

Access to Justice Arrangements Draft Report

Submission by Australian Corporate Lawyers Association

28 May 2014

ABOUT ACLA

Thank you for the opportunity to make a submission to the Productivity Commission regarding the Draft Report on Access to Justice Arrangements. ACLA would welcome the opportunity to be heard in support of this submission.

ACLA is the peak professional membership body representing in-house counsel – the quarter of the Australian legal profession working in businesses and government organisations, in sole-legal-officer roles through to larger teams.

Our members are both providers of legal services and purchasers of legal services.

As providers of legal services, in-house counsel work within and with their organisation to minimise risk, identify issues early and promote compliance and ethical decision making. They represent cost-effective access to quality legal advice, that is based solely on value and not time.

By being embedded, in-house counsel are more able to prevent issues arising than external counsel, and enhance the organisational ability to respond quickly to market opportunities and threats.

In-house counsel are also sophisticated purchasers of external legal services and are increasingly exploring new and innovative ways to create more value (cost management, fit for purpose advice, upskilling etc) for their organisations through the adoption of project management, alternate fee arrangements, value add deliverables and the use of alternate legal service providers.

The economic value created by in-house counsel has yet to be defined. However, from a cost to access justice perspective, in-house counsel compare favourably as shown below in the comparison of raw per hour costs:

	private practice Counsel	in-house counsel
Partner/General Counsel	\$629/hr	\$130/hr
Associate/Senior In-house Counsel	\$412/hr	\$85/hr

Source: Access to Justice Draft Report and ACLA Remuneration Report

In-house lawyers are as equally qualified as their external peers, are bound by the same obligations and professional ethics, and operate in sometimes complex environments. Increasingly they are required to hold practising certificates which reinforces their independence as legal advisers and imposes continuing education requirements to ensure maintenance and extension of skills. ACLA proudly represents this 'quiet achiever' segment of the legal profession.

Our contact details are:

*Tanya Khan, Chief Legal Officer, Australian Corporate Lawyers Association
Level 1, 620 Bourke St, Melbourne, 3000 - +61 3 9248 5500*

PART 1: INTRODUCTION, SUMMARY & GENERAL COMMENTARY

1. INTRODUCTION

INHOUSE AS PART OF THE LEGAL PROFESSION

In-house counsel represent approximately 25% of the Australian legal profession. Our members are bound by the same professional standards and fundamental ethical duties as their private counterparts – that is to the client, the court, the profession and the administration of justice.

ACLA recommends that in-house lawyers (including government lawyers) hold practising certificates. This enhances the professional standing of the in-house legal profession, reinforces their commitment to the legal professional standards, increases the quality of legal services through mandatory CPD requirements and, importantly, supports their ability to claim legal professional privilege on appropriate communications with their client.

In-house counsel are enablers of access to justice by working with and within their organisation to minimise risk, identify issues early and promote compliance and ethical decision making. By being embedded, they are more able to prevent issues arising and can guide ethical decision making in terms of response. In many cases their corporate memory and knowledge equips them to provide strategic advice earlier and with a closer focus.

WHAT THIS SUBMISSION COVERS

ACLA's comments follow the order presented in the draft report, but ACLA only provides specific responses where an issue relating to ACLA's members is raised. A summary of these responses is in section 2 of this Part 1, with the full responses in Part 2.

Any general comments in relation to topics raised by the draft report, and which are not addressed in Part 2, are made in section 3 of this Part 1.

ACLA'S POLICY POSITIONS

We have reviewed the draft report and make this submission in the context of the following broad policy positions:

- Our members are both providers of cost-effective legal services and sophisticated purchasers of legal services.
- Many of the recommendations appear to be targeted at the 75% of the legal profession that are not in-house counsel, yet the term 'lawyer' is used indicating that in-house counsel would be subject to the recommended form of regulation as well.
- Where in-house have a lower regulatory need then costs of regulating private practice should not be apportioned to in-house. For example, where recommendations which have no application to in-house result in additional regulation and powers (and thus administration and enforcement costs), these should in no way require funding by in-house counsel (for example, any increased cost of their practicing certificate).

- Duplication in any form results in added cost. ACLA's members support cutting red tape, creating certainty and clarity for business and embracing the benefits of competitive reform and a seamless approach to the legal profession.
- The recognition and consideration of in-house counsel in regulation and administration is essential for effective access to justice.

