

***Victorian Bar Response to the
Productivity Commission
Issues Paper on
'Access to Justice
Arrangements'***

4 December 2013

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1. This submission is a response to the Productivity Commission Issues Paper, 'Access to Justice Arrangements', dated September 2013 (*Issues Paper*). This submission is not an exhaustive response to the issues and questions raised in the Issues Paper, but is intended to summarise some key aspects of the independent Bar in Victoria which relate to the Productivity Commission's mandated inquiry.

Executive Summary

2. The independent Bar is vital to both competition and excellence in the market for legal services. Barristers provide experience, flexibility and efficiency to the legal market.
3. The barriers to entry to, and exit from, the Victorian Bar are very low.
4. The Bar provides education to new barristers and Continuing Professional Development (*CPD*) to all members and promotes high ethical standards.
5. The Bar contributes to procedural innovations which serve to improve access to justice.

The Victorian Bar

6. A barrister is a specialist advocate with distinctive competencies. Barristers combine a deep understanding of the law and rules of court with an expertise in legal strategy and dispute resolution – all developed and honed from frequent appearances in courts and tribunals arguing matters on behalf of clients.
7. As at July 2013, there were 1945 practising barristers who are members of the Victorian Bar. Barristers forego the membership of the wider legal profession in signing the Bar roll and thereby join an association of lawyers providing specialist legal services to the community.
8. Barristers compete for work which is (generally) provided by instructing solicitors. Success within such competition is predicated upon the endeavour, efficiency, excellence and expertise of the individual barrister. With experience and consistency, the barrister is able to build a reputation. The Victorian Bar is intended to be and is a meritocratic association.
9. The Victorian Bar is, in part, self-governed by the Bar Council, an annually elected group of 21 barristers and various committees, including an Ethics Committee.

10. Concern for access to justice is a facet of the barrister's commitment to the rule of law, objectivity and the interests of the lay client. Members of the Victorian Bar have a strong and longstanding commitment to access to justice. As at July 2013, of the 1945 barristers at the Bar, 964 participate in the Victorian Bar Pro Bono Scheme (up from 896 in 2012). In 2013, participating barristers handled 246 non-criminal referrals arising from 1560 non-criminal inquiries.
11. Sophisticated and well-funded corporate litigants might generally be expected to avail themselves of the global legal market through jurisdiction or arbitration clauses and forum-shopping. Australia fares well against its competitors in the international legal market. The World Bank's 'Doing Business 2014' Report ranks Australia at 14th position in the world for the ease of enforcing contracts, with legal costs on average 21.8% of the claim value.¹

Barristers and Solicitors

12. There are no restrictions preventing solicitors from doing the work of barristers. Solicitors can, and do, appear before courts and tribunals at all levels. They can, and do, provide litigation advice.
13. Notwithstanding, solicitors continue to instruct barristers. This is because:
 - (a) there is a recognition (whether by the solicitor or lay client) that a given matter requires expert legal or strategic input, or that the matter will be litigated in the testing court or tribunal environment;
 - (b) many solicitors rely upon the flexibility provided by the Bar, with a view to trial preparation and advice work and specialist advocacy;
 - (c) solicitors or lay clients may seek a second opinion which benefits from the independence and objectivity of a barrister. Barristers are generally a step removed from the lay client as compared with the solicitor and tend not to have an ongoing relationship with the client.

Entry to the Bar: The Readers' Course

14. Entry to the Victorian Bar is available to all Australian legal practitioners² upon completion of the Readers' Course. The Readers' Course is conducted twice a year, and is of approximately nine weeks duration. In 2010, the Victorian Bar introduced an entrance examination to the course. The examination has enabled the course to be taught against the background of an assumed base level of knowledge. It has also served to ensure the competence of those coming to the Bar.

¹ The World Bank, *Doing Business 2014*, (29 October 2013) <<http://www.doingbusiness.org/data/exploreeconomies/australia#enforcing-contracts>>. See also Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, vol 1 [4.19].

² Defined by s 1.2.3(a) of the *Legal Profession Act 2004* (Vic) as 'an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.'

15. The Readers' Course is taught in the most part by volunteers from the Bar and the bench. The course is aligned with the mentoring program through which all readers sit in chambers with a barrister of more than ten years call for nine months at no cost to the reader.
16. The Readers' Course and the entry examination are being continually updated and refined in order to provide excellent advocacy training and early exposure to the tools necessary for the proficient delivery of service to clients. Coaching accreditation has also been conducted to maintain the high standard and consistency of instruction provided during the Readers' Course.

