

Submission to Productivity Commission: Access to Justice Arrangements

Roger Quick ©

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1. PREAMBLE

I lodge this submission as a solicitor and a writer. As a solicitor I have practised for over 40 years in the United Kingdom and in Australia. As a writer I have written extensively on the law, history and the practice of costs. I lodge the submission in support of my application to appear before the Commission in its public consultation. I seek to persuade the Commission that Legal Project Management or LPM is an emerging discipline of which the Commission should take account in considering its terms of reference such as:

- factors that contribute to the cost of legal representation in Australia;
- whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute;
- impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution;
- which have been effective at lowering the costs of accessing justice services, securing legal representation and promoting equality in the justice system

This submission seeks to inform the Commission about Legal Project Management (LPM). This is an emerging discipline that can usefully be considered by the Commission in weighing terms of reference such as:

- Information symmetry and other legal services market failures;
- Court practices and procedures;
- Billing practices; and
- Features of the legal services market which have to date prevented the costs of legal representation being proportionate to legal disputes.

Whilst much of what is written here will be applicable to the purchase of legal services by a retail or consumer client as well as a commercial or government client this submission is primarily concerned with the problems currently experienced by the commercial or government client in successfully securing legal services of a satisfactory quality, on time and within budget. Those legal services may, or may not, be in or about litigation. The questions of such a client to a lawyer before engaging the lawyer are likely to be:

1. What are you going to charge?
2. How long will you take?
3. Are there going to be any extras?
4. How do we deal with any problems that arise?

One current problem with the provision of legal services is that lawyers cannot answer these questions satisfactorily.

This submission is best read with a chapter of Quick on Costs (QC) 'The Future of the Law of Costs' which deals in detail with Legal Project Management (LPM), Costs Budgeting and Costs Management and the options to time costing usually described as Alternative Financial Arrangements or AFA's. In addition that chapter deals with other strategies important to the successful procurement and management of legal services provision such as Alternative Business Structures, and Legal Process Outsourcing (LPO) or Legal Outsourcing (LO).

Definitions are used in this submission without the further detail given in the chapter 'The Future of the Law of Costs.' These definitions include Project, Project Management Triangle, Scoping Work & Product Breakdown Statement or Work Breakdown Statement (WBS).

1.1 Project

Both Project Management, the ancestor discipline to LPM, and LPM itself are concerned with the management of a project and not the management and improvement of a business process. For present purposes we may define a project as a temporary endeavour with a defined beginning and end undertaken to meet unique objectives and goals usually aimed at bringing about beneficial change or added value. Typically the beginning and the end are constrained by one or more of time, cost, and budget and by funding or

deliverables. The primary aim of project management is thus to achieve all of the project objectives and goals and comply with the constraints.

In their temporary nature projects contrast with business process improvements. Typically business processes are repetitive, permanent or semi-permanent activities to produce products or services.¹

1.2 The Project Management Triangle

The Project Management Triangle has many names including “the iron triangle”, “the triangle of truth” and “the scope, resource, time triangle”. It recognises a traditional view that there are three principal competing constraints; time, cost and scope. Quality is sometimes seen as an additional constraint. The time and cost constraints refer to the available time and budget but the scope constraint refers to both of the available time and budget and identifies what needs to be done to produce the project’s intended end result. Too often detailing scope is neglected at the expense of time and cost. However, without a scope initially defined and updated, you cannot rebalance the triangle by changing either or both cost and time when changes or variations are requested.

1.3 The Scoping of Work

Traditional project management assumes poor communication and therefore requires both a defined initial scope of work and the detailing of changes or variations to that scope.

The fundamental ideas here are:

- A request for a change or variation needs to scope the change or variation.
- Changes or variations are predictable and controllable if first the initial scope of work and then any changes or variations are adequately scoped and specified;
- The project objectives will state concisely the results the parties want to see the project achieve. Changes or variations require the parties to revisit these objectives so as to ensure that the project remains viable;
- Assumptions are the parties’ beliefs about their relationship and the project, one of which will be the relationship the parties want to see maintained between scope, cost and time. It follows that assumptions as to what is included in the work in the project and exclusions from that work need to be stated with care to enable the relationship between scope, costs, quality and time to be maintained in the way envisaged by the triangle;² and
- Scope is first and foremost about defining what is and what is not included in the client’s project.