2. SUMMARY OF SPECIFIC COMMENTS ON RECOMMENDATIONS AND REQUESTS

INFORMATION REQUEST 6.1

ACLA submits that there is no consumer benefit in duplicating existing mechanisms for enforcement of the Australian Consumer Law, nor for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of in-house lawyers within their jurisdictions.

DRAFT RECOMMENDATION 6.1

ACLA submits that more work should be done to improve the billing methods employed by private practitioners.

DRAFT RECOMMENDATION 6.3

ACLA submits that centralised online resources reporting on typical legal matter costs should include information about the costs and benefits of in-sourcing legal services for organisations. In addition to outlining the value of in-house counsel, ACLA recommends the site/s contain/s information to assist an organisation set up a greenfields in-house counsel role.

INFORMATION REQUEST 6.2

ACLA submits that centralised online resources reporting on typical legal matter costs should include information on how to analyse legal bills and why variances may occur, in addition to any other valuable pricing data that can be provided.

INFORMATION REQUEST 6.3

ACLA submits that it may be an appropriate host of online resources for businesses and other organisations as we are both a national body and represent the most informed business purchasers of legal services in Australia.

DRAFT RECOMMENDATION 6.8

ACLA submits that it is inappropriate for complaint bodies to be given the power to compel in-house lawyers to produce information or documents.

DRAFT RECOMMENDATION 7.1

ACLA submits that in addition to the review of the three stages of legal education, there be a separate review of the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold a practising certificate.

INFORMATION REQUEST 7.1

ACLA submits that the recognition and consideration of in-house counsel in regulation and administration is essential for effective access to justice.

3. GENERAL COMMENTARY

ADR (CH 8)

ACLA is a strong advocate for alternative dispute resolution as a means to more efficiently and collaboratively facilitate and restore business relationships. Our members' organisations are not in the business of litigation and with in-house counsels' dual duty to the Court and client, the sooner a commercial dispute can be appropriately settled the better for all, including reducing the burden on the courts and reserving access for those in greatest need.

Accordingly, ACLA endorses the focus of the report on ADR and particularly the importance of education and the availability of information and knowledge about ADR. ACLA agrees that lawyers should be trained on, and all parties fully informed about, the range of dispute resolution options available.

COURT PROCESSES, DUTIES OF PARTIES, COST AWARDS, SELF REPRESENTED LITIGANTS, COURT AND TRIBUNAL FEES AND COURT TECHNOLOGIES (CH 11-17)

ACLA supports reform which provides parties with cost certainty and clarity of process, roles, responsibilities and accountabilities. Accordingly, ACLA supports the general emphasis in the report on linking the provision of information with the issue of access to justice.

PRIVATE FUNDING OF LITIGATION (CH 18)

As litigation funders are principally a financial service for the funding of litigation, ACLA supports the implementation of appropriate safeguards and monitoring by a regulatory body such as the Australian Securities and Investments Commission (ASIC). ACLA supports the view of the Governance Institute of Australia on this matter – as set out in its submission dated 20 May 2014.

As the peak national body representing the interests of in-house lawyers in Australia, ACLA would be concerned about any proposal that would encourage litigation as the primary means of dispute resolution. The greater use of contingency fees may have this effect and needs

further consideration. ACLA supports the view of the Australian Institute of Company Directors on this issue, as set out in its submission dated 19 May 2014.

PRO BONO (CH 23)

ACLA's members are keen to undertake pro bono work in either their personal capacity or as part of their corporate legal team in order to contribute to their organisation's broader corporate social responsibility objectives. There are two regulatory aspects which impact whether an in-house counsel can provide pro bono services, namely practising certificate restrictions and insurance requirements. These positions differ across each jurisdiction, leading to what is currently a very complicated and multi-layered framework, which can be a significant deterrent to in-house practitioners who wish to provide pro bono services. For example, in the Northern Territory and Tasmania, in-house counsel are not entitled to be the solicitor on record for any pro bono matter. In other jurisdictions in-house legal teams are being prevented from starting pro bono projects because of practising certificate restrictions in their jurisdiction.