Low Barriers to Entry

17. The barriers to entry to the Victorian Bar are otherwise very low. Through Barristers Chambers Ltd (**BCL**) the Victorian Bar makes chambers accommodation available to barristers at reasonable rates and on monthly terms, including integrated IT and telephone services. This allows barristers to commence practice without undertaking onerous long-term rental commitments and provides a benchmark for commercial operators of chambers.
18. The majority of the Bar's practising members at any one time use chambers provided by BCL, though it is not compulsory to do so. As at July 2013 there were 1945 practising members in Victoria. Of these:
 - (a) 66% (1286) of practising members were using chambers provided by BCL;
 - (b) 16% (317) of practising members were using chambers not provided by BCL; and
 - (c) 18% (342) of practising members were not using any chambers.

Therefore, 80% of those using chambers were using BCL chambers.

Ethical Standards at the Bar

19. The Victorian Bar is committed to upholding the highest of ethical standards. Barristers must be equipped to meet their ethical obligations and adhere to the standards of professional conduct required of them while maintaining their independence and duty to court and client. The Victorian Bar has no doubt that such standards are essential to the expeditious resolution of matters and the protection of client interests.
20. To this end, the Bar has an Ethics Committee, the function of which is (in part) to investigate complaints, as referred by the Legal Services Commissioner pursuant to s 4.4.9 of the *Legal Profession Act 2004* (Vic). Over the last 12 months, the Committee has received 22 such referrals and completed 15 investigations. As at 30 June 2013, the Committee held 11 open complaint files. Upon the completion of an investigation, the Committee reports to the Legal Services Commissioner. Only the Legal Services Commissioner may dismiss a complaint or make a finding against a practitioner (s 4.4.13). Thus, while the Bar's Ethics Committee assists with the investigation of any complaints referred to it by the Legal Services Commissioner, all complaints are independently determined.

21. The Ethics Committee also provides ethical guidance to barristers in the form of:
- (a) education sessions conducted in both the Readers' Course and the CPD program;
 - (b) rulings to individual barristers in respect of specific situations; and
 - (c) bulletins published where a need is perceived.³
22. The Victorian Bar also has a Professional Standards Committee, the principal focus of which has been to conduct a review of, and suggest changes to, the Bar's Professional Conduct and Practice Rules to bring them in to line with the Australian Bar Association's Model Rules. The Committee will be producing a second edition of the Bar's publication relating to standards of professional practice, the *Good Conduct Guide*, as soon as the National Legal Reforms have been implemented and the new Rules settled.

Legislation: purpose, sanctions and innovation

23. At both Federal and State level, there is now legislation in place in respect of the 'overarching purpose' of civil litigation procedures. As stated in s 37M of the *Federal Court of Australia Act 1976* (Cth) (as introduced by the *Access to Justice Civil Litigation Reforms*) *Amendment Act 2009* (Cth)):
- (1) *The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:*
 - (a) *according to law; and*
 - (b) *as quickly, inexpensively and efficiently as possible.*
 - (2) *Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:*
 - (a) *the just determination of all proceedings before the Court;*
 - (b) *the efficient use of the judicial and administrative resources available for the purposes of the Court;*
 - (c) *the efficient disposal of the Court's overall caseload;*
 - (d) *the disposal of all proceedings in a timely manner;*
 - (e) *the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.*
 - (3) *The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.*

Section 7 of the *Civil Procedure Act 2010* (Vic) is to like effect.

24. There have been a number of recent cases in the Federal Court which show the Court taking into account the overarching purpose in a significant way in various matters. This demonstrates a change in approach to case management and an attempt to arrive at practical and just solutions to matters as diverse as discovery of documents and provision of information, mode

³ For example, in 2011-2012 the Ethics Committee updated two bulletins: *Direct Access Rules* (from 2004) and *Documents Produced Under Subpoena* (from 1991). The Committee also published three new bulletins: *Conflict in Respect of Legal Proceedings Currently before and Court*, *Caution When Conferring with Witnesses* and *Email Communications With Courts And Tribunals*.

of trial, seeking to maintain a trial date, provision of particulars, and application for further hearing: see for example, *Velickovic v Western Australia* [2012] FCA 782; *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516 (affirmed *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53); and *Mijac Investments Pty Ltd v Graham* [2010] FCA 896.

