Cover image for the Australian GOvernment Productivity C0mmission Draft Report titled 'Access to Justice Arrangements'. Published April 2014.

This is a draft report prepared for further public consultation and input.
The Commission will finalise its report after these processes have taken place.

Commonwealth of Australia 2014

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**An appropriate citation for this paper is:**

Productivity Commission 2014, *Access to Justice Arrangements*, Draft Report, Canberra.

The Productivity Commission

The Productivity Commission is the Australian Government’s independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission’s independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

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# Opportunity for further comment

You are invited to examine this draft inquiry report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by **21 May 2014**, and/or by attending a public hearing.

Public hearing will commence on **2 June 2014**, with the venues to be advised. For those participating in the public hearings, the Commission would appreciate receiving advance copies of submissions or a brief summary of the main discussion points at least **2 working days** prior to the relevant hearing date.

The final report will be prepared after submissions have been received and public hearings have been held, and will be forwarded to the Australian Government in September 2014.

Further information on how to provide a written submission or register your attendance at the public hearings (as a participant or an observer) is available on the inquiry website: www.pc.gov.au/projects/inquiry/access-justice.

**Commissioners**

For the purposes of this inquiry and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Dr Warren Mundy Presiding Commissioner

Angela MacRae Commissioner

# Terms of reference

I, David Bradbury, Assistant Treasurer, pursuant to Parts 2 and 3 of the Productivity Commission Act 1998, hereby request that the Productivity Commission undertake an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law.

**Background**

The cost of accessing justice services and securing legal representation can prevent many Australians from gaining effective access to the justice system. For a well-functioning justice system, access to the system should not be dependent on capacity to pay and vulnerable litigants should not be disadvantaged.

A well-functioning justice system should provide timely and affordable justice. This means delivering fair and equitable outcomes as efficiently as possible and resolving disputes early, expeditiously and at the most appropriate level. A justice system which effectively excludes a sizable portion of society from adequate redress risks considerable economic and social costs.

**Scope of the Inquiry**

The Commission is requested to examine the current costs of accessing justice services and securing legal representation, and the impact of these costs on access to, and quality of justice. It will make recommendations on the best way to improve access to the justice system and equity of representation including, but not limited to, the funding of legal assistance services.

In particular, the Commission should have regard to:

1. an assessment of the real costs of legal representation and trends over time
2. an assessment of the level of demand for legal services, including analysis of:
   1. the number of persons who cannot afford to secure legal services but who do not qualify for legal assistance services, and
   2. the number of pro bono hours provided by legal professionals
3. the factors that contribute to the cost of legal representation in Australia, including analysis of:
   1. the supply of law graduates and barriers to entering the legal services market
   2. information asymmetry
   3. other issues of market failure
   4. the structure of the legal profession in State and Territory jurisdictions
   5. legal professional rules and practices
   6. court practices and procedures
   7. models of billing practices
   8. the application of taxation laws to legal services expenditure, and
   9. other features of the legal services market which drive costs
4. whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute
5. the impact of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services, including analysis of:
   1. the ability of disadvantaged parties, including persons for whom English is a second language, to effectively self-represent, and
   2. the extent to which considerable resource disparity impacts on the effectiveness of the adversarial system and court processes
6. the economic and social impact of the costs of accessing justice services, and securing legal representation
7. the impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, including analysis of discovery and case management processes
8. alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these, including analysis of the extent to which the following could contribute to addressing cost pressures:
   1. early intervention measures
   2. models of alternative dispute resolution
   3. litigation funding
   4. different models of legal aid assistance
   5. specialist courts or alternative processes, such as community conferencing
   6. use of technology, and
   7. expedited procedures
9. reforms in Australian jurisdictions and overseas which have been effective at lowering the costs of accessing justice services, securing legal representation and promoting equality in the justice system, and
10. data collection across the justice system that would enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these.

The Commission will report within fifteen months of receipt of this reference and will consult publicly for the purpose of this inquiry. The Commission is to provide both a draft and final report, and the reports will be published.

David Bradbury

Assistant Treasurer

[Received 21 June 2013]

# Acknowledgments

The Commission acknowledges the assistance of the South Australian court system, which allowed the inquiry to survey users of South Australian courts.

