

SUBMISSION TO THE PRODUCTIVITY COMMISSION BY LEGALWISE AUSTRALIA PTY LTD

We apologise for the late submission of this document. The activity of the Commission came to our notice very recently. We also apologise if points made in other submissions are repeated.

Objectives of the Commission

Paraphrased, the stated objective of the Commission is to make recommendations to Government to achieve:

- a) a more productive legal services environment;
- b) the enhanced welfare and living standards of all Australians.

General Comment

An effective and publically respected legal profession, is in the mix of the foundation of a civilized society. If lawyers were to be marginalised for any reason, the public will become marginalised. The realisation of an environment in which there is meaningful, affordable and easy access to the legal profession by the public, is of fundamental importance to ensure the welfare of society. Recommendations by the Commission aimed at providing a basis for regulatory reform to establish a more flexible legal services operating environment, would promote efficiency and innovativeness.

Without getting into the questions of legal fees and efficiencies, a significant percentage of lawyers may eventually be lost to the profession if their current income levels and operating environment are subject to further restrictions. Superficial market research may show that lawyers in general do not enjoy the high standards of living generally perceived to be the case. We agree with the City of Sydney Law Society on this point. Often not taken into account, is the cost to lawyers' emotional welfare, of constantly dealing with urgencies, challenges from regulators, their own customers, professional indemnity insurers and their own financial needs. It is a very difficult and emotionally taxing environment and apparently not rewarding enough. More lawyers may have been lost already to the profession, than there are currently practising lawyers in Australia. If so, it is a significant economic waste and a further erosion of the public's prospects of having affordable access to lawyers for a much wider range of issues than simply those desperate situations where they have no option but to use a lawyer.

The present Government has signalled its support for an overhaul of regulations across the board, to minimise the negative impact of "over-regulation". The possibility of that currently being the reality for lawyers across the country, is an enquiry worth pursuing.

It is probably common cause that currently, the public would only use a lawyer when they have no choice, or stand to gain substantially. They effectively have no choice when it comes to partnership dissolution/divorce and probate and stand to gain financially for personal injury. In many, if not most other cases, the costs outweigh the benefit.

As far as the "no choice" category is concerned, the issue to examine is whether costs are exorbitant. That issue is also an issue for matters where costs outweigh the benefits, but in this

case, there is an additional issue of public importance. There exists a vast need in this area that is currently not met, despite the existence of various ombuds and community services.

The “no choice” category.

Assuming costs are exorbitant, to what extent is regulatory compliance a contributing factor? From the limited information we have, it appears that a significant slice of lawyers’ time is utilised by unproductive activity such as elaborate cost agreements, setting up service structures to provide “over servicing” either to avoid any possibility of public liability claims, or as an additional income generator of dubious value to the consumer.

In the short time available to make this submission, we will provide some information, and ask questions, the answers to which we believe, will provide the Commission with valuable information.

Questions pertaining to the current process:

1. The submissions received so far, appear to be mainly from the category of regulators and institutions involved in the delivery of legal services. Very few individuals made any submissions. We surmise that many individuals would be reluctant to make public comment. We do not know if independent market research (with the supply of respondents’ personal details being optional), amongst individual lawyers, has been undertaken or is envisaged. If not, the question we pose is whether the current process will provide as full a picture as may be necessary.
2. Some submissions are favourable to the idea of legal expenses insurance, which together with “legal protection insurance” are the names most commonly referred to internationally.

We point out to the Commission that legal expenses insurance is not a new idea in Australia. General support for the idea has existed for decades. Legal Expenses Insurance Pty Ltd (LEI), was launched in Australia as far back as 1988 with GIO as the underwriters. It was not successful. LegalSure, another legal expenses insurance provider based in Queensland shortly after that, is no longer in business. Other failed efforts are referred to in the submission by the Law Council of Australia.

3. This submission is made by the wholly owned subsidiary of an Australian owned specialist legal expenses insurance company in South Africa, doing business exclusively in Africa. The company too, tried unsuccessfully to promote legal expenses insurance in Australia two years ago. Consumer interest was low and the uptake too slow to justify the massive investment that would be required over an extended period of time to create sufficient numbers to achieve the essential spreading of the insurance risk. Unless Government becomes a partner by way of clamping down on any abuse of institutions like legal aid, educating the public and providing financial incentives to entice insurers, legal expenses insurance will face an uphill battle in Australia. Lack of consumer interest may be due to over reliance on free legal services by the middle group of consumers. The previous Government earmarked an additional \$118 million dollars for this purpose. That, in our view, will exacerbate the problem. Such an investment could be better utilised to assist in the

establishment of a viable legal expenses insurance sector.