25. The provisions require the Court to be proactive and innovative in its approach to achieve the objects of the overarching purpose: *Hodgson v Amcor Ltd; Amcor Ltd v Barnes* [2011] VSC 63 at [26]. In managing a proceeding a court should have regard to the most efficient, effective and cost efficient disposition of pre-trial issues, including that of discovery. This will be particularly so in complex and large scale litigation: *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 3)* [2011] VSC 399.
26. Where a lawyer fails to conduct litigation in a way that is consistent with the overarching purpose, the Court has a variety of sanctions available to it, including ordering the lawyer to bear costs personally (and the lawyer must not recover those costs from his or her client): s 37N(5) of the *Federal Court of Australia Act 1976* (Cth); s 29 of the *Civil Procedure Act 2010* (Vic). The courts are imposing such sanctions: *Modra v Victoria* (2012) 205 FCR 445.
27. The Victorian Bar considers that the courts have, by recent amendments to their rules, recognised the necessity for the imposition of sanctions on legal practitioners where appropriate. These sanctions should serve to encourage efficient and practical participation in the procedures of the courts by practitioners which will, in turn, benefit the community and improve access to justice.
28. The Victorian Bar has also contributed to, and participated in, recent procedural innovations which serve to improve access to justice. These innovations include the following examples:
 - (a) The Pilot Scheme in the Civil Division of the Court of Appeal was introduced in September 2013. This is a pro bono roster system of duty barristers offering their services to assist self-represented litigants in civil appeals. The Scheme was launched to address a backlog of applications for leave to appeal from self-represented litigants. To date, the Scheme has been well resourced with a significant number of barristers volunteering their time. An assessment of the success of the Scheme is anticipated to be made at the conclusion of the pilot phase in December 2013.
 - (b) The Federal Court Fast Track List was introduced in May 2007 to streamline court procedures and significantly reduce the costs of litigation. The key elements of the Fast Track List involved the abolition of pleadings, the use of conferences to identify key issues, a substantial reduction in the volume of discovery, a trial that will be a 'chess-clock' style and judgment delivered within six weeks of the conclusion of the trial.⁴

⁴ Federal Court of Australia, *Fast Track System* <<http://www.fedcourt.gov.au/case-management-services/case-allocation/fast-track-system>>.

- (c) The ongoing objective of the Commercial Court of the Supreme Court is to use flexible procedures to achieve the just and efficient disposition of commercial disputes.⁵ To achieve this, judges and practitioners alike consult the 'Green Book' (Practice Note No 10 of 2011),⁶ a key practice document which sets out the purpose of the Commercial Court, the case management issues to be considered, and the practices and procedures that will be deployed to meet the Court's objective.⁷ Revisions to the Green Book are determined in consultation with the Commercial Court Users Group, a body of specialist Commercial Court judges and practitioners, including members of the Bar. The Users Group also provides input on other Commercial Court issues which come up from time to time, such as mediation procedures and electronic filing.
- (d) Recent innovations in the Federal Court referred to in the Federal Court Annual Reports of 2010-11 and 2011-12, including:
- (i) The individual docket system (all cases allocated to a judge upon commencement of the matter and remaining with the judge until disposed).
 - (ii) The Court's eServices strategy, which aims to utilise technology to maximise the efficient management of cases by increasing on-line accessibility for the legal community and members of the public, as well as assisting judges in their task of deciding cases according to law quickly, inexpensively and as efficiently as possible.
 - (iii) Assistance for self-represented litigants.
 - (iv) Revision of the Federal Court Rules in 2010-2011.

29. The independent Victorian Bar is an important participant in the administration of justice in Victoria and Australia. It provides a cost efficient specialist advocacy service to the community. The Victorian Bar contributes to and encourages changes in the mechanisms of the administration of justice intended to improve access to justice and diminish the costs of that access.

⁵ Supreme Court of Victoria, Commercial Court, *The Green Book: Announcement from the Chief Justice* <<http://www.commercialcourt.com.au>>.

⁶ Supreme Court of Victoria, Commercial Court, *The Green Book* , <<http://www.commercialcourt.com.au>>.

⁷ Above n5.