While in-house counsel do not have expertise in civil specialities such as family law or other personal disputes, in-house counsel bring a wealth of knowledge about government, business and commercial transactions which could be used to support and assist not-for-profit or other community based organisations. Given the calibre and availability of in-house counsel who wish undertake pro bono legal work, ACLA supports reform which at the very least would allow holders of all classes of practising certificate to undertake legal work on a volunteer basis subject to ongoing CPD obligations to ensure quality of legal work provided by volunteers is maintained at the same level expected of practitioners providing paid legal services. Any harmonisation of practising certificate and insurance requirements for in-house lawyers wishing to undertake pro bono work would serve as a way to increase access to justice.

DATA AND EVIDENCE (CH 24)

Many of these recommendations appear to be targeted at the 75% of the legal profession that are not in-house counsel, and accordingly the language should reflect this. As previously stated, where in-house have a lower regulatory need then costs of regulating private practise should not be apportioned to in-house.

CONCLUSION

In-house counsel are enablers of access to justice by working with and within their organisation to minimise risk, identify issues early and promote compliance and ethical decision making. By being embedded, they are more able to prevent issues arising and can guide ethical decision making in terms of response.

ACLA submits that the recognition and consideration of in-house counsel in regulation and administration is essential for effective access to justice, and the general use of the term "lawyer" in the draft report may lead to unintended consequences and costs for in-house counsel. ACLA recommends further consultation be undertaken with respect to a number of issues in the report, particularly those highlighted above in section 2 of this Part 1.

ACLA welcomes the opportunity to be heard in support of this submission.

PART 2: SPECIFIC RESPONSES TO FINDINGS, RECOMMENDATIONS AND REQUESTS

CHAPTER 2: EXPLORING LEGAL NEEDS

DRAFT FINDING 2.2

ACLA:

Please note ACLA's general statement on ADR in Part 1 of our Submission.

CHAPTER 5: UNDERSTANDING AND NAVIGATING THE SYSTEM

DRAFT RECOMMENDATION 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

ACLA:

In principle, ACLA supports rationalising existing services to establish a widely recognised single contact point for legal assistance and referral, to provide better access to justice. Specifically, ACLA believes the provision of basic advice on how to approach legal and non-legal matters consumers have with businesses and government may lead to quicker and more appropriate outcomes for both parties. Most organisations take managing their reputation very seriously and want to address the concerns of their customers, whether legally or non-legally based.

Furthermore, we suggest that this service be promoted to businesses and government so that they can refer customers. It can be frustrating for in-house counsel in dispute resolution when it is emotion and not legal principle driving the issue. Without access to counsel, the matter can be prolonged for the customer, only compounding the issue.

CHAPTER 6: INFORMATION AND REDRESS FOR CONSUMERS

INFORMATION REQUEST 6.1

Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?

ACLA:

ACLA recognises the need for consumers to have access to information and redress if the information does not comply with the Australian Consumer Law (ACL).

ACLA makes the following comments in relation to this information request:

1. *Definition of lawyer*

The information request appears to be targeted at mechanisms for the regulation of the 75% of the legal profession that are not in-house counsel, yet the term 'lawyer' is used indicating that in-house counsel would be subject to this form of regulation as well.

2. *Application to in-house counsel*

If this were to apply to in-house counsel, then there are conflicting messages for consumers on how to deal with matters falling under the ACL. For example, is redress available against the company or government through the ACCC and its equivalents, AND against the in-house counsel through their regulatory body?

3. *Duplication of regulatory bodies*

ACLA's members firmly believe that there should be less regulatory burden on organisations, not more. ACLA can see no benefit in the adoption of this duplicate mechanism for the in-house lawyer, their organisations or their organisation's consumers. The various law societies already play an important part in protecting and enhancing standards in the legal profession and it is difficult to see in the in-house context what additional public benefit will flow from the duplication suggested.

4. *Duplication in any form results in added cost*

Given there is no benefit for the consumer in adding this duplicated and confusing layer of regulatory burden to in-house lawyers, if adopted, any additional administration and enforcement costs incurred by the legal service commissions (and their equivalents) should in no way require funding by in-house counsel, including through the cost of their practicing certificate.

ACLA submits that there is no consumer benefit in duplicating existing mechanisms for enforcement of the Australian Consumer Law, nor for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of in-house lawyers within their jurisdictions

DRAFT Recommendation 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

ACLA:

Again, ACLA contests the use of the word 'lawyer' in this way. This recommendation appears to be targeted at the 75% of the legal profession that are not in-house counsel, and accordingly the language should reflect this.

