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Access to Justice
Productivity Commission
PO Box 1428
Canberra City ACT 2601

Access to Justice Arrangements

Thank you for the opportunity to make a submission to this inquiry.

I have researched the civil justice system for over 20 years. Since 2009 I have also been a presidential member of the ACT Civil and Administrative Tribunal (ACAT), one of the super tribunals. In ACAT I manage the administrative review division as well as hearing cases and appeals in areas such as mental health, occupational regulation and discrimination. The tribunal has provided me with many insights into access to justice however this submission is made in my personal capacity as an academic researcher.

In 2009-2010, I served as a member of the National Legal Profession Reform Consultative Group for the (COAG) National Legal Profession Reform project. Information about the project may be found at

http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/lpr_index

Given the scope of the inquiry, I propose to address particular questions that have been raised in the Issues Paper as follows:

- Legal representation in tribunals
- Practices and procedures which may impede access to justice – pleadings
- Model litigant obligation
- Case management
- Contingent billing and billing practices
- Litigation funding

Other submissions have provided data about legal needs and caseload. For example, the Law Council's preliminary submission dated 17 October 2013 provides a table which cross-references matters raised in the Issues Paper with past reports. Further, the *Legal Need in Australia* report authored by Coumarelos et al (2012) is a rich source of data for that area. I will therefore focus upon some of the policy arguments and aspects of the literature.

DETAILED COMMENTS

Legal representation in tribunals

Should the scope for legal representation within the context of tribunals be more or less limited and why? Issues Paper page 19

Several tribunals have provisions which require parties to seek leave to be represented in proceedings. For example, section 43 of the *Queensland Civil and Administrative Tribunal Act (QCAT Act)* states that general proposition that parties should represent themselves unless the interests of justice require otherwise. The tribunal may grant leave for a party to be represented in particular circumstances i.e.

- (a) the party is a State agency;
- (b) the proceeding is likely to involve complex questions of fact or law;
- (c) another party to the proceeding is represented in the proceeding;
- (d) all of the parties have agreed to the party being represented in the proceeding.

This model is proposed for NCAT, the new super tribunal in New South Wales. (NCAT Reference Group discussion Paper 2(c), 7 February 2013)

Conversely, the Migration Review Tribunal (MRT) in its submission to the present inquiry (31 October 2013) articulates a process which is designed to facilitate unrepresented and non-lawyers representing parties to bring cases. The MRT notes that whilst applicants often do have legal representation, the effective operation of the review process is not predicated upon such representation".

In my view, the optimal process would facilitate participation by both represented and unrepresented parties. It should be sufficiently flexible to accommodate both situations and, in particular, where one party is represented, the lawyers acting in the proceedings can significantly assist the decision maker. This facilitation may be articulated as an obligation to assist – see for example, section 33 of the *Administrative Appeals Tribunal Act 1975 (Cth)*

(1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

Rules that create barriers to participation by lawyers can be heavy-handed and lead to satellite disputation. For example, section 43 of the *QCAT Act* is referred to in 143 cases on Austlii. This is a large number, considering that QCAT was formed in 2009.

In my view, it is preferable to rely upon market mechanisms, accompanied by appropriate public funding to incentivise participation by lawyers. For example it is generally not cost-effective for lawyers to represent parties in small value claims. In most of the jurisdictions where small value claims are brought the costs rules create additional disincentives. This allows for these jurisdictions to develop more informal types of procedures that are responsive to small value claim e.g. conferencing.

Rather than excluding lawyers, they should be regarded as colleagues in a mutual project to facilitate access to justice. In this respect I agree with the submission made by the University of Adelaide Law School (dated 31 October 2013) which comments that appropriate involvement of the legal profession - not its exclusion - will best facilitate efficient proceedings.

The role of lawyers as officers of the court should be used positively to assist courts and tribunals, not just negatively to restrain unethical behaviour. In jurisdictions like Australia where the costs rules create impediments to commencing unmeritorious proceedings, lawyers can provide an effective filtering mechanism to at least appraise parties of the merits of their claims and to provide advice about the reality of a party's case and dispute resolution generally.

Practices and procedures which may impede access to justice – pleadings

Are there any other court or tribunal practices and procedures which may impede access to justice? Issues Paper page 20

In my view the rules and practices about pleading in civil cases create excessive complexity and agree with Marfording's comments in her submission (1 November 2013) that the formulation of the procedural rules on pleadings inhibits identification of the real issues between the parties and allows lawyers to proliferate the issues. In this respect, the practice adopted in tribunals of identifying facts and contentions in my view sufficiently identifies and narrows the issues to enable parties to adduce evidence in support of their claim without recourse to the prolixity that is inherent in pleading practice.

Model litigant obligation

How effective are model litigant rules and other existing legislative conduct

obligations? Should model litigant obligations be extended to circumstances where a private party is significantly better resourced than the other in proceedings? Should model litigant obligations be extended to circumstances where a private party is significantly better resourced than the other in proceedings? Issues Paper pages 19 - 20

I have recently conducted research on the model litigant obligation which was presented as a conference paper at the Australian Institute of Administrative Law National Conference in July 2013.

The juridical nature of the model litigant obligation (MLO) is still being developed by the case law and but consists of several justifications such as equality of arms, the state as moral exemplar, exercising powers for the public good and the superlative officer of the court or tribunal. However, in my view, the primary justification for the MLO is based on the rule of law.

The model litigant obligation has a significant antiquity in the general law and the early cases, such as *Pawlett v Attorney-General* (1667) 145 E.R. 550 dealt with fundamental questions about whether the King could be bound by claims that were brought against him. Codification of the obligation occurred in the late 1990s by, for example, section 55ZF of the *Judiciary Act* 1903 (Cth) and the Legal Services Directions, which limited enforceability of the obligation (section 55ZG of the *Judiciary Act*). However the codification raised awareness of the common law obligation and has led to an use of the common law doctrine. The courts are becoming increasingly robust about imposing the obligation.

However, in *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522, the High Court showed considerable reluctance to expand upon the content or jurisprudence of the MLO and the so-called "duty of fairness" that the New South Wales Court of Appeal found was owed by ASIC. This is discussed in my article 'Wavering alternations (2013) 2 *Journal of Civil Litigation and Practice* 111 ('Wavering alternations') at 120-124.

Although the common law operation of the MLO is being steadily expanded by the courts, nevertheless some governments are retreating from a holistic and transparent accountability framework. For example, the Office of Legal Services Coordination (OLSC) has some responsibility for the coordination of the Commonwealth Legal Services Directions and more recently has shifted its focus from acting as a quasi-regulator to the provision of training to assist compliance by the agencies with the Directions and a following a policy introduced in April 2013 the primary responsibility for compliance rests with the individual agency (OLSC, Compliance and Reporting <http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Complianceandreporting.aspx>)

I agree with NSW Bar Association submission (4 November 2013) that a review should be conducted of the current arrangements for the enforcement of the model litigant standard, with a view to establishing whether the current ramifications of a breach are sufficient and appropriate. I also note the submission of Appleby and Le Mire (4 November 2013) that there is no real opportunity for persons who appear against the government to lodge a complaint about its conduct in litigation for proper investigation.

Although the courts have become more robust in recognising and requiring model litigant behaviour of governments, the conduct gets observed by courts at a very stage and the modelling element of the duty should be in play much earlier, for example to quell unnecessary litigation. As stated by Appleby and Le Mire the courts are operationally limited in what they can review.

Although there are some commentary, particularly by Cameron and Sands, that supports the extension of the obligation to parties who are better resourced than the other in proceedings and, in particular, corporations, I think this is best achieved through an application of an obligation to assist, similar to that imposed upon government decision-makers in section 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth). In my view, aspects of the MLO which emphasise the rule of law, the public good and the modelling responsibility of the Attorney-Generals should not be watered down by the imposition of the obligation upon a wider group whose activity in litigation should be restrained because of concerns about equality of arms.

Case management

How effective have the case management systems, processes and practices adopted in different jurisdictions been in reducing cost and delay? Issues Paper page 23

In the last 15 years significant progress has been made in Australia in developing of good case management practices. There is an increased emphasis upon the effective management of courts and tribunals generally but also a culture has developed which recognises that timetabling of matters is necessary and adherence to timetables is of critical importance. These reforms have been enhanced by the interpretation of procedural rules through the use of overriding purpose provisions. This has allowed courts and tribunals to ratchet up the performance expected of parties. The history of case management and the current state of play in Australia is discussed in chapter 2 of Colbran, Spender, Jackson, and Douglas *Civil Procedure: Commentary and Materials* (2012).

The High Court's ruling in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 emphasised the importance of case management. This is discussed in more detail in chapter 2 of *Civil Procedure: Commentary and Materials* (2012) and my article 'Wavering alternations of valour and caution: Commercial and regulatory litigation in the French CJ High Court' (2013) 2 *Journal of Civil Litigation and Practice* 111 ('Wavering alternations') at 116.

Due to the increased emphasis upon managerialism, courts and tribunals have become more aware of their performance. The collection of the ROGS data has contributed to this. However the ROGS data is still fairly broad brush and more detailed information would assist public scrutiny.

Contingent billing and billing practices

How has the use of contingent billing improved access to civil justice in Australia, and could it be improved? What regulatory constraints should be used in relation to contingent billing and why? Issues Paper pages 30 (billing practices) and 37 (contingent billing)

The use of conditional or no-win no fee arrangements is widespread in the legal profession, therefore the introduction of a contingency fee would only shift to some extent this "widespread practice of service based upon the prospect rather than the promise of payment" (New South Wales Bar Association submission 4 December 2013).

Because contingency fee agreements are currently prohibited in all Australian jurisdiction it would require a careful examination of the benefits and disadvantages of implementing such a system, however this exercise has been recently and exhaustively undertaken by the UK, beginning with a preliminary report by Lord Justice Jackson in 2009 (R. Jackson LJ, *Civil Litigation Costs Review – Preliminary Report*, 2009). This process has resulted in the introduction of a contingency fee, therefore it would be worth examining the UK outcomes closely.

The UK has introduced contingency fees for damages-based agreements (DBAs). They are capped at 25% of damages in personal injury cases (excluding damages for future care and loss) and in other cases to 50%. They only apply to lawyers who are subject to the professional conduct rules. The other type of agreement, the conditional fee agreement (CFA) allows for a success fee which is capped at 25%. (Ministry of Justice, Main changes <http://www.justice.gov.uk/civil-justice-reforms/main-changes>)

Although the changes in the UK have achieved valuable structural reforms, the arrangements are complex and likely to result in excessively complex retainers. The retainers currently used in Australia are already complex and many clients have

difficulty understanding them. This was discussed in the submission of Prue Vines (31 October 2013).

This difficulty may be alleviated by the changes that have occurred in New South Wales and Victoria pursuant to the COAG legal profession reforms that are discussed above. This has led to the Legal Profession Uniform Law (LPUL) which comes into effect in 2014. The LPUL will replace the detailed cost disclosure obligations currently in the Legal Profession Acts with the principle of informed consent, which require a law practice to take all reasonable steps to satisfy itself that the client has understood and is giving consent to a proposed course of action for the conduct of the matter and the proposed costs. This is discussed in the submission of the Office of the Legal Services Commission of NSW (4 November 2013).

Contingency billing and damages-based agreements do facilitate access to justice because they expand the capacity of lawyers to fund claims. Currently, the litigation funding companies (LFCs) in Australia tend to fund economic claims such as investor group proceedings, commercial claims and insolvencies. The LFCs as they are presently structured will have minimal impact upon the middle class (except for retail investors and some consumers) where the decline in access to justice has been most marked. Contingency billing and damages-based agreements allow lawyers to both complement and potentially compete with LFCs to service high demand but lower value areas such as family, housing, credit/debt, and employment disputes.

In the United States, a substantial portion of the market for litigation funding is in tort claims because the market has grown from the contingent financing provided by lawyers, who cover legal expenses by drawing on their firm's general operating account or by a bank line of credit. Litigation funding company funding is therefore supplemental to attorney contingency fee funding.

This issue is discussed more extensively in my article 'After Fostif: Lingering uncertainties and controversies about litigation funding' ('After Fostif') (2008) 18 *Journal of Judicial Administration* 101 at 103.

I also note the submission of the Law Society of South Australia (4 November 2013) which suggests that if contingency arrangements are introduced into Australia it might lead to lower charges than the current rates charged by LFCs. The submission also points to the pre-existing regulation of the legal profession which provides a safeguard for major policy changes such as introduction of contingency fee.

Litigation funding

What proportionate and targeted regulatory responses are required to manage [litigation funding] risks, and is more uniform regulation required across jurisdictions on this matter? Issues Paper page 37

Contrary to the glossy scaremongering promoted by several of the submissions lodged with the inquiry, litigation funding has enhanced access to justice in Australia. It does so because it allows meritorious claims to be brought in circumstances where they would otherwise be precluded due to cost. Some of the claims that are supported by litigation funding strategically foster access to justice because they promote general deterrence of corporate misconduct e.g. insolvency claims and class actions.

In particular, there is no evidence that litigation funding or class actions increase the overall volume of litigation. Barker's 2011 study (Issues Paper page 37) estimates it to be 0.1% of the civil litigation market and the Morabito study at <http://www.buseco.monash.edu.au/blt/staff/v-morabito-second-report-2010.pdf> found no increase in the frequency of class action attributable to litigation funding: It has commonly been asserted that litigation funding promotes trafficking in litigation but this claim does not hold up under rigorous analysis. See the discussion in 'After Fostif' (2008) 18 *Journal of Judicial Administration* 101 at 107-110.

Similarly there is no evidence of an increase in unmeritorious claims due to litigation funding. In fact, the opposite conclusion is more logical because the funders perform a gatekeeping role in screening for merit. In any case, remedies for unmeritorious claims have become more efficacious since the advent of case management. Courts and tribunals are becoming familiar at an earlier time of the merits or otherwise of the parties' claim and defences. Consequently courts and tribunals are now more likely than ever before to strike out claims for lack of merit or abuse of process. However the need to ensure procedural fairness may impede these procedures where the claim is viable but not strong.

However, many of the submissions also discuss the need for regulation of the area. I also consider that the sector needs regulation. I consider that licensing is appropriate either by way of special litigation funding licence (AICD submission 4 November 2013) or by an Australian Financial Services Licence which provides capital adequacy standards for clients and parties to litigation (Bar Association of NSW submission 4 November 2013) and Law Council submission (13 November 2013).

Although litigation funding is being explored in the case law, many questions are left unanswered or inadequately explored. This is demonstrated by the High court's judgment in *International Litigation Partners Pte Ltd v Chameleon Mining NL*

(Receivers and Managers Appointed) (2012) 246 CLR 455; which is discussed in my 'Wavering Alternations' article (2013) 2 *Journal of Civil Litigation and Practice* 111 at 127-130.

I would be happy to expand upon any of the issues raised above in order to assist the Commission.

Yours sincerely,

Professor Peta Spender