's position. On one view, the Working Party's concern is overstated. Courts in England and Wales have power to order costs against experts and there does not appear to be any evidence or suggestion that this has had a 'chilling effect'. **It is recommended that experts should not be singled out for attention in relation to sanctions but equally should not be immune from sanctions applicable to other participants in the civil justice system, including costs orders in appropriate cases.**

(b) on the issue of **disclosure of financial arrangements with experts**, the NSWLRC recommended that there should be transparency and that all financial arrangements should be disclosed. The Working Party took a different view and only favoured disclosure of arrangements where the expert had agreed to a deferral of payment or payment in the event of a 'successful' outcome. One difficulty with this is that it may not catch arrangements whereby an expert agrees to a fee which is apparently payable in any event but in practice written off if the party loses and is unable to afford to pay. Moreover, there is considerable force in the view that 'problems' arising out of pecuniary interest are not limited to situations where the fees are deferred or contingent on outcome. On one view, experts who are paid substantial sums of money and who have pre-existing or ongoing financial or other 'commercial' arrangements with parties to litigation may be no less problematic. Accordingly, **it is proposed that if there is to be any requirement of disclosure of financial arrangements, this should not be selective.**

5.6 The area where further clarity is required is in relation to the application of client legal **privilege** and litigation privilege to experts. There are some important questions of principle (both in favour of retaining the existing privilege and in favour of abrogating it) and some obvious practical problems which require detailed consideration. One practical problem at present arises out of the inherent uncertainty as to the scope of implied waiver when the expert is to be called as a witness and where a report is prepared and served. This creates problems for the parties, and for the court, and is the subject of much interlocutory and *inter partes* disputation in some jurisdictions. It is recommended that, insofar as this is not already the position, privilege should not apply to any communication with an exert who is to give evidence in a court proceeding or any document arising in connection with the engagement of the expert, including drafts of reports, letters of instruction etc. The existing law in relation to privilege would continue to apply where a

person has been engaged as an expert, but where it is not proposed that that person be called as an expert witness in the proceeding.

Query the position where a person has been retained an expert without any intention on the party engaging him or her to call the person as an expert but where the other party subpoenas the person to give evidence?

6. CLASS ACTIONS AND PUBLIC INTEREST REMEDIES

Draft recommendations

6.1 SUMMARY OF PROPOSALS

There are presently four draft recommendations in relation to class actions. Two are technical and are intended to solve practical problems arising out of judicial interpretations of the class action statutory provisions. The third involves the establishment of a new funding mechanism, with benefits for both plaintiffs and defendants. Although not limited to class actions, the proposed fund is likely to be in demand in class action litigation and likely to derive substantial revenue from class action proceedings. The fourth involves conferring on the court power to grant *cy pres* type remedies in certain circumstances, including where damages have not been claimed by class members following class action settlements or judgments. This may involve a significant change in the substantive law, depending upon the interpretation of one of the existing statutory class action provisions and the present ambit of judicial power in the case on 'unjust enrichment'.

6.2 Technical amendments to clarify the law

In the period since the enactment of the Commonwealth and Victorian class action statutory regimes there has continued to be a considerable amount of forensic disputation and interlocutory appeals (at both federal and state level) in relation to the interpretation of key statutory provisions. There continues to be legal controversy including as to (a) whether all class members are required to have individual claims against ALL defendants in cases where there are multiple defendants, and (b) whether a class action can be brought where the class is limited to identified individuals who have consented to the pursuit of claims on their behalf.

In these two areas, discussed below, judicial interpretations have been adopted which have given rise to judicial controversy, academic criticism and ongoing interlocutory battles and appeals. These problematic interpretations have added substantially to costs and delays in many class action proceedings. In other instances, cases have not been able to proceed because of non compliance with procedural 'requirements'.

Moreover, there is evidence to suggest that the statutory provisions are no longer being utilised by some plaintiffs and litigation funders who have sought to utilise the representative action rule in order to circumvent some of the problems arising out of problematic judicial interpretations of the statutory class action provisions. In some cases judicial rulings have resulted in a substantial increase in the size of the class on whose behalf the proceedings are maintained.

The recommendations outlined below are intended to solve perceived 'problems' by clarifying the law. In so far as the present prevailing judicial interpretations of these key statutory provisions are correct, the proposals would

change the law. In any event, there is a clear need for certainty to avoid ongoing costly and protracted forensic disputation that will otherwise continue until there is either statutory reform or final appellate determination by the High Court.

6.2.1 There should be no 'requirement' that all class members should be required to have individual claims against ALL defendants in class action proceedings involving multiple defendants.

The 'requirement' that all class members have to have individual claims against ALL defendants in class actions involving multiple defendants derives from the Federal Court case of *Philip Morris (Australia Ltd) v Nixon*.[52] In that case the point was not argued. Counsel conceded that this was a 'requirement' of Part IVA of the *Federal Court Act*, and in particular s 33C(1)(a). This provides that a class action may be commenced, inter alia, where '*7 or more persons have claims against the same person*'. Sackville J proceeded to conclude that:

> 'The expression 'the same person' in s 33C(1)(a) is to be read as including more than one person (see *Acts Interpretation Act 1901* (Cth), s 23(b)), provided that all applicants and members of the represented class make claims against all respondents to the proceedings'[53]

Thus, on this construction every plaintiff and group member must, in cases involving multiple defendants, have an individual claim against *each* of the defendants.

The alleged failure to satisfy this 'requirement' has given rise to continuing judicial and academic controversy, interlocutory disputation, strike out applications and appeals. This has added substantially to costs and delays in class action litigation.