1.4 Work Breakdown Structure (WBS)

In LPM a WBS takes the project objectives and divides each of them into manageable components in size, duration and responsibility. The result is a common framework for the development of the overall planning and control of a project and the basis for dividing work into refinable increments.³

2. WHAT IS CURRENTLY WRONG WITH THE PROVISION OF LEGAL SERVICES?

Five things are relevant to answering this question more fully than we have done in the preamble:

- What lawyers do;
- The nature of legal costs;
- The doctrine of indemnity;
- Retroactive quantification; and
- The billable hour.

¹ See further QC Chapter ‘The Future of the Law of Costs’

² QC Chapter ‘The Future of the Law of Costs’

³ QC Chapter ‘The Future of the Law of Costs’

2.1 What lawyers do

Lawyers have to be qualified to provide legal services. Historically therefore an early concern of professional regulation has been with a lawyer's fitness to provide legal services. This has stunted consideration of a client's concerns. The qualified lawyer in the course of a long history gained two monopolies in the supply of some legal services. The first, and very much older, monopoly was that to charge for representation in litigation (the litigation monopoly) and the second, given casually and at the beginning of the 19th Century, was a monopoly to charge clients for drafting documents (the conveyancing monopoly).⁴

2.2 The nature of legal costs

At bottom the relationship between lawyer and client is a contract of agency and the charges the lawyer is entitled to make to the client are the lawyer's remuneration as agent. So far as the lawyer is entitled to make them, therefore these charges belong to the lawyer and they are commonly called 'solicitor and client costs'. Where, however, the lawyer is providing the services pursuant to the litigation monopoly and the services are in or about litigation then the doctrine of indemnity applies to the solicitor and client costs.

2.3 The doctrine of indemnity

The doctrine of indemnity is but one example of the museum like character of the law of costs originating as the doctrine did in an English statute of 1275.

The doctrine dictates at least five things in litigation:

1. Often Anglo-Australians Courts have a statutory power in deciding the winner of the litigation before it to award the winner 'party and party' costs of that litigation as partial reimbursement of 'solicitor and client costs.'⁵
2. This is a power, and a discretion, not an obligation or duty, to award these costs. The winner does not have a right to party and party costs.
3. The court also has a discretion to decide by whom the 'party and party' costs should be paid. Usually the court will order the losing party to the litigation before it to pay them but on occasion the court may order a stranger to pay them such as the directors of a company that has lost the litigation.
4. The 'party and party' costs must not exceed the 'solicitor and client' costs for which the winning party is responsible to their lawyer.
5. That a retroactive process of quantification of the 'party and party' costs should apply. Anciently this has been called taxation or sometimes moderation. Nowadays it is more often called costs assessment.

2.4 Retroactive quantification

It is rare for a court in awarding 'party and party' costs to fix the amount of these costs. It is much more common for the costs to be assessed by a court officer or, in Queensland and New South Wales, by a lawyer in private practice approved by the court to conduct assessments. The court officer has usually been referred to as a taxing officer and the lawyer as a court appointed assessor. The process of assessment requires the winning party to prepare a costs statement which is in an itemised form that allows the losing party to challenge the validity of particular items in the bill and require the assessor to determine each challenge. Ideally the process of quantification should begin at the outset, be shaped by scoping and estimating and be driven by budgeting. Estimating is a first class tool for controlling cost prospectively and the State Legal Profession Acts require a lawyer to estimate the total costs of what he or she is being asked to do and impose further obligations to update an initial estimate⁶ but there are at least three problems with these controls. The first is that they do not apply to a 'sophisticated client' unless such a client stipulates they should apply.⁷

⁴ See 'The Law of Costs a Comparative Introduction' accessible at <http://comparativecosts.blogspot.com.au/2013/08/the-law-of-costs-comparative.html>

⁵ This is the English Rule by which a Court awards party and party costs to the winner and 'Loser pays.' In the United States where broadly the doctrine of indemnity does not apply the American Rule dictates each party bears their own costs of litigation. In Australia criminal proceedings and family/matrimonial proceedings are usually considered American style "no cost jurisdictions."

⁶ See e.g. s 308(1)(f) and s 315 *Legal Profession Act 2007* (Qld).

⁷ Defined to include, for example, large proprietary companies, see e.g. s 311 *Legal Profession Act 2007* (Qld) and contemplated to include government clients.

The second is that the law enforcing the possible controls on estimating is hopelessly underdeveloped in Australia. It has recently been comprehensively stated in the UK as a result of the Woolf and Jackson reforms as we show below.