In principle, ACLA supports the requirement that external lawyers be able to demonstrate that they took reasonable steps to ensure that the client understood the billing information presented.

However, we believe more focus should be placed on understanding the causes of estimate blowouts and potential solutions that may provide greater certainty. ACLA's members are sophisticated purchasers of legal services. Yet despite this, in-house counsel are still working on ways to better predict and manage external costs. There is significant disparity between the perceptions of in-house counsel and those in private practice. Research shows that even as sophisticated purchasers of legal services, in-house counsel are not satisfied with estimates and billing practices of their main external law firm¹.

- *38% of General Counsel do not believe the main law firm they work with is upfront and transparent about pricing*
- *53% of General Counsel do not believe the main law firm they work with provides realistic estimates*
- *54% of General Counsel do not believe the main law firm they work with provides advice at a reasonable price*
- *79% of General Counsel do not believe the main law firm they work with offers Alternate Fee Arrangements that work.*

Given this, ACLA supports more work to be undertaken in this area.

ACLA submits that more work should be done to improve the billing methods employed by private practitioners.

¹ ACLA 2012 in-house counsel Report: Benchmarks and Leading Practices

Draft Recommendation 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.

The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.

ACLA:

ACLA wishes to draw to the attention of the Productivity Commission, that in-house counsel offer businesses and government organisations an alternative to solely using external firms. In-house counsel are equally qualified, may be an appropriate fit for their needs, provide additional value, and cost, on average, 1/5 of the price of external providers.

If Draft Recommendation 6.3 is adopted, then ACLA recommends the inclusion of information about in-house counsel, so that organisations can make fully informed decisions.

ACLA submits that centralised online resources reporting on typical legal matter costs should include information about the costs and benefits of in-sourcing legal services for organisations. In addition to outlining the value of in-house counsel, ACLA recommends the site/s contain/s information to assist an organisation set up a greenfields in-house counsel role.

INFORMATION REQUEST 6.2

How would central online resources with information about legal fees be implemented? What level of aggregation is required to avoid any confidentiality issues? On what measures should information be available (means, medians, hourly rates, total bills)? Are the prices charged by all providers relevant — for example, should a minimum threshold of number of cases of each type per year be required before cost data is submitted, should very small and very large firms be included?

ACLA:

Focusing solely on cost may not provide the consumers of legal services with sufficient information to be able to make better informed decisions. Based on member feedback, the fee arrangement is important, but so are timeliness (urgent and important matters are valued more highly) and fit with purpose (some matters require extensive detail and exploration of every potential risk, and others do not).

For these reasons ACLA suggests that information on how to analyse a legal bill and why variances could be applicable would be of assistance to consumers of legal services.

ACLA submits that centralised online resources reporting on typical legal matter costs should include information on how to analyse legal bills and why variances may occur, in addition to any other valuable pricing data that can be provided.

INFORMATION REQUEST 6.3

The Commission is seeking views on the appropriate 'hosts' for central online resources with information about legal fees — should they be hosted by each jurisdiction's Attorney-General's department, legal services commissioner (or equivalent) or legal aid commission? Could this resource exist alongside a 'directory' listing of firms who are willing to advertise their prices through, say, a law society website?

How could information on quality of service elements best be gathered and reported? Are there international examples that would be applicable in Australia? Where should such ratings be reported — should they be 'hosted' by governments, professional associations or independent providers?

ACLA:

ACLA does not support central online resources separately hosted at jurisdictional levels as this is a duplication of effort and an added and unnecessary cost burden for either the profession or the public.

ACLA believes it would be appropriate to provide detail at a national and where possible a jurisdictional level, but that there should be one national host for businesses and government and one for consumers.

ACLA could be a relevant host of such information for businesses and government, as in-house counsel are among the best judges of the value of legal services and of the information needed for businesses to make better purchasing decisions. ACLA does not recommend that associations for, or regulators of, private practitioners be responsible for the selection of what information is relevant, nor for the publication.

ACLA submits that it may be an appropriate host of online resources for businesses and other organisations as we are both a national body and represent the most informed business purchasers of legal services in Australia.

INFORMATION REQUEST 6.4

The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether:

- *consumers are aware of complaints avenues and using them*
- *resolution of disputes and investigations is timely and the sanctions imposed proportionate*
- *consumers and lawyers are satisfied with the outcomes of complaints processes?*

ACLA:

Please see response to Draft Recommendation 6.8.