A number of judges have raised doubts about whether there is in fact any such requirement but have felt constrained to follow the Full Court decision in *Philip Morris*. A differently constituted Full Court of the Federal Court upheld the validity of a proceeding against 'all (or alternatively any) of the Respondents' despite objections of the respondents that each group member did not have a claim against each respondent.[54]

The problematic nature of this requirement may be illustrated by several factual situations.

In a product liability case it is often the case that there may be a common manufacturer of an allegedly defective product but there may be different distributors (e.g. in different states or regions). Persons claiming loss or damage as a result of use of the defective product may have a claim against both the manufacturer and the distributor. Where the manufacturer had manufactured all the products in question then a class comprised of all users of the product could

[52] (2000) 170 ALR 487.
[53] At [108].
[54] *King v GIO Australia Holdings Ltd* [2000] FCA 1543.

join the manufacturer in any class action proceedings. However, in so far as there were different distributors involved, none of the distributors could be joined as a defendant as all class members would not have a claim against each individual distributor.

This problem also looms large in investor class action litigation. There are many situations where there may be defendants against whom all class members have a claim and other potential defendants against whom only various subsets of the total class have individual claims. For example, in shareholder litigation it is not uncommon to join directors as defendants to the class action. In some instances there may be fluctuating membership of the board of directors such that some directors were only appointed after the date on which certain class members either acquired or sold shares or before or after certain documents were published or representations were made. Depending on when the various causes of action of shareholders arose and/or when certain losses were suffered, there may be some directors against whom some shareholders may not have claims. The problem is further complicated where the proceedings are commenced against one or more defendants but additional cross defendants are brought in by the original defendants for the purpose of claims for indemnity, contribution or proportionate liability.

One solution to these 'problems' would be to bring separate class action proceedings on behalf of each relevant 'sub-group'. However, a preferable solution would be to clarify the position (or, insofar as this is necessary, 'change' the law) so as to make it clear that in cases where there is at least one defendant against whom ALL class members have individual claims (thus satisfying what appears to be, on one construction, the requirement of s 33C (I) (a) of both the *Federal Court of Australia Act 1976* and the *Supreme Court Act 1986* (Vic)) additional defendants may be joined even if only some members of the class have individual claims against such additional defendant(s).

The class action procedure introduced into the Supreme Court of Indonesia does not require all class members to have individual claims against ALL defendants, although all class members must have individual claims against at least one defendant (as presently proposed under these recommendations).

6.2.2 There should be no legal impediment to the use of the class action procedure by identified persons or entities who are aggregated together or who consent to the pursuit of claims on their behalf.

There is at present a 'problem' arising out of the decision of the Federal Court in *Dorajay Pty Ltd v Aristocrat Leisure Ltd*[55] and the corresponding decision of the Victorian Supreme Court in *Rod Investments (Vic) Pty Ltd v Clark*.[56]

There are several dimensions to this 'problem'. These are discussed in detail in a number of articles.[57]

[55] (2005) 147 FCR 394 (Stone J).
[56] [2005] VSC 449 (Hansen J).

Although the statutory class action regime was introduced to facilitate the commencement of proceedings on behalf of a defined group, with a right of individual members to opt out of the proceedings if they do not want to be bound by the result or wish to conduct there own separate actions, a vexed question has arisen as to whether it is legally permissible or appropriate to bring a class action on behalf of a limited group of individually identified individuals, including in circumstances where each of the class members has consented to the pursuit of proceedings on their behalf.

On one view of the existing statutory provisions and the recommendations of the Australian Law Reform Commission (in its report on *Grouped Proceedings in the Federal Court*) this is presently permissible (and has in fact occurred in numerous instances). However, in light of the abovementioned decisions in *Dorajay* and *Rod Investments* there continues to be controversy about this and there is ongoing interlocutory disputation and the prospect of appeals. Again, this is adding to the costs and delays in class action litigation. It has also resulted in a number of instances in the abandonment of the class action procedure and resort to the representative action rule in order to avoid the 'problem'.

It is recommended that the position should be clarified by making it 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 behalf.

In other respects, the statutory requirements for the commencement of a class action would still be required to be satisfied and the court would retain its existing discretion to order, in appropriate circumstances, that the proceeding not continue in representative form.

However, such discretion should not be able to be exercised to prevent a class action from proceeding merely because the defined group, comprising only identified individuals, is smaller than the total of the group of affected persons who may have claims and on whose behalf a class action could have been brought.

In so far as a defendant or potential group member is concerned about the limited ambit of the group on whose behalf the proceedings are brought, a question arises as to whether there should be express provision for the defendant or potential group member to make application for an order expanding the definition of the group. In this event, in the exercise of judicial discretion, the court might order the expansion of the group, particularly in situations where there is a prospect of a multiplicity of separate class actions and/or individual proceedings.

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[57] See e.g. Morabito, V 'Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29(1) *Sydney Law Review*; Cashman, P 'Class actions on behalf of clients: Is this permissible?' (2006) 80 *ALJ* 738; Murphy B and Cameron C 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399.

At present, the legislation provides that the Court may, at any stage of a class action proceeding, give leave to amend the writ commencing the class action so as to '**alter the description of the group**'. However, this can only be done (under this provision at least) **'on application made by the plaintiff'**.[58]

On one view, in the interests of judicial economy and given the costs consequences for the defendant(s), the entitlement of groups of individuals to group together to pursue a class action should not be permitted to give rise to a multiplicity of individual and /or class action proceedings by persons with common, similar or related claims against the same defendant(s). However, in appropriate cases, the court might utilise existing powers to make orders for any such separate proceedings to be consolidated or heard together.

On the other hand, any such provision for application by parties other than the representative party, or non parties, to expand the group may lead to further interlocutory disputation, delay and cost escalation. Moreover, under the present regime, people or entities who are already encompassed within the class as defined for the purpose of the litigation at its inception have a right to opt out, including for the purpose of pursuing separate proceedings. This occurred in the Esso class action proceedings, for example. In the present Amcor price fixing litigation, one of the large commercial entities (Cadbury Schweppes) has opted out and initiated its own separate proceeding. There are no doubt many situations where different persons or entities may have good reasons to run their case separately to other similar proceedings.

Where the simultaneous conduct of a multiplicity of 'similar' proceedings is considered undesirable, the existing powers of the court and procedural rules would facilitate orders staying new proceedings until existing proceedings are determined, or ordering that different proceedings be consolidated or heard together.

Even if express power was conferred to permit applications by defendants or prospective group members to expand the class there may be judicial reluctance to require the representative party to take on the responsibility (and the associated costs) of conducting an action on behalf of a larger class than the representative party has agreed to. Even if a judicial imprimatur is given the representative party may not be prepared to continue to conduct the matter on this basis, particularly given the potential personal liability for the defendant's costs if the case fails. A litigation funder providing financial support for the class action proceeding may also have concerns about expansion of the group (although such concerns may abate if the funder is able to secure an entitlement to a share of the amount recovered by the larger group in the event that the litigation is successful).

A further potential complication in allowing the class to be expanded other than with the consent of the representative party is that this may make settlement more difficult, particularly where there is uncertainty as to the number of people

[58] S 33K(1*) Supreme Court Act 1986* (Vic).

within the expanded class definition and difficulty in determining how many will ultimately come forward and be able to establish their individual entitlements.

On balance, the arguments in favour of permitting expansion of the class other than with the consent of the representative plaintiff are considered to be outweighed by the arguments against.

Of course, a person who is concerned at their own exclusion from the ambit of the group may, under existing provisions, make application to be joined as a party to the proceedings. This would enable them to participate and to obtain any benefit from the outcome. However, as a party they would have potential liability in respect of any adverse costs order.

6.3 The introduction of a new judicial power (or clarification of existing powers) to order *cy pres* type remedies in class action proceedings

It is proposed that the court should have power to order *cy pres* type remedies where: (a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage ('unjust enrichment') has accrued to the person or entity contravening the law as a result of such contravention (c) a loss suffered by others is able to be quantified and (d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.

The proposed 'new' power (or, on one view, clarification of existing powers) would, at least initially, be limited to class actions. In the light of practical experience consideration could later be given to whether such a power should be exercisable outside of the class action context.

The question of whether a power to grant *cy pres* type remedies is already within the statutory or other powers of the court is a vexed question.

Under part 4A of the *Supreme Court Act 1986*, in a class action proceeding the court is empowered to determine questions of law and of fact, to make declarations of liability, to grant any equitable relief, to award damages to group members, to award damages in an aggregate amount (without specifying amounts awarded in respect of individual group members) and to:

> 'make such other order as is just, including, but not limited to, an order for monetary relief other than for damages and an order for non-pecuniary damages'.[59]

By way of contrast the corresponding provision of the *Federal Court of Australia Act 1976* provides that the court may 'make such other order as the Court thinks just'.

Both the Federal and Victorian statutory class action provisions also make provision for the constitution of a fund to facilitate the distribution of money to

[59] Section 33Z (1) (g).

class members. Along with various machinery provisions designed to facilitate notice to class members, the making of claims on the fund by eligible class members and the distribution of funds to class members who have established an entitlement to be paid out of the fund, the statutory provisions confer a *discretion* on the court to 'make such orders as it thinks for the payment from the fund to the defendant of the money remaining in the fund'.

Insofar as it is provided that the court '*may* make such orders as it thinks fit' for payment to the defendant of any surplus in the fund the legislation appears to assume that there may be circumstances where the court may decline to make such an order. The reference in the legislation to '***the*** *money remaining in the fund*' does not seem to contemplate, at least expressly, that the court may order payment to the defendant of only some of the surplus in the fund.

In its report which led to the federal class action provisions, the ALRC not only recommended that a special fund should be established to provide financial assistance in class action proceedings, but also made it clear that any unclaimed residue which had not been otherwise allocated to class members or which was not returned to the defendant 'might, in appropriate cases, also go to this fund. A fund could be set up to be self-financing to some extent'.[60]

However, before considering the circumstances where there may be '*money remaining in the fund*' it is necessary to consider the nature and extent of the power conferred by s 33Z (1) (g). What is the meaning of the words: '*an order for* ***monetary relief other than for damages*** *and an order for* ***non pecuniary damages***'? There does not appear to be any Victorian class action case law on the meaning of these terms.

In the event that on a proper construction of this provision and other powers of the court there is no power vested in the court in a case of 'unjust enrichment' to do anything other than to order either (a) compensation/damages to those persons individually identified (who come forward and make a claim, prove their entitlement and quantify their loss) or (b) to make orders for the return of any surplus to the defendant, then it is recommended that the court should have such power. In any event, to avoid ongoing uncertainty and scope for forensic argument and appeals about the nature and extent of the existing powers legislative clarification is warranted.