The third is that the doctrine of indemnity operates to create a kind of “arms race” in which the parties are each incentivised to pay accelerating costs because it is only if they win that they can get the discretionary and partial indemnity against ‘solicitor and client’ costs that ‘party and party’ costs represent. It is also the case that the parties’ lawyers have no incentive to control the accelerating costs where they are paid by ‘the billable hour’.

There is presently no brake on these effects of the doctrine of indemnity. One such brake could be constituted by a requirement that the end must justify the means i.e. that the expenditure in costs must be proportionate to the likely result or results of the litigation. We consider the billable hour next. Before we do that, however, note that all these things combine to make the process of quantification of costs in litigation not prospective, as it needs to be if we are to have any hope of bringing certainty and satisfaction to the costs of provision of legal services, but retrospective. This retrospectivity has been likened to the backward flight of the mythological Australian Oozlum bird.⁸

2.5 The billable hour

In the absence of any other financial arrangement for payment of a lawyer agent’s remuneration the client pays the lawyer on “the billable hour” or “time costing”. The client pays for his or her work the costs of production plus a margin for profit on the lawyer’s calculation of the time it has taken to produce the work.

In the absence of an alternative financial arrangement (AFA) therefore the client does not pay according to the results of the lawyer’s work or the value of those results to the client. In many other commercial relationships the cost of production is the seller’s concern not the buyer’s and perhaps for this reason alone there has been longstanding judicial and client dissatisfaction with time costing.

A recent survey of Australian corporate lawyers for example reported 75% of the ASX’s top 100 clients saying they were paying over 90% of their fees on ‘hourly rates’ (i.e. the ‘billable hour’) with only 4% of respondents endorsing time billing and 52% saying that they were not being offered options to time billing.

Results like these prompt these comments:

First, in the current crescendo of complaints as to whether the business model of which the billable hour forms part (the ‘Big Law’ business model) has finally had its day and argument and counterargument as to which business models will fail and which will succeed there are as yet, no authoritative pointers to the future of AFA’s;

Secondly, of the 7 or 8 type model AFA’s there is some support for saying that fixed fees and value pricing are emerging as front runners;⁹

Third, it is clear that adoption of a business strategy to pursue AFA’s by law firm or client require courage, skill and commitment because initial failures are likely to be fast and costly;

Fourthly, there is some evidence from the US, the largest of legal services markets and the market with the most experience of AFA’s, that in 2009, the first year of the Great Recession, AFAs could be estimated at 9% of the total legal services market. The use of them has been growing since.¹⁰

Our initial question was ‘what do lawyers do’. Our concluding questions might well be:

- What do you think lawyers do?;
- How well do you think lawyers do what they do?;
- As a client or project manager to a client can you project manage something you do not understand? and;
- How do you project manage legal work?

⁸ See http://en.wikipedia.org/wiki/oozlum_bird

⁹ These types of AFA’s are considered in the QC Chapter ‘The Future of the Law of Costs’

¹⁰ See Chapter The Future of the Law of Costs’

2.6 What do you think lawyers do?

When introducing clients to LPM in about 2002 the answers to this question seemed to the author to be:

- Clients, even commercial clients, had little understanding of what tasks their lawyers would carry out to achieve a client's ends;
- There was equally little understanding of how lawyers estimated professional fees; and
- Clients genuinely appreciated their lawyers seeking to budget fees;
- They equally appreciated the application of project management principles to hourly billing;
- They were enthusiastic about the preparation and costing of a "project plan" in litigation in particular;
- The "project plan" was of much use in preventing disputes about variations and their costs;
- Clients did not want to pay for "the project plan" seeing it as part of the processing of their work for which they were already paying.

We consider below how clients might answer the question in 2014.

2.7 How well do you think lawyers do what they do?

Our concern here is not with the technical competence of lawyers but with the client's need to secure the communication and collaboration essential to good management. The client is entitled to assume technical competence and regulation will now attempt to enforce it. The difficulty lies in securing from lawyers as individuals and as an organisation the skills to work effectively to a common purpose. Any project of size or difficulty is a voyage of discovery where the crew should be handpicked for skills including teamwork. The difficulties in doing this successfully with law firms and lawyers have not been better expressed than they were by the celebrated American management consultant David Maister in an article "Are Law Firms Manageable?" first published in the April 2006 issue of the American Lawyer and accessible at www.davidmaister.com:

- Do not assume that law firms are like all other professions with the ability to learn from others.
- Law firms are different because lawyers have:
 - Problems with trust;
 - Difficulties with values;
 - Professional detachment; and
 - Unusual approaches to decision making.