This paper uses unpublished data from the Legal Australia-Wide Survey (LAW Survey). This survey was undertaken by the Law and Justice Foundation of New South Wales, and more details of the survey are provided in Coumarelos et. al (2012). The Commission acknowledges the Foundation for providing the survey data for use in the inquiry report; any errors in its use are solely the responsibility of the Commission.

The Commission acknowledges data provided by Comcare, the NSW Costs Assessment Scheme and a number of other stakeholders who provided useful information about litigation costs to the inquiry.

Finally, the Commission is particularly grateful to everyone who has given freely of their time to discuss with it the very wide range of matters canvassed in the terms of reference and looks forward to continuing that engagement through the hearing process and as the Commission finalises its report.

# Disclosure of interests

The Productivity Commission Act 1998 specifies that where Commissioners have or acquire interests, pecuniary or otherwise, that could conflict with the proper performance of their functions during an inquiry they must disclose the interests.

Dr Warren Mundy has advised the Commission that he is a Fellow of the Australian Institute of Company Directors and that he has not been involved in any way with the preparation of that organisation’s submission to this Inquiry.

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# Abbreviations and explanations

Abbreviations

AAT Administrative Appeals Tribunal

ABS Australian Bureau of Statistics

ACAT ACT Civil and Administrative Tribunal

ACCC Australian Competition and Consumer Commission

ADR alternative dispute resolution

AFAs alternative fee arrangements

AGD Commonwealth Attorney‑General’s Department

AIJA Australasian Institute of Judicial Administration

ALA Australian Lawyers Alliance

ALRC Australian Law Reform Commission

ALSWA Aboriginal Legal Service of Western Australia

ASIC Australian Securities and Investments Commission

ATO Australian Taxation Office

ATSILS Aboriginal and Torres Strait Islander legal services

CALD culturally and linguistically diverse

CIJ Centre for Innovative Justice

CJC Community Justice Centre

CLCs community legal centres

CLE community legal education

CLSIS Community Legal Service Information System

CLSP Community Legal Services Program

COAG Council of Australian Governments

COAT Council of Australasian Tribunals

DIISR Department of Innovation, Industry, Science and Research

DoJ Department of Justice

EIU Early Intervention Unit

FDR family dispute resolution

FTE full‑time equivalent

FVPLS family violence prevention legal services

FWC Fair Work Commission

HCLC Hunter Community Legal Centre

HPL Henderson Poverty Line

ILNP Indigenous Legal Needs Project

IRIS Indicator Reporting Information Service

LACs legal aid commissions

*LAW Survey* Legal Australia‑Wide Survey

LECS legal expenses contribution scheme

LEI legal expenses insurance

LJF Law and Justice Foundation

MRT Migration Review Tribunal

NAAJA North Australian Aboriginal Justice Agency

NACLC National Association of Community Legal Centres

NADRAC National Alternative Dispute Resolution Advisory Council

NATSILS National Aboriginal and Torres Strait Islander Legal Services

NLA National Legal Aid

OECD Organisation for Economic Co‑operation and Development

OLSC Office of Legal Services Coordination

PC Productivity Commission

PCO protective costs order

PIAC Public Interest Advocacy Centre

PILCH Public Interest Law Clearing House

QCAT Queensland Civil and Administrative Tribunal

QPILCH Queensland Public Interest Law Clearing House

RLC Redfern Legal Centre

RRR regional, rural and remote

RRT Refugee Review Tribunal

RTA Road Traffic Accident

SMLS Springvale Monash Legal Service

SRL self‑represented litigant

SSAT Social Security Appeals Tribunal

TIO Telecommunications Industry Ombudsman

VCAT Victorian Civil and Administrative Tribunal

VLA Victoria Legal Aid

VLRC Victorian Law Reform Commission

Explanations

|  |  |
| --- | --- |
| Billion | The convention used for a billion is a thousand million (109). |
| Findings | *Findings in the body of the report are paragraphs high­lighted using italics, as this is.* |
| Recommendations | ***Recommendations in the body of the report are high­lighted using bold italics, as this is.*** |
| Requests for further information | *Information requests are paragraphs highlighted using italics, as this is.* |
| Meaning of ‘civil law’ | *In this report, the term ‘civil law’ is used broadly and includes family law matters. It excludes criminal law matters.* |