

13 May 2014

Your Ref:
Our Ref: ES:10220

Access to Justice
Productivity Commission

By email: access.justice@pc.gov.au

Dear Commissioners

Re: Access to Justice Arrangements Draft Report

Thank you for the opportunity to make a further submission following the publication of the draft report. The draft report provides a comprehensive view of access to justice arrangements that complements previous inquiries and reports.

The purpose of this submission is to provide additional information in relation to matters discussed in Chapter 6 and Chapter 19 of the draft report, as those are areas in which our practice has a depth of experience. We also wish to make some brief comment in relation to Chapter 4.

Regulation of costs

The concept of a "retail client" in Chapter 6 of the report is helpful and accurate. These clients do need a level of consumer protection in their dealings with lawyers. However, lawyers' fees are already subject to a level of regulation that is much greater than other service providers, including those providing assistance to the same client group.

By way of example, our practice regularly assists consumers and small business people with credit and debt problems. We do this by the provision of traditional legal services such as advice and negotiation, charging for the work we do on a fixed fee basis, where that fee is calculated with reference to the complexity of the task. Sometimes our clients report that they have also contacted non-lawyer services that assist people with debt problems. Often those services have a fee structure where they charge substantially more than lawyers, with an initial lump sum fee that applies irrespective of the extent of the work done, and further fees which may be set by reference to the size of the debts.

It is difficult to understand why imposing additional fee regulation on lawyers who already:

- Meet education and training standards in order to practice
- Are subject to the Australian Consumer Law and profession specific consumer regulation
- Are subject to a specific consumer protection regime through legal services commissions, and
- Owe a fiduciary duty to their clients

is warranted. If there are failures impacting on retail clients currently, then it is not for lack of a regulatory regime. As stated in our original submission, we consider that the complex costs disclosure regime actually inhibits clients' understanding of costs. We consider that the regulation should be streamlined and scaled, as discussed in the draft report.

We also think that there is a role for legal professional associations to support lawyers working with retail clients to become more skilled at communicating with clients about costs.

Centralised on line costs resource

We do not consider the proposal for a centralised on line costs resource maintained by government is either necessary or feasible. It is unlikely to be able to provide anything more than the broad range of costs estimates that is already required in the Costs Disclosure Statement required under the Legal Profession Acts.

What matters to consumers is understanding what their case will cost. It would be more useful to develop a communication tool that assisted retail clients to understand the drivers of legal costs. In our experience these drivers are:

- The nature of the client. Two people can have exactly the same legal problem dealt with in exactly the same process, and yet make very different calls on their lawyers' time. Clients who wish to have more and lengthier communication with their lawyers need to understand that this will cost more (in the same way that if they called on any other professional service providers' time they would be expected to pay more).
- The attitude of the parties. A key driver of cost is the attitude of the parties to the issue. In family law property settlement, for example, there is usually a reasonable range within which negotiations occur and a settlement is reached without the necessity for court proceedings. However if the parties not willing to negotiate within that range (for whatever reason) then court action will be necessary. If they take a particularly adversarial approach to the matter then those court proceedings will go further and take longer and cost more. Despite our best efforts to encourage our own clients towards resolution and to point out to the other party the weaknesses of their position, this is not a variable which lawyers can control.
- The complexity of the matter. Where the facts are contested, or the law is uncertain a matter will be more difficult to resolve at all stages. If there are voluminous documents, a lawyer will need to read those documents.

- The method for resolution of the issue. As was identified in the draft report, many issues are resolved informally in the shadow of the law at minimal cost. However, once cases become part of a formal process, then parties are subject to compulsion about the legal work that must be undertaken. In our experience, courts and tribunals, in the interests of efficiency of their processes adopt a “one size fits all” approach that place a significant costs burden on clients that is disproportional to the benefit to the court. For example, we are currently assisting a self-represented litigant in a low value family law property dispute in the Federal Circuit Court where the other party has no legal assistance. The parties have been ordered to file an agreed joint case summary document before their case can be listed for hearing. Both parties are from a non-English speaking background, there is a history of domestic violence that includes imprisonment for breach, and one party contends that the other is not entitled to anything from the proceeds of the sale of the former matrimonial home. Reaching agreement about a joint case summary is in itself a complex task. Our client will bear the cost of this task as we attempt to negotiate with the other party to produce a joint document. We consider that the resource restraints in the Federal Circuit Court are a driver of this push to make parties do more.

Supporting unbundled legal services for the missing middle

We agree that barriers to unbundling should be removed, and that the legal profession should do more to support lawyers to offer unbundled legal services and increase community awareness of the availability of unbundled legal services. However, we are cautious about additional regulation in this area that imposes a higher compliance burden.

In our view this issue is best addressed by:

- A minor amendment to the Australian Solicitors Conduct Rules that recognises unbundling in a similar way to the American Bar Association Model Rules for Professional Conduct Rule 1.2 which provides
(c) a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- Professional associations developing guidance and resources to assist lawyers to offer unbundled services including a range of risk management tools
- Amendments to court rules that recognise unbundling and allow lawyers to be removed from the court record without the leave of the court. A good example is Family Law Rule 8.04.
- Professional association and lawyers taking more steps to increase community awareness about the availability of unbundled legal services.

The proper role for government in providing and facilitating access to justice

As stated in our initial submission we consider that the Commission can add considerable value by providing micro-economic policy analysis of the proper scope for government in the provision of, or in funding of the provision of, legal services to people seeking to participate in the civil justice system. We found the analysis in chapter 4 of the draft report and its application to the issues in Chapter 21 is very useful. We would welcome further analysis by the Commission that could be used to establish the overall funding requirement for a reasonable level of civil legal assistance services, and that could be used to inform the overall eligibility requirements, priorities and guidelines for legal assistance.

Yours faithfully

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