In Maister's own words his conclusions were:

"If firms are to deliver on the visions they have set for themselves, they must address such issues as what behaviour partners have a right to expect from each other, what the real minimum standards and values are, and how common values and standards can actually be attained, not just preached..."

There is some hope, because what has been reported here are common tendencies, not ironclad laws. There are firms that are exceptional, singular counterexamples to the propositions explored here, and they are tackling head-on the core issues of culture, trust, and partner behaviour. On the other hand, many other firms are doing the very things that will prevent them from creating the truly collaborative organizations their lawyers say that they want.

One of the central things we know about trust and collaboration is that they come mostly from repeated interactions between people who have not only a history together, but also the certainty of a future together. Trust comes from relationships and the expectation of continuing relationships. Over time, as they interact with each other, they as partners, practice groups, and offices may actually come to trust each other.

Unfortunately, in many of today's firms that have been cobbled together from lateral hires and newly merged practices, the personal history that forms the basis of trust is often missing, as is the confidence that everyone will be practising together for a long time. In many firms, even solidly successful partners live in fear that they will be among the next group of partners to be "let go."

In such an environment, the natural evolution of trust may be difficult, if not impossible. Instead, what firms need, literally, is a constitutional convention where their lawyers draft the explicit, basic law that is going to govern their firms—the precise behaviours, rules, and principles that will determine what partners have a right to expect from each other....

Without a prior, explicit agreement on minimum standards, and the resolve to enforce them, many law firms will not function well as firms but will remain what they are today: bands of warlords, each with his or her followers, ruling over a group of cowed citizens and acting in temporary alliance—until a better opportunity comes along.”

3. WHAT IS LPM AND HOW DOES IT WORK?

One definition is this:

"Legal Project Management is the application of widely accepted project management standards such as those promulgated by the Project Management Institute (PMI), to legal matters.¹¹

To this definition we need to add:

1. PMI produces the influential international guide to project management known as the Project Management Book of Knowledge (PMBOK) now in its 5th edition;¹²
2. LPM is a discipline emerging from Project Management;
3. Project Management alone is not LPM;
4. Pricing alone is not Project Management. For example, LPM can be applied to work being billed by the hour;
5. Similarly Costs Budgeting alone is not LPM.
6. All of 3 – 5 and more such as Knowledge Management can be included in LPM if that is what the client's work needs.

3.1 The UK Experience with the Woolf Reforms (1995 – 1996) and the Jackson Reforms (2009 to date)

A brief consideration of the UK experience with these reforms is a useful introduction to what LPM could be here in Australia.

Lord Woolf's reforms resulted in the introduction of the Civil Procedure Rules (CPR) which have spawned imitations here in Australia. For present purposes it is only necessary to note that Lord Woolf saw the then state of the law of costs as a mischief that had to be dealt with. For the work of Lord Woolf Professor Adrian Zuckerman made the analysis which we have mentioned of a lawyer's self interest in hourly billing and the racheting effects of the indemnity principle. Because of them Professor Adrian Zuckerman advocated the introduction of enforceable prospective budgeting.¹³ Lord Woolf might have accepted Professor Zuckerman's proposal but for the antagonism with which the UK legal profession greeted it. They saw it as a flanking manoeuvre on solicitor and client costs.

Lord Woolf did introduce estimates in the CPR. However the effect of estimates was left unclear and the possible benefits of their introduction were lost. Additionally a protracted introduction and re-introduction of Conditional Fee Agreements (CFA's), or 'no-win-no-fee' agreements, allowed the institutionalisation of the billable hour as the measure of 'solicitor and client costs' until 2008 and the reforms of Lord Justice Jackson, the Jackson reforms, which came into effect on 1 April 2013.

Given a year in which to do this by the then Master of the Rolls, Sir Rupert Jackson issued a Preliminary Report (2009) and a Final Report (2010)¹⁴ proposing wide ranging changes to the system of costs in civil litigation. For present purposes what is important is the recognition that:

¹¹ "Legal Project Management, Pricing and Alternative Fee Arrangements - What Firms are doing" J Hassett, LegBiz Dev (2013)

¹² QC Chapter 'The Future of the Law of Costs'

¹³ For papers by Professor Zuckerman considering both the Woolf Reforms and the Jackson reforms, see <http://adrianzuckerman.co.uk/publications.php>.

¹⁴ See <<http://www.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexOJacksonvolume1.pdf>> For the Review of Civil Litigation Costs: Preliminary Report and <<http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>> for the Review of Civil Litigation Costs: Final Report.