Although in some jurisdictions, including in Canada, such powers have been conferred on courts by class action statutes, in some jurisdictions (notably the United States) the power to make *cy pres* type orders has been held to be within the equitable or other jurisdiction of the court. Thus, in the United States at least, cy pres jurisprudence has developed through judicial innovation.[61]

One example of a situation where such a power is clearly required is the litigation arising out of the constitutional invalidity of state tobacco excise laws. This gave rise to a multitude of proceedings between tobacco retailers and

[60] ALRC 46 *Grouped Proceedings in the Federal Cour*t [312].
[61] See generally, Mulheron R *The Modern Cy Pres Doctrine: Applications & Implications* (2006).

tobacco wholesalers as to who should be entitled to retain the money after it was held that it could not be validly collected by state revenue authorities. The money in question had been in fact collected from consumers of tobacco products. The consumers failed in their attempt to bring proceedings seeking to recover the money because the individual consumers who had paid the particular amounts in question were unable to be identified and the court did not have power to order some form of *cy pres* or public interest remedy. Thus, both the retailers and wholesalers who litigated the issue were battling over what was a windfall for either party.

There is one situation at least where the exercise of the power to grant *cy pres* type remedies would need to be carefully considered or constrained. There may be circumstances where the relevant limitation law(s) applicable to certain causes of action have not expired and where there is a prospect of further claims by persons who have suffered loss and damage but who are not within the ambit of the group on whose behalf the proceedings are being brought. It would be manifestly unfair to deprive a defendant of the amount of any unjust enrichment through the exercise of cy pres type remedies but to permit future claims by persons claiming to have suffered loss and damage insofar as the amount of such loss and damage had been 'disgorged' pursuant to the previous cy pres remedies.

There are a number of ways through which this potential problem could be addressed. These are presently under consideration by the commission.

If a provision is introduced which empowers the court to grant *cy pres* type relief, including in circumstances where it is not practicable or cost effective to identify or distribute monies to individual class members who have suffered loss or damage, this is likely to have collateral impact on existing legislative provisions which empower the court to prevent a class action continuing, or to prevent it continuing in class action form or in respect of monetary relief, in certain circumstances.

For example: s 33M of the *Supreme Court Act 1986* (Vic) provides that in a class action which includes a claim for payment of money to group members the court may direct that the proceeding no longer continue as a class action or may stay the claim for monetary relief if the Court concludes:

> 'that is likely that, if judgment is given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of the amounts.'

Section 33N also empowers the Court to order that the proceeding no longer continue as a class action where it is satisfied that it is in the interests of justice to do so because (a) the costs would be excessive having regard to the costs of separate proceedings by group members, (b) relief can be obtained by another type of proceeding (c) the class action will not provide an efficient and effective means of dealing with the claims of group members or (d) it is otherwise inappropriate that the claims be pursued by means of a class action.

If it is accepted, in principle, that the Court should have (or already has?) power to make *cy pres* type orders, some further matters require detailed consideration.

Public interest remedies: Matters requiring further consideration

1. Should such a power only be able to be exercised for the purpose of distributing money for the benefit of persons who fall within the general characteristics of those whose losses have given rise to the 'unjust enrichment' in question? For example, to take the well known United States case of *Daar v Yellow Cab Co*[62], where the taxi company had overcharged passengers who had used taxis during a certain period, should any relief only be for the benefit of (past, present or future) taxi passengers? Alternatively, should the court be able to apply any monies for the benefit of say users of public transport, or consumers generally? If so, would the Court be comfortable in exercising such a broad discretion to determine who the beneficiaries should be? Would this be subject to appeal?

The commission is presently of the view that the courts powers should not be limited or constrained so as to require that any distribution of money be only for the benefit of persons who fall within the general characteristics of those whose losses have given rise to the 'unjust enrichment' in question. For example, to take the tobacco excise litigation: it may not be considered appropriate to apply the funds in question to bring about a reduction in the price of tobacco products. Why should such funds not be allocated, e.g., to assist anti smoking groups and campaigns designed to reduce the incidence of tobacco consumption? However, on one view, both would be in the 'interests' of tobacco consumers. Any decision as to how such monies should be distributed will involve value judgments and a choice between various alternatives.

2. Should such power be able to be exercised to require monies to be paid into the Justice Fund (or some other fund)? The commission is presently of the view that this option should be open to the Court.

3. Should the Court have a general discretion as to how such relief should be granted or should it be limited to approving or choosing between proposals made by the parties to the litigation? The commission is presently of the view that the Court should have a general discretion which should not be constrained by the proposals of the parties.

4. Should there be scope for intervention by public interest or consumer bodies for the purpose of making submissions on the how any moneys should be allocated? The commission is presently of the view that there should be scope for such intervention.

[62] 67 Cal 2d 695, 63 Cal Rptr 724 (1967).The taxi company had overcharged by unlawfully altering the meters of the cabs. The court ordered the company to reduce the fares below the authorised fares.

5. Should the court be empowered to not approve a settlement agreement reached between the parties as to how any such monies should be allocated? (At present, the class action statutory provisions require court approval for any class action settlement). The commission is presently of the view that the Court should retain power not to approve of any such settlement.

6. Should there be notice given of the proposed exercise of the cy pres power? The *Supreme Court Act 1986* (Vic) presently makes provision for notice to be given of any matter at any stage of a class action proceeding. The commission is presently of the view that the parties should be required to give Court approved notice to the public that the power may be exercised and this should include, where appropriate, notice to particular entities that may be eligible for consideration as appropriate recipients of the funds.

7. Should the exercise of the Court's discretion to grant *cy pres* remedies be subject to appeal? The commission is presently of the view that there should be only limited appeal rights, based on *House v The King* type principles.