DRAFT RECOMMENDATION 6.8

The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.

ACLA:

ACLA recognises that in certain situations the power to compel lawyers to produce information or documents to the complaints body may be necessary to resolve an issue. However, this is not appropriate for in-house counsel.

ACLA makes the following comments in relation to this draft recommendation:

1. Definition of lawyer

The draft recommendation appears to be targeted at mechanisms for the regulation of the 75% of the legal profession that are not in-house counsel, yet 'lawyer' is used indicating that in-house counsel would be subject to this form of regulation as well.

2. Redress for in-house counsel's client

With the client being the employer, in-house counsel are not the subject of billing complaints as the fee for the legal services is fixed. Regarding other potential complaints, employers can, but seldom do, make a complaint about their in-house counsel through the current legal complaints bodies. This is primarily because employers have other means, including dismissal, for dealing with poor or questionable performance or legal advice.

3. Application to in-house counsel

If this were to apply to in-house counsel, then it could be misused as a tool to frustrate a company or government organisation with vexatious and/or frivolous complaints to tie up resources.

4. Increased cost potential for organisations

Given this recommendation is more likely to be used against, rather than add value for, organisations with in-house counsel, it may be counterproductive, potentially forcing in-house counsel to outsource more work to protect their client, and in doing so increasing the cost.

5. Added costs

If adopted, not only should in-house counsel be excluded, any additional administration and enforcement costs incurred by the complaints bodies should in no way require funding by in-house counsel, including through the cost of their practicing certificate.

6. Privilege

There should be no distinction between in-house and external lawyers in relation to the ability to claim legal professional privilege in client communications.

ACLA submits that it is inappropriate for complaint bodies to be given the power to compel In-house Lawyers to produce information or documents.

CHAPTER 7: A RESPONSIVE LEGAL PROFESSION

DRAFT RECOMMENDATION 7.1

The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:

- *the appropriate role of, and overall balance between, each of the three stages of legal education and training*
- *the ongoing need for the 'Priestley 11' core subjects in law degrees*
- *the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education*
- *the relative merits of increased clinical legal education at the university or practical training stages of education*
- *the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.*

ACLA:

ACLA commends Australian legal education providers on the quality of graduates and commitment to high standards.

ACLA does not support the notion that 'LLB is the new arts degree' as this implies it is somehow devalued by the number of graduates or the ability of LLB holders to apply their legal training in multiple fields.

ACLA believes the three stages of education outlined are the beginning and not the end. With three distinct parts to the profession – the bar, private practice and in-house – skill and knowledge development continues well after obtaining a practising certificate. While legal principles and training are the base for all three, each requires distinctive skill sets. This is the purpose for ACLA's existence – to provide the education and support for in-house counsel to effectively fulfil their primary obligation to the courts, their obligation to their client and thirdly their obligation as an employee.

ACLA wishes to specifically address the last bullet point, which we believe may have unintended consequences and should be subject to a separate review.

ACLA recommends in-house counsel have practising certificates, to reinforce their commitment to the legal profession standards and to support their ability to claim legal professional privilege (LPP) on appropriate communications with their client. The latter is an area of significant concern for businesses and government organisations as erosion of in-house counsel's ability to provide frank and fearless legal advice to their client can force the use of higher cost external lawyers where the same advice could have been provide by in-house counsel.

Equally, ACLA recognises the need for in-house counsel to operate in multiple jurisdictions

globally or regionally, and to provide advice at a cross jurisdictional level or in another jurisdiction. They may also be required to relocate to other jurisdictions to share the knowledge of the organisation to its various offices.

As the consequence of losing LPP for organisations is great and the impacts on the costs of justice through external counsel unwarranted, ACLA strongly recommends this point be removed from the recommendation and further consultation be undertaken just on this issue.

ACLA submits that in addition to the review of the three stages of legal education, there be a separate review of the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold a practising certificate.

INFORMATION REQUEST 7.1

Which aspects of legal professional regulation present the greatest obstacles to the profession? Are there 'best practice' jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?