4. As far as we are aware, Australia and New Zealand are two of the few in the English speaking world, if not the only ones, that does not have a viable legal expenses insurance sector. If the Commission requires more insight into the international landscape of legal expenses insurance, we make ourselves available in any form or manner that may assist the Commission in its task. We have extensive experience (30 years), in that market but it is very difficult within the constraints of the current submission process, to highlight all our views, opinions and the many technical issues and challenges inherent in that specialised class of insurance.

We note for example, that the Law Council of Australia suggests that legal expenses insurance as a component of other insurance products could be considered as an option. Such an approach introduces significant potential conflict of interests. The topic is dealt with in various publications, notably by the American Bar Foundation. Legal expenses insurance is a specialised class of insurance where independence is of great importance. Products are ideally sold as “stand alone” insurance policies. It has been a successful specialist class of insurance in Continental Europe, for nearly a century. The industry operates independently of the general insurance industry and is represented by the International Association of Legal Protection Insurance (RIAD), based in Brussels.

A more productive legal services environment

For the purpose of this submission, we will assume that “productive” includes “effective”.

Questions about the productivity/welfare of Australian Lawyers

1. In the narrow sense of economic activity, Australian lawyers as probably as productive as lawyers anywhere else in the world. Like lawyers across the globe, they too appear to turn off the lights long after the working day has ended for most. They too, mull over clients’ problems on the way home, while they are at home, and while they are supposedly sleeping ... to the detriment of their own and their families’ welfare.
2. Taking into account the emotional cost to their welfare, do lawyers in fact earn what they may well deserve? Is it not true (possibly due to unique supply and demand dynamics in Australia), that some trades with lesser qualification requirements and shorter working hours are better off than many lawyers?
3. If there is a high level of attrition in the legal profession, will there ever be enough lawyers in the future to satisfy the significant unmet need of the public, or will they all end up in either the lucrative corporate work arena or the limited categories mentioned, and leave individuals with their “mundane” problems in the lurch?
4. Does the current environment foster innovativeness amongst lawyers to broaden the scope of their services to meet the actual needs of the public, in return for fair financial rewards? Given the appropriate opportunity, individual lawyers will answer that question. There are

innovative ideas floating around. About 2 years ago there was an article by a lawyer in the journal of the Tasmanian Law Society for example, where reference was made to the provision of legal services in a more accessible format (McDonald's was referred to).

5. To the extent that there may currently be innovative ideas, to what extent are those lawyers or other persons or institutions with innovative ideas constrained by current regulations to implement solutions to provide effective services for a wider variety of issues?

Questions about the cost effectiveness of lawyers

1. Our opinion is that lawyers are not cost effective. Over-regulation may be just one of the causes. In our view, the only reliable indicator of the extent to which lawyers are constrained, is to get their individual opinions in a format conducive to candid feedback.
2. We'll point to one minor example of the inefficiency of just one regulation.
 - a. In some territories, lawyers are "forced" to enter into elaborate "costs agreements" with clients. While it may be a good idea in principle, it is fraught with problems. A client still has no idea of how much in legal fees s/he may be faced with. It increases the workload of the lawyer, and does not help the client at all when faced with what may be perceived as an astronomical bill at the end. The client still has to go through various loops (at his own cost), in order to have his complaint resolved. Most clients will give up at this point.
 - b. Lawyers however, cannot bank on the fact that most clients would "give up". They have to cover themselves for the non-income producing time and effort that may be required to deal with enquiries from the Regulators. Understandably, they have to take that and the cost of PI insurance into account in their pricing strategies. That results in even higher costs for the user.
3. If there is a viable legal expenses insurance sector, other possible reasons for inefficiencies are typically addressed in the unique tri-partite relationship that is created between the paying party (insurer), the lawyer and the client. The insurer has a vested interest in ensuring cost efficiency and desirable outcomes. The client has a knowledgeable ally that can interface with the lawyer. If managed properly, there are three clear winners: the lawyer, client and insurer. A fourth winner by default, is the State. A vibrant legal expenses insurance industry reduces pressure on public coffers to fund initiatives like Legal Aid which may be open to abuse.

The public

1. If independent market research shows that consumers only use lawyers when they have no option and there remains an unmet need, why is that? Is it poor planning by the user? (a point made by the City of Sydney Law Society). Is it an over-reliance or abuse by consumers of State subsidised initiatives like Legal Aid?

2. There is no doubt that lawyers are generally perceived by the public to be too expensive or unaffordable. The reality is that after the many years of studying and training to be completed, one would expect lawyers to be expensive. If that is the reality for consumers of legal services, it is no different to the reality that a Rolls Royce is expensive and unaffordable to most. Consumers can address that reality to a large extent by appropriate personal financial planning, in which case legal expenses insurance should be as indispensable as home or funeral insurance for example (premiums for legal expenses insurance would be roughly the same as for funeral insurance).
3. Do lawyers charge excessively? Our view is that they don't. Their charges are comparable to those of other professions. It is the output that can be questioned.