8. As an alternative to conferring a *cy pres* power on the court (in so far as it does not at present have such power) might it be preferable to create a civil penalty calculated by reference to the amount of any 'unjust enrichment', with provision for such penalty to be paid into a designated fund (the 'Justice Fund') or used for specified 'public interest' purposes?

7. LITIGATION FUNDING

7.1 The establishment of a new litigation funding mechanism: the Justice Fund.

Class actions are now an established part of the legal landscape. However, Victoria remains the only jurisdiction, apart from the Commonwealth, to have enacted a comprehensive statutory class action regime. For good reason the Victorian provisions in Part 4A of the *Supreme Court Act 1986* are modelled on the provisions of Part IVA of the *Federal Court of Australia Act 1976*. The federal provisions were based substantially on the recommendations of the ALRC. However, the Federal Government failed to implement the ALRC's important proposal in relation to the establishment of a class action fund. The proposed Victorian Justice Fund will remedy this problem. However, it is presently proposed that the fund will *not* be restricted to funding class actions. Also, the fund is intended to be self funding, as discussed below.

It is proposed that a new funding body be established (provisionally titled the Justice Fund) which would (a) provide financial assistance to parties with meritorious civil claims, (b) provide an indemnity in respect of any adverse costs order and (c) meet any requirements imposed by the court in respect of security for costs.

The body would, in consideration of providing the abovementioned financial support, receive an agreed percentage of the amount recovered in successful cases. The body would seek to be self funding (through income derived from success fees in funded cases, through costs recovered from unsuccessful parties and through payments into the fund which the court would be empowered to order pursuant to the *cy pres* type remedies referred to above).

7.2 A new litigation funding mechanism should be established: the 'Justice Fund'.

As noted above, in its report which led to the introduction of Part IVA of the *Federal Court of Australia Act 1976* (on which the Victorian class action provisions are based) the ALRC recommended that a special fund should be established to assist in financing class action litigation and as a source of funds to pay costs awarded against representative parties.[63] Also as noted above, the ALRC also proposed that the fund could be self-financing to some extent through receiving the unclaimed residue of monetary relief which had not been claimed by eligible class members or returned to the defendant.

The Law Council of Australia in its submission to the Standing Committee of Attorneys-General on litigation funding[64] recommended that a similar fund be created. The Law Council called it a 'Litigation Guarantee Fund'.

[63] Grouped Proceedings Report [308].
[64] September 2006.

Funding and costs are a particular problem in class action litigation for a number of reasons:

- Class action litigation is often expensive to conduct and protracted
- There are often numerous interlocutory applications and appeals
- Class members have statutory immunity for adverse costs orders and thus the representative plaintiff may be ordered to pay the costs of the defendant(s) or any amount required by way of security for costs
- The present law relating to orders for security for costs against representative plaintiffs in class action litigation is unclear and on one view it is arguably unfair for a representative party to provide security in respect of the costs of pursuing remedies for the benefit of others
- Although the amount at stake in the litigation may be very large, the representative plaintiff's individual claim may be very modest
- Civil legal aid is generally not available for plaintiffs
- Corporate defendants and insurers often have substantial financial and human resources and may be able to claim a tax deduction for the legal fees and expenses incurred in defending an action

There are also a number of particular costs problems for defendants and their insurers.

- It may be difficult to quantify the total value of the claim(s) and thus settlement may not be practicable and the proceedings may become protracted and expensive
- Until the case is advanced or concluded it may not be possible to determine how many members of the group will in fact proceed to submit claims even if liability is established
- Where there are multiple defendants it may be difficult to apportion liability or determine appropriate contributions
- Apart from the substantial costs of the determination of the common issues, there may be substantial transaction costs in determining the claims of individual class members
- Because of the statutory immunity of class members any costs orders in favour of the defendant may only be against the representative party who may be unable to pay such costs

To some extent some of these problems have been ameliorated, for the benefit of both plaintiffs and defendants, by the emergence of commercial litigation funders. Some commercial funders are prepared to finance the litigation, meet any obligations to provide security for costs and provide an indemnity in respect of any adverse costs order. This is usually in consideration of agreement by the assisted parties to pay to the litigation funder a specified percentage of the amount recovered if the litigation is successful.

However, such agreement cannot be entered into by the representative party on behalf of the class. Thus, in order to secure a legal entitlement to share in the amount recovered by class members litigation funders usually endeavour to get individual class members to enter into contractual litigation finance

arrangements. Moreover, litigation funders are usually only agreeable to fund litigation on behalf of those individual class members who have agreed to enter into litigation finance agreements.

These commercial considerations have led to a proliferation of class actions where the defined classes are limited to persons who have agreed to enter into litigation finance arrangements with commercial litigation entities. Thus, in effect, the 'opt out' statutory class action regimes have been in many cases utilised by groups limited in number to those who have contractually agreed to 'opt in' to proceedings brought to recover money on their behalf.

This has a number of undesirable policy consequences given that the class action procedure was designed as a mechanism for obtaining a remedy for 'all' of those adversely affected by the conduct giving rise to the litigation. This has attracted judicial scrutiny and expressions of concern. Moreover, as noted above, some judges have refused to allow class actions to proceed where the classes in question have been restricted to groups of claimants who have either entered into litigation finance arrangements with a commercial funder or have agreed to fee and retainer arrangements with a particular law firm.