ACLA:

In-house counsel are often forgotten in regulatory review and administrative application. Fundamental to our members' careers is their ability to act as lawyers for their employers. This may require moving interstate, working across a number of subsidiaries and State and Territory jurisdictions or working part-time in two separate organisations. Decades old issues that vary across jurisdictions, such as the ability to advise related entities and mutual recognition requirements, present a barrier to the portability of in-house counsel services and potentially encourage the use of external legal services over internal legal service, raising the cost of justice and increasing uncertainty to business.

ACLA supports removal of the remaining barriers to the practice of law in Australia and a seamless economy. For in-house counsel this means uniform regulation of the legal profession that appropriately recognises the modern nature of organisational structures, an individual's need for flexible work arrangements and the right to simple portability of practitioner status across Australia. ACLA would support changes which reduced red-tape for in-house counsel, for example, one application, registration, licence and insurance program nationwide

ACLA submits that the recognition and consideration of in-house counsel in regulation and administration is essential for effective access to justice.

DRAFT RECOMMENDATION 7.3

State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.

ACLA:

ACLA supports competition that improves the access to justice.

INFORMATION REQUEST 7.2

Does the inability to operate as a limited liability partnership represent a significant cost to, or barrier to entry for, law firms? What are the potential benefits of allowing this particular business structure and to whom do the benefits accrue? What are the potential costs of allowing this structure and who bears those costs?

ACLA:

ACLA supports the use of new business models that make the providers of legal services more accountable and reduce the pressure on private practitioners to be 'fee earners'.

CHAPTER 8: ALTERNATIVE DISPUTE RESOLUTION

INFORMATION REQUEST 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to \$50 000).

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

ACLA:

ACLA supports the use of mediation, and suggests that guidance on the use of compulsory mediation consider the attitudes of the disputing parties. If both seek resolution, then mediation may be successful. However, if one party seeks a 'win' then mediation may just prolong the process and cost of justice.

DRAFT RECOMMENDATION 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

ACLA:

ACLA supports the use of mediation; however, we suggest the timeframe for implementation for all government agencies take into consideration the availability of staff to implement the requirement. In doing so, agencies will be able to implement within existing resources rather than increase the burden to the public by having to outsource the work to meet the deadline.

CHAPTER 9: OMBUDSMEN AND OTHER COMPLAINT MECHANISMS

DRAFT RECOMMENDATION 9.1

Governments and industry should raise the profile of ombudsman services in Australia. This should include:

- *more prominent publishing of which ombudsmen are available and what matters they deal with*
- *the requirement on service providers to inform consumers about avenues for dispute resolution*
- *information being made available to providers of referral and legal assistance services.*

ACLA:

In general, ACLA members' organisations promote alternate ways to resolve disputes including the promotion of any relevant ombudsman.

ACLA does not support any additional burden on organisations.

DRAFT RECOMMENDATION 9.3

In order to promote the effectiveness of government ombudsmen:

- *government agencies should be required to contribute to the cost of complaints lodged against them*
- *ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded*
- *government ombudsmen should be subject to performance benchmarking.*

ACLA:

ACLA does not support a mechanism that has a cost penalty attached regardless of the finding. Government agencies should not be required to contribute to the cost of complaints against them as this could encourage frivolous 'revenge' complaints or targeted costly campaigns against the agency's policies.

There would also be a need for some form of adjudication where a dispute arises regarding the appropriate level of fees. This would contribute to increased regulation.

DRAFT RECOMMENDATION 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

ACLA:

ACLA agrees the role of ombudsmen is important. Equally, the remit should be clear and the funding based on a public benefit test rather than volume.

Before industries are asked to further support the funding of ombudsmen, ACLA suggests wider consultation to ensure additional competition barriers are not placed on Australian businesses.

CHAPTER 12: DUTIES ON PARTIES

INFORMATION REQUEST 12.5

The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?

ACLA:

ACLA is willing to participate in further consultation on this matter so that any application is practical and not anti-competitive for Australian organisations.

CHAPTER 16: COURT AND TRIBUNAL FEES

DRAFT RECOMMENDATION 16.2

Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.

The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:

- *whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body*
- *the amount in dispute (where relevant)*
- *hearing fees based on the number of hearing days undertaken.*

ACLA:

ACLA is concerned that the use of party characteristics as a determinant for court fees may encourage frivolous and vexatious litigants to go to court to seek maximum retribution.

DRAFT RECOMMENDATION 16.3

The Commonwealth and state and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2.

ACLA:

See above.