1. The existing costs regime had become a business for lawyers. For example the English Bar had a specialist bar – the Costs Bar – dealing with costs matters;
2. It was vital to sever the lawyers’ self interest in his or her remuneration, i.e. solicitor and client costs, and the client’s interest in the ‘party and party costs’ recoverable;
3. It would take 4 years to effect the abolition of the doctrine of indemnity;
4. Clients were keener on costs budgeting and costs management than their lawyers;
5. Costs budgeting and costs management should be introduced to reflect these six propositions suggested by the UK Law Society:
 - 5.1. Litigation is a “project” for commercial ends;
 - 5.2. It should be run on a budget (i.e. budget driven like any normal project);
 - 5.3. No one knows who will be paying the bill when the costs are being run up. Both parties (under the influence of the indemnity principle) believe the more they spend the more likely they are to win;
 - 5.4. Neither party controls the other side’s costs;
 - 5.5. Both parties have an interest in controlling total costs because one of them will be paying the bill; and
 - 5.6. The court should control recoverable costs at each stage – or make other orders requiring notification to the court when a budget is exceeded.¹⁵
6. The CPR should contain an amended definition of proportionality so that in the assessment of the recoverable costs of litigation proportionality should always prevail over reasonableness where the two conflict so that means reflect ends.

3.2 Why and how LPM can fix what is wrong

7. Costs budgeting Sir Rupert believed should reflect these four principles:
 - i. The parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets.
 - ii. The court states the extent to which those budgets are approved.
 - iii. The court manages the case so that it proceeds within the approved budgets.
 - iv. At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.¹⁶

We should first note that these principles readily translate to the management of a client’s work other than litigation. We next need to consider how LPM works and what it can offer.

3.3 How LPM Works

Writing in 2009 Hassett, to whose work we have already referred, formulated eight matters Legal Project Management should deal with which were:

1. Set objectives and define scope
2. Identify and schedule activities
3. Assign tasks and manage the team
4. Plan and manage the budget
5. Assess risks
6. Manage quality
7. Manage client communication
8. Negotiate changes of scope

¹⁵ Review of Civil Litigation Costs: Final Report, Rupert Jackson pp 413 – 414.

¹⁶ Review of Civil Litigation Costs: Final Report, Rupert Jackson pp 400 – 401. A party may be limited to recovery of its’ court fees if there has been no approved budget, see e.g. *Andrew Mitchell MP v Newsgroup Newspapers Ltd* [2013] EWCA Civ 1537 (27/11/2013).

These are not sequential stages. PMBOK envisages 4 stages (initiation, planning and design, Execution or construction and completion) with the creation of Project Controls.

The steps do, however, link one with another so that, for example, the assessment of risks follows and can drive the budget and costs management.

In 2014 there are other formulations of the steps or stages of LPM such as this for example:

1. Define the project – Agree objectives, scope what needs to be done and what done will look like
2. Risk Management – identify risks and gaps and plan for major risks and break down
3. Develop the strategy – plan and breakdown the work. Develop the WBS.
4. Develop the Roadmap/Critical Path – Plan program and assign the phases and tasks.
5. Establish the budget – Price the work taking risks and contingencies into account. Ensure you do not underestimate and consider if you need optimistic/pessimistic and likely budgets.
6. Manage the project – manage it to time, quality and budget.
7. Agree a communications Strategy – Use an RACI (responsible, accountable, conceited, informed matrix) and agendas in the communication of the SOW and Road Map to all team members.
8. Identify and negotiate changes in scope.
9. Review lessons learned by a process such as an 'After Action Review'.¹⁷

4. WHAT CAN LPM OFFER A CLIENT?

In 2014 LPM can offer a client:

- The alignment of a lawyer's aims and those of the client;
- The ability to choose lawyers:
 - who can operate with a LPM framework; and
 - who can offer AFAs i.e. alternatives or options to the Billable Hour¹⁸
- Costs Savings on an initial billable hour budget.
- Answers to elusive questions such as:
 - What tasks their lawyers will carry out;
 - How long these tasks will take;
 - How their professional fees will be calculated;
 - Are they getting a good deal?

¹⁷ See the case study in QC Chapter 'The Future of the Law of Costs'

¹⁸ See QC Chapter 'The Future of the Law of Costs'. The client wanting to use AFA's will need to know whether the lawyers the clients wants to use have a defensive strategy, an aggressive promotional strategy or no strategy at all for AFA's. AFA's for present purposes may include: fixed fees, task based billing, value pricing, a retainer, conditional fees (but not yet contingent fees) or combinations of one or more of these options