There are a number of ways in which these problems might be addressed, in whole or in part:

- A legal mechanism could be adopted to facilitate a claim by a litigation funder to a share of the total amount recovered at the conclusion of the litigation brought on behalf of an 'opt out' class, without necessarily requiring each of the group members to enter into separate individual contractual arrangements with the funder at the time of commencement of the proceeding (but preserving the existing right of individual class members to 'opt out' of the litigation if they are unhappy with the proposed payment to the litigation funder out of any money recovered on their behalf)
- The existing statutory provision which empowers the court to deduct from sums recovered on behalf of class members any 'shortfall' between the legal costs incurred by the representative applicant in conducting the proceeding and the amount of costs recovered from the defendant could be expanded to encompass (a) settlements (as distinct from judgments) and (b) amounts payable to a litigation funder (as distinct from legal costs)
- The existing prohibition on law practices being able to charge a fee calculated by reference to the amount recovered in the litigation could be abolished, at least in the context of class actions
- A fund could be established which could (a) provide financial assistance in class actions, (b) satisfy any order for security for costs and (c) provide an indemnity in respect of any adverse costs order made against the representative plaintiff if the class action is unsuccessful.

Leaving aside for present purposes the first 3 of these alternatives (which are not mutually exclusive) the way in which it is proposed that the fund would operate is explained below.

7.2.1 Outline of the way in which the proposed fund would operate

1. For administrative convenience, and to reduce establishment costs, the fund should be established, at least initially, as an adjunct to an existing entity. One appropriate body would be Legal Aid Victoria.

2. There would have to be a statutory foundation for the fund including to (a) facilitate recovery by it of a share of the proceeds of the litigation (given that the representative party has no legal authority to contractually assign a share of the amounts recovered on behalf of other class members) and (b) to limit its potential legal liability for adverse costs (see below). The statutory provisions would also specify the objects of the fund and the criteria for granting assistance.

3. Although an initial seeding grant would be required to establish the fund[65], it would seek to become self funding out of revenue derived from class action cases that were financially supported. [Following the Quebec model, it might be feasible to establish a mechanism for the fund to derive revenue from ALL class action proceedings.] The body would compete on financial terms with existing commercial litigation funding entities but unlike such commercial funders, that distribute profits to shareholders, the fund would use any profits for the purpose of (a) providing additional funding for commercially viable meritorious litigation (b) funding important test cases or public interest cases, (c) financing research on civil justice issues and (d) funding initiatives of the Civil Justice Council.

4. The fund would have considerable commercial flexibility to determine the nature and extent of financial assistance provided and the terms and conditions of such assistance. For example, in some cases it might provide comprehensive financial support for the litigation as a whole, including financial assistance for the conduct of the case, satisfying any requirements in relation to security for costs and providing an indemnity in respect of adverse costs orders made against the assisted party. In other cases it might only provide some parts of this 'package' or it might only provide assistance up to a certain point in the litigation, subject to further review.

5. In class action proceedings, one safeguard is that notice would be required to be given of the terms and conditions of the funding arrangement and group members who were not agreeable to the financial terms would retain the right to opt out of the class action proceeding.

[65] The commission is interested in suggestions as to sources of funding to establish the fund.

6. The fund would seek to make a 'profit' out of providing assistance rather than merely seek to recoup its outlays. It would be permitted to provide assistance on the basis that the assisted party agreed to pay to the fund a percentage of the amount recovered. However, unlike commercial litigation funders that distribute profits to shareholders or investors, the fund would use revenue generated for the purposes of the fund.

7. The statutory provisions establishing the fund would authorise the fund to recover monies not only from the representative party conducting the class action proceedings but also out of any monies recovered for the benefit of class members, including by way of judgment or settlement.

8. The fund should be structured so as to minimise potential liability for income tax or capital gains tax on any 'profits'.

9. In order to reduce the level of 'cash' initially required to finance its operations each law firm acting in funded cases would be normally expected to continue to conduct the case to its conclusion (including any appeal) without any financial contributions from the fund, other than a guarantee that the firm would ultimately be paid agreed fees and re-imbursed agreed expenses if the case is unsuccessful. For the purpose of conducting the case the firm would be required to utilise its own professional and financial resources, including for the purpose of meeting expenses and disbursements, including counsels fees and the cost of witnesses etc.

10. Thus, in all cases that are successful, the fund would receive income without having to outlay monies. Leaving aside the administrative costs of operating the fund, in crude financial terms if there were at least twice as many successful as unsuccessful cases the fund would break even (assuming that the average cost of such cases is the same). There would need to be twice as many successful cases because in unsuccessful cases the fund would be liable for two sets of costs: those of the unsuccessful applicant and those of the successful respondent. In view of the fact that the fund would only provide assistance in cases that were determined to have merit, on the basis of independent expert opinion, it is highly likely that the success rate of the funded cases would be relatively high.

11. For actuarial and solvency reasons it would be necessary, initially at least, to be able to quantify the potential liability of the fund to meet any adverse costs order in cases in which assistance has been provided. It is proposed that this be done using the approach adopted by the English Court of Appeal in determining the liability of commercial litigation funders for adverse costs in civil litigation in England & Wales.[66] Thus, the

[66] *Arkin v Borchard Lines Ltd* [2005] 3 All ER 613. By way of contrast, English courts have held that 'pure funders' (as distinct from commercial litigation funders) should not have liability for adverse costs: *see Hamilton v Al Fayed* [2003] QB 1175. A legislative provision similar to s 46 *Legal Aid Commission Act 1979* (NSW) could be enacted to impose a statutory limit on exposure to costs. That provision seeks to limit the liability of the legally aided person. To that extent, it has been held to be inapplicable in federal proceedings. This would not create a difficulty in the

legal liability of the fund in respect of adverse costs would be capped at the level at which financial assistance had been provided to the party assisted by the fund. In other words, if the fund had provided financial assistance in the sum of say $1 million dollars to the assisted party, the maximum liability of the fund in respect of any adverse costs order would be the same amount. Although this may not adequately indemnify successful defendants in some cases, particularly where there are multiple defendants, such financial indemnity is a considerable improvement on the position that defendants presently confront in defending class actions brought by parties of limited means. Moreover, the fund would have discretion to pay in excess of the statutory cap. The defendant would also retain such rights as it has under existing law to seek to enforce any costs order against the party ordered to pay costs.

