

Commonwealth of Australia 2014

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| The Productivity Commission |
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| 5 September 2014 | | | ***Canberra Office***  Level 2, 15 Moore Street Canberra City ACT 2600 GPO Box 1428 Canberra City ACT 2600  Telephone 02 6240 3200 Facsimile 02 6240 3399  ***Melbourne Office***  Telephone 03 9653 2100  www.pc.gov.au |

The Hon Joe Hockey

Treasurer

Parliament House

CANBERRA ACT 2600

Dear Treasurer

In accordance with Section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission’s final report into *Access to Justice Arrangements*.

Yours sincerely

|  |  |
| --- | --- |
| 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]

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The complete two volume report is available from the Productivity Commission’s website (www.pc.gov.au).

Acknowledgements

The Commission is grateful to everyone who has taken the time to discuss the very wide range of matters canvassed in the terms of reference.

This inquiry 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 the assistance of the South Australian court system, which allowed the inquiry to survey users of South Australian courts. The Commission also 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. In addition, the Commission acknowledges the data and information of the costs and benefits of service provision provided by various legal aid commissions and other legal assistance providers.

The Commissioners would like to express their appreciation to Dominique Lowe, who led the inquiry, and the team: Meredith Baker, Elina Gilbourd, Geoff Gilfillan, Pragya Giri, Suzana Hardy, Andrew Irwin, Vashti Maher, Rosalie McLachlan, Dianne Orr, Alan Raine, Tina Samardzija, Anthony Smith, Leo Soames and Kirsten Wren.

Disclosure of interests

The *Productivity Commission Act 1998* (Cth) 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 submissions to this inquiry.

# Abbreviations and explanations

AAT Administrative Appeals Tribunal

ABS Australian Bureau of Statistics

ACAT ACT Civil and Administrative Tribunal

ACCC Australian Competition and Consumer Commission

ACG Allen Consulting Group

ACL Australian Consumer Law

ACT Australian Capital Territory

ADR alternative dispute resolution

AGD Attorney‑General’s Department

AIFS Australian Institute of Family Studies

AIJA Australasian Institute of Judicial Administration

ALAF Australian Legal Assistance Forum

ALRC Australian Law Reform Commission

ANAO Australian National Audit Office

ANEDO Australian Network of Environmental Defender’s Offices

ANZOA Australian and New Zealand Ombudsman Association

APRA Australian Prudential Regulation Authority

ASIC Australian Securities and Investments Commission

ATO Australian Taxation Office

ATSI Aboriginal and Torres Strait Islander

ATSILS Aboriginal and Torres Strait Islander legal services

AVO Apprehended Violence Order

CALD culturally and linguistically diverse

CCLC Consumer Credit Legal Centre NSW

CFDR coordinated family dispute resolution

CIJ Centre for Innovative Justice

CLC community legal centre

CLE community legal education

CLSIS Community Legal Service Information System

CLSP Community Legal Services Program

COAG Council of Australian Governments

CRIS Consultation Regulation Impact Statement

DHS Department of Human Services

EDO Environmental Defender’s Office

EWON Energy and Water Ombudsman NSW

FCA Federal Court of Australia

FCC Federal Circuit Court

FCLC Federation of Community Legal Centres (Victoria)

FCWA Family Court of Western Australia

FDR family dispute resolution

FMC Federal Magistrates Court of Australia

FRC Family Relationship Centre

FSP Family Support Program

FTE full time equivalent

FVPLS family violence prevention legal services

GST Goods and Services Tax

HCA High Court of Australia

HCLC Hunter Community Legal Centre

HECS Higher Education Contribution Scheme

HELP Higher Education Loan Program

HRSCATSIA House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

ILNP Indigenous Legal Needs Project

IT information technology

LACs legal aid commissions

LAF Legal Assistance Forum

LANSW Legal Aid New South Wales

LAQ Legal Aid Queensland

LAW Survey Legal Australia-Wide Survey

LCA Law Council of Australia

LECS legal expenses contribution scheme

LEI legal expenses insurance

LIV Law Institute of Victoria

LSC Legal Services Commission

MRT Migration Review Tribunal

MYEFO Mid Year Economic and Fiscal Outlook

NAAFVLS North Australian Aboriginal Family Violence Legal Service

NAAJA North Australian Aboriginal Justice Agency

NAATI National Accreditation Authority for Translators and Interpreters

NACLC National Association of Community Legal Centres

NADRAC National Alternative Dispute Resolution Advisory Council

NATSILS National Aboriginal and Torres Strait Islander Legal Services

NCAT New South Wales Civil and Administrative Tribunal

NCYLC National Children’s and Youth and Law Centre

NDIS National Disability Insurance Scheme

NFP not for profit organisation

NLA National Legal Aid

NPA National Partnership Agreement

NPBRC National Pro Bono Resource Centre

NSW New South Wales

NSWADT New South Wales Administrative Decisions Tribunal

NSWLRC New South Wales Law Reform Commission

NT Northern Territory

NTLAC Northern Territory Legal Aid Commission

NZ New Zealand

OECD Organisation for Economic Co-operation and Development

OLSC Office of Legal Services Coordination

OPC Office of Parliamentary Counsel

ORIC Office of the Registrar of Indigenous Corporations

PBS Portfolio Budget Statements

PC Productivity Commission

PCLC Peninsula Community Legal Centre

PCO protective costs order

PIAC Public Interest Advocacy Centre

PILCH Public Interest Law Clearing House

PLEAS Public Legal Education and Support

PM&C (Department of) Prime Minister and Cabinet

PPF Public Purpose Fund

PTