ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

Australian Financial Review Legal Conference 2008

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CHECK AGAINST DELIVERY

[Acknowledgements]

- **First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.**

[Other Acknowledgements]

- **Chair, Mr James Eyers, Legal Editor, Australian Financial Review**
- **Mr Glenn Burge, Editor, Australian Financial Review**
- **Ladies and gentlemen**

[Introduction]

1. **In 1789, George Washington wrote to America's first Attorney-General:**

   "*The administration of justice is the firmest pillar of good government.*"

   No mere platitude on Washington's part.

   All of us who have worked in the law, and in government, appreciate the fundamental truth within Washington's assertion.

2. **Yet more than 200 years on, we know that the rising costs of justice threaten to shake this firmest pillar of government.**

   To be relevant justice must be accessible.

3. **I know I am not the first to make this observation.**

   This is a world-wide concern.

   In the United Kingdom, the Lord Woolf's interim report on access to civil justice noting: "*The problem of costs is the most serious problem besetting our litigation is not system.*"

I would not disagree with that assessment being made in Australia.

4. **The growing complexity of modern business, together with current trends in the global economy, are likely to increase large scale commercial disputes.**

   Also, the current stock market turmoil is expected to increase class actions.

   This will have consequences for all Australians as we the taxpayers also must bear the cost of resolving these disputes.

   It is not just a cost to those involved in the disputes.

5. **It is important that we have a robust court system that deliberates with the benefit of expert submissions.**

   Indeed it is the view of the Rudd Government that we should promote The Federal Court as the regional hub for commercial litigation.

   This necessarily means companies should have

the option to pursue civil remedies through litigation where necessary.

6. **However, court resources are finite.**

   Justice should be available for everyone, not merely for those who can afford protracted litigation.

   It should be available to working Australians and small business just as it is available to big business.

7. **I have had my own experience of needlessly protracted litigation.**

   On one occasion I acted for workers who had not received proper severance pay from their employer, a major Australian company.

   The litigation ran for three years and it would have been line ball whether it would have been cheaper for the company to pay the workers rather than run the case.

   Eventually, judgment was obtained by my clients and the presiding judge made a penalty order against the company.

But it was a hollow victory: just prior to judgment being handed down the company was wound up.

8. **Commercial disputes such as these should be resolved expeditiously and economically. Litigants and the courts must maintain perspective by ensuring costs are kept proportionate to the relief claimed.**
   As Chief Justice Spigelman of the New South Wales Supreme Court suggests, "we can't have commercial litigation where the flag fall for discovery is $2 million."
9. **To ensure justice is affordable we need to look at innovative ways of keeping our civil courts costs effective and efficient.**
10. **But how best do we grapple with large commercial disputes, including shareholder class actions?**
11. **This is not just an access to justice issue. There are also strong economic grounds for ensuring that litigation costs are proportionate to**

the relief claimed.

Unnecessary delay and time spent in court ties up significant capital and managerial time which could be better applied to more productive endeavours.

As a result, they are financial imposts not just on a company but also on the broader economy.

For example, banks factor the cost of recovering debt into the cost and availability of credit.

Given that litigation occurs most frequently at times of economic downturn, these indirect costs to small business and the community of litigation can be amplified at the most counterproductive times.

12. **Of course, the value of the rule of law to a community cannot be calculated in mere dollars and cents.**

    But increasingly the question of whether a company or an organisation can obtain - or rather- afford a remedy for a civil wrong, boils down to just that calculation.

As a result, there is a risk that disputes below a certain value or litigants without sufficient financial resources will not be heard by a court.

This is because the costs of hearing them are totally disproportionate to the value of the claim.

If this leads to a perception that certain wrongs can go unremedied or only the wealthy can obtain remedies that inevitably will undermine our system of justice.

For justice to be relevant it must be accessible.

[Challenges of Commercial Litigation]

13. **Over many centuries we have developed a system of adversarial justice that has assumed that control of the court process leading up to trial is best left in the hands of the lawyers - or worse still lawyers operating within the constraints of court rules and processes that are overly bureaucratic and burdensome.**

But experience shows it is now clear that in, some areas, this has been a disaster.

The establishment of a separate Federal Magistrates

Court happened in large part because reform of family court had proven to be all but impossible.

It is becoming increasingly evident that modern litigation is no longer an efficient model of dispute resolution when confronting complex business transactions.

This includes coping with the tsunami of documents created by electronic communication.

This adds to time costs and delay.

14. **Many judges have also spoken of their frustration at delaying tactics being used for strategic purposes.**

For instance, concerns have been raised about the use of interlocutory actions to delay the resolution of the real issues in dispute.

Justice Sackville has noted the powerlessness of judges "in the face of litigants who, for whatever reason, decide to press on notwithstanding huge and often disproportionate costs burdens."

As a result, courts and judges now confront the question of how to reconcile their role as an independent and impartial arbiter with the need to control proceedings by interventionist and active

participation to ensure that justice is done.

For Government, large-scale commercial litigation poses a different set of challenges to the administration of justice.

How do we ensure the 'big end of town' doesn't monopolise the court's time, to the detriment of the entire civil justice system?

And a perennial issue - how do we better guarantee that taxpayer funds are spent effectively and used efficiently?

[Reforms to the Federal Court System]

15. **I believe there is room for reform.**

    In fact it's essential if we're to have a legal framework that is efficient, and improves the productivity and competitiveness of our economy.

    And one that provides fair access to justice.

16. **But as mentioned, I also want to ensure that the Federal Court of Australia is well equipped to operate as a regional hub for commercial litigation.**

17. **So in conjunction with the courts I am considering a range of possible reforms to the federal court**

system.

This will fulfil the Government's objectives - to cut red-tape, rationalise business regulations, and responsibly manage the economy.

[Cost to the Community]

18. **We know that large corporate clients are well resourced to pay for teams of lawyers for months in court.**

    But only part of the cost.

    It's the wider community that bears the cost of maintaining the civil justice system.

    The taxpayer not only picks up the tab through judicial salaries, court officer and registry staff salaries, and court premises but also effectively shoulders part of the cost of highly-paid lawyers through the tax system.

19. **In relation to the last matter I note Victorian deputy premier Rob Hulls' recent comments that the courts are in danger of becoming "a fiefdom for large corporate entities to take action…in the**

full knowledge that their legal fees are tax-deductible."

20. There is undoubtedly a public benefit in ensuring that individuals and companies have proper advice and representation to meet their often complex legal obligations.

However, that benefit comes with reciprocal obligations to not abuse the litigation process for corporate or strategic purposes.

I believe there is some merit in examining the role of public funding where there has been an abuse of process or a case has been unnecessarily or unreasonably protracted.

21. In relation to tax deductibility, it is a general principle in the income tax law that expenses relating to income earning activities are deductible.

Denying or limiting deductibility would overturn a basic principle of the tax law.

It could involve complex changes to the tax. It could in fact lead to more litigation as a result of

disputes over the meaning of new tax provisions

Before any suggestion that action should be taken in this area there would need to be careful whole-of-government consideration.

23 However, bearing in mind the need to ensure that parties do not abuse the court system, I believe it is appropriate that consideration be given to providing federal courts with greater statutory power to award costs in relation to unnecessary interlocutory proceedings.

24. Also, in recent years, the United Kingdom has moved towards a system of full cost pricing across all civil courts.

This means litigants pay court fees closely matched to the full price of the court.

There are concessions for the less well-off. But greater cost recovery, for those who can afford it, is widely accepted throughout the UK.

25. While I am keen to explore options that ensure public money is equitably spent - I have no intention of inhibiting the resolution of large commercial disputes.

Or to out-price the Federal Court from becoming a regional judicial hub.

26. I have asked my Department to engage in initial consultations on the idea of greater cost recovery for large litigators and to find a balance between these competing considerations.

27. I have also written to my State and Territory counterparts seeking their views.

Greater cost recovery would require a consistent approach across Australian jurisdictions, to discourage big litigators forum shopping.

Indeed, many of the initiatives that I have mentioned here today would benefit from cooperation across jurisdictions so I look forward to discussing many of them with my SCAG colleagues.

28. Cost recovery for mega-litigators was recently suggested by Chief Justice Spigelman who observed that "[companies] are prepared to demand and pay for [access to justice] through their own lawyers but not pay, as it were, the community."

29. On the other hand, Chief Justice Gleeson of the High Court has remarked that "*charging people on*

a user pays basis for the administration of justice, which is an exercise of government power, has a philosophical problem about it."

30. However, a limited system of cost recovery for big litigators could potentially benefit a range of court support services.

31. In times of restraint on government spending, I have to look at new ways of funding community justice initiatives.

32. Targeted cost recovery shouldn't inhibit corporations seeking access to the justice system. But the revenue raised could help organisations expand their services to poorly-resourced court users.

33. For example, one possible initiative could be the extension of the Court Network Program which has been operating very successfully in this state for the last 28 years.

Court Network provides information, support and referral services to people attending Victorian courts and is now looking to extend its services to all Federal courts in Australia.

The service is particularly valuable to vulnerable litigants including those who have suffered from domestic violence.

34. I would welcome further debate on the issue of cost recovery generally.

[Case Management]

35. I also see value in developing the role of judges as case managers.

36. Justice Sackville, informed by his 'C7' experience, believes judges should be given explicit statutory powers for case management.

37. His Honour argues that these powers would ensure costs are kept proportionate to the matter in dispute, and would relieve the court of undue resource burdens.

38. The evolution of judges from independent adjudicators into active case managers is becoming more widely accepted in Australia.

39. As indicated recently by the Victorian Law Reform Commission, more can certainly be done.

40. As Ronald Sackville indicated, active case management in federal courts may need a statutory foundation.

41. To this end, I note the statutory requirement in NSW that disputes be resolved justly, cheaply and as efficiently as possible.

This notion could also be enshrined in federal statutes as the overriding purpose of case management in federal courts.

42. The Commission also noted that lawyers and their clients can do more to better manage civil cases.

I am considering the merits of pre-action protocols to set out codes of sensible conduct that parties would be expected to follow when faced with the prospect of litigation.

43. Another option I am considering for the Federal Court is to provide it with broad powers to make directions limiting:

- **the time for examining witnesses;**
- **the number of witnesses;**
- **the number of documents tendered in evidence; and**

- **the time for submissions.**

The Federal Court is currently examining how this might be done.

It is commendable that the court is examining these issues and I look forward to receiving its proposal.

These powers should be used to confine the court's inquiry to the real issues in dispute.

At all times, case management should be proportionate to the issues in dispute and not become another cost burden or cause of delay.

[Other Case Management Proposals]

46. The courts themselves have suggested innovative solutions to address the modern challenges of mega-litigation.

47. For example, Western Australian judges have proposed that multiple trial judges preside over large cases at first instance.

The intention is to split up witnesses between the judges and for them to hear concurrently.

Significantly, Australia would lead the world if this proposal was introduced.

48. Another innovation is the 'Fast Track List' or 'Rocket Docket', recently introduced in the Victorian District Registry of the Federal Court.
It is intended to streamline civil court procedures, making case management more efficient and cost effective.

49. So far the 'Rocket Docket' has achieved impressive results.
Matters on the List are taking an average of 115 days from the date of filing to finalisation.

50. Options like the Rocket Docket, multiple trial judges, and extended case management powers are certainly worth considering.

[Alternative Dispute Resolution]

51. Since my appointment as Attorney-General, I have spoken frequently about the enormous value of Alternative Dispute Resolution.
And of the need for courts to make far greater use of qualified adjudicators.
I would like to see ADR processes built in to the fabric of our court system.

52. Even if a matter can't be resolved through ADR, the issues in dispute can be significantly narrowed to shorten court proceedings.

53. To this end, I recently asked the National Alternative Dispute Resolution Advisory Council to report on strategies that would remove barriers to Alternative Dispute Resolution (ADR) by providing incentives to ensure its greater use, as an alternative to and during litigation.

[Litigation Funding]

54. If properly managed, litigation funding has the potential to provide access to justice to a broader range of people.

It can assist in providing a remedy where the likely cost of litigation is disproportionate to the sum in dispute.

55. However, I am concerned that in some cases there appears to have been insufficient disclosure of the funding arrangements to either the court or those who have been funded.

It may be necessary to consider if adverse costs

orders should be enforceable against third-party funders and also whether the funders should have adequate capital to meet those orders.

56. The regulation of litigation funding is an issue currently before the Standing Committee of Attorneys-General.

However, it is important to ensure that business is not burdened with unnecessary extra regulation.

The work to come out of SCAG may be used as a basis for wider consultation on this matter.

And I encourage legal professionals to put forward their views.

[Conclusion]

57. The possible reforms I have mentioned are aimed at providing flexibility, reducing delays and minimising the cost of litigation.

Mega-litigation and shareholder class actions, in particular, could benefit from faster and cheaper court procedures.

58. I accept there is no "silver bullet".

I agree with the comments of the Victorian Attorney-General that what is required is a cultural change in the way in which we resolve disputes and use the court system.

Lawyers have a duty to their clients to provide the best possible advice and representation.

But they also have a responsibility to ensure that our system of civil justice remains strong and that public confidence in our courts is not undermined.

They should not put their passion for the contest ahead of securing practical outcomes for their client.

59. Debate on our courts' future must consider the equitable use of finite court resources.

I want the pillars that support our federal courts to hold down the costs of justice.

Affordable justice can contribute to our courts ability to be a centre of excellence for commercial litigation in our region.

From that base we can support the growing productivity and competitiveness of our economy.

60. In conclusion, I want to commend the Australian Financial Review for organising this comprehensive conference.

61. I am sure today's conference will encourage further discourse and help people and companies to devise new solutions to old problems - and innovative approaches to emerging challenges.

62. I wish you well.

ENDS