12. The fund would be able to receive income by way of *cy pres* orders made in cases, including cases where the fund had not provided financial assistance.

13. Decisions as to the funding of cases would be made in the light of independent advice concerning the merits and financial viability of the proposed litigation, including by counsel and experienced solicitors.

14. Once it becomes sufficiently solvent, the fund would be able to provide financial assistance on 'non commercial' terms in other areas of litigation other than class actions, including in test cases and in public interest cases. Although at its inception the fund would not be restricted to funding class action proceedings, it is likely to be a highly desirable source of financial support in such cases and also likely to derive substantial income from successful class actions.

15. Funding in class actions would be limited to class actions in the Supreme Court of Victoria, pursuant to Part 4A of the *Supreme Court Act 1986* and representative actions under Order 18 of the *Supreme Court (General Civil Procedure) Rules 1996.* [Query whether such assistance should also extend to class actions under Part IVA of the *Federal Court of Australia Act 1976* (Cth) either generally or only where the Federal Court is sitting in Victoria?]

16. In the event that the fund is able to provide assistance in Federal Court proceedings, it may be necessary to consider the potential inconsistency between the proposed statutory provisions relating to costs and federal law governing costs. Also, query the implications, if any, of empowering the fund to receive part of the damages otherwise payable to class members, without their consent.

17. There would be a minimum of full time professional and support staff and there would be a board of directors or trustees who would serve in

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present context as the proposed fund would only be able to provide assistance in connection with proceedings in Victorian courts.

an honorary capacity. There needs to be detailed consideration of how such persons would be appointed. Initially at least the fund might only require a chief executive officer and a secretarial/administrative assistant.

18. The operation of the fund would be subject to audit and under the scrutiny of the Civil Justice Council.

19. Although the fund would compete with commercial litigation funding entities, there is no reason why it could not enter into joint venture agreements in respect of particular cases, both with commercial litigation funders and with private law firms engaged in the conduct of the case on behalf of the party assisted by the fund. Where a joint venture agreement is entered into with a private law firm the fund would be able to negotiate with the law firm in relation to both (a) the degree of financial risk which the law firm would assume in relation to the litigation in question and (b) the sharing of a percentage fee between the fund and the law firm. The intention is that the fund should have considerable commercial flexibility as to how it operates.

8. SELF REPRESENTED LITIGANTS

The commission is yet to adopt any recommendations in relation to self represented litigants. This topic is to be considered at a meeting of the commission's Civil Justice Division scheduled for 28 July 2007.

As noted above, the commission is presently considering (a) various means by which additional assistance may be provided to self represented litigants (who have claims or defences which appear to have merit) and (b) various means by which unmeritorious claims and defences (whether by represented or self represented litigants) may be screened out without proceeding to trial.

9. COSTS

To date the Division has adopted a number of specific recommendations in relation to costs. These are set out below. Other matters are presently under consideration. Also, various other recommendations outlined above will have an impact on the costs of proceedings.

The specific recommendations in relation to costs adopted to date are as follows:

9.1 A specialist Costs Council should be established, as a division of the (proposed) Civil Justice Council.

9.2 The court should have power to require parties to disclose to each other and the court estimates of costs and actual costs incurred.

9.3 Although fixed or capped costs are a good idea in principle, there are practical problems in their implementation. These should be developed for particular areas of litigation after consultation and with the agreement of stakeholders (under the auspices of the Costs Council/Civil Justice Council).

9.4 The Justice Fund should be able to provide assistance, including indemnity in respect of adverse costs, in cases other than class actions after it has become self funding.

9.5 The present multiple bases for taxation of costs should be simplified.

9.6 The present gap between party-party and solicitor client costs is unreasonable in a number of cases.[67] The recoverable costs on a party-party basis should be 'all reasonable costs incurred'.

9.7 Other methods for ordering recovery of legal costs of a successful party should be utilised (more often), including ordering costs as a specified percentage of the actual (reasonable) solicitor-client costs,

[67] Based on research carried out by the commission, it would appear that in many instances only about half or less of the solicitor client costs are recovered on a party-party basis following taxation of costs.

with a view to avoiding the costs and delays associated with the present process of taxation of costs.

9.8 The court scales of costs need to be revised/up-dated.

9.9 There should be a common scale across courts. The question of whether or not there should be proportionate differentials between courts in terms of recoverable party-party costs is to be further considered at a later Division meeting.

9.10 There should be a prohibition on law firms profiting from disbursements, including photocopying, except in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. Where a client recovers costs only the reasonable actual costs of the disbursements (excluding any profit element) should be recoverable from the losing party.

A draft provision is as follows:

(1) Unless the client or another person providing indemnity or financial support for the client[68] is (a) of reasonably substantial means[69] and (b) agrees to pay in excess of the prescribed rate for disbursements, a law practice shall not charge a client any amount for disbursements in excess of the prescribed rate.
(2) In making any order for costs against a party or other person who is not a party the Court shall not allow recovery of any amount for disbursements in excess of the prescribed rate.
(3) Law practice includes any related person or entity, including a service company.
(4) Prescribed rate means the approximate actual cost of the disbursement without any allowance for mark up by the law practice or profit by the law practice. The actual cost may include a reasonable allowance for law practice office overheads. [For example: the 'actual cost' of internal photocopying would include (i) the cost of the paper, (ii) charges payable to an unrelated lessor or owner of any photocopying equipment used in making the copies and (iii) other costs associated with the purchase, lease or use of photocopying equipment in the possession of the law practice . The cost of the labour involved in the copying and collating would be included as part of the allowance for law practice office overheads. The 'actual cost' of copying done externally would be the charges made by an unrelated commercial photocopying company plus a reasonable allowance for law practice office overheads, including the labour involved in collating, despatching and collecting the documents].

[68] It may be preferable to pick up the terminology currently incorporated in the *Legal Profession Act 2004* (Vic) in respect of related persons to whom the costs disclosure obligations now apply.
[69] The commission is mindful that this expression is imprecise and invites suggestions as to more appropriate terminology.

(5) To avoid complicated computations, the law practice may make a reasonable estimate of the approximate actual cost of the disbursement or charge at a rate approximate to the rate charged by unrelated commercial suppliers of services [e.g. photocopying].
(6) The prescribed rate for disbursements may be set by [the Costs Council].

9.11 There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.

9.12 There is a need for more data and research on costs. This might be achieved by empowering the court to require parties to disclose costs data at the conclusion of the matter.

Matters requiring further consideration

1. The current prohibition on percentage fees is to be further considered at a later meeting of the Division.

2. In the event that there is a common scale for recoverable costs applicable across the three courts, should there be 'standard' percentage reductions in the amount of costs recoverable, depending upon which court the proceeding is in. Alternatively, is the principle that the recoverable costs should be 'reasonable' sufficiently flexible to accommodate variations between courts (in the event that such variations are considered desirable) without the need for prescribed variations?

3. Court fees are still be considered and will be discussed by the Division later.

4. The rules relating to offers of compromise and costs consequences will be considered the Division at a later date.

5. In exercising the proposed power to order disclosure of costs incurred and estimates of costs likely to be incurred, should there be limits on the type of information required to be disclosed so as to protect information that may have confidential strategic or forensic significance or which might otherwise be privileged?

10. CASE MANAGEMENT

Apart from those matters encompassed by the proposals referred to above, the commission has not to date formulated any further reform proposals in relation to judicial case management. The matter is for consideration at a meeting of the Division scheduled for 28 July 2007. Prior to that there will be further consultation with the courts.

As noted in the English context, active judicial case management includes:

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the one occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.[70]

As noted above, a number of these elements of judicial case management have been identified in the draft Overriding Purpose provision.

Other matters presently under consideration by the commission include:

- Procedures for the summary disposition of unmeritorious claims and defences
- Methods for controlling interlocutory disputes
- The imposition of limits on trial time, interlocutory hearings and submissions
- The use of case conferences as an alternative to directions hearings
- Greater use of telephone directions hearings and technology generally
- Procedures for narrowing the issues in dispute
- Mechanisms for the summary determination of issues which may resolve the proceedings and the use of 'mini trials'
- The possible introduction or expansion of a docket system
- Methods of enhancing party compliance with procedural requirements and directions
- The desirability of earlier and more determinate trial dates

[70] Hurst P *T Civil Costs* Third Edition Sweet & Maxwell London 2004 at 14.

11. ONGOING REVIEW AND CIVIL JUSTICE REFORM

The commission proposes to recommend the establishment of a new body which would have ongoing statutory responsibility for review and reform of the civil justice system. It is proposed that it be called the Civil Justice Council which is the name of the body established in the United Kingdom which has a similar role[71]. It would be comprised of persons from various stakeholder groups, including the courts, the Justice Department, the legal profession, business and insurance groups and consumer organisations etc.

Members of the Civil Justice Council would serve in an honorary capacity but would be re-imbursed for expenses etc. There would be a secretariat comprising a chief executive officer and support staff.

The role of the Civil Justice Council would include (a) assisting in the implementation of the reforms proposed by the Law Reform Commission, (b) monitoring the impact of such reforms, (c) identifying further areas in need of reform, (d) conducting or commissioning research, (e) bringing together various stakeholder groups with a view to reaching agreement on reform proposals, including through the use of mediation and other methods. The proposed Costs Council (referred to above) would operate as a Division of the Civil Justice Council but would focus exclusively on issues to do with legal costs.

12. MISCELLANEOUS TECHNICAL REFORMS

In the course of the civil justice enquiry the commission has received numerous submissions calling for various ad hoc reforms in a number of areas. It is presently anticipated that a number of these will be the subject of recommendations in the forthcoming report in September 2007. The Division has yet to consider these matters. They are scheduled to be considered at a meeting on 28 July 2007.

COMMENTS AND SUGGESTIONS

The commission is seeking comments and suggestions concerning the matters referred to above. These should be submitted to: Victorian Law Reform Commission, GPO Box 4637 Melbourne Victoria 3000; or DX 144 Melbourne Victoria; or law.reform@lawreform.vic.gov.au. Comments should be submitted by no later than **Friday 27 July 2007**.

[71] Information on the Civil Justice Council is available at the following internet site: www.civiljusticecouncil.gov.uk; 2006 Annual Report: www.civiljusticecouncil.gov.uk/files/cjc_annual_report_2006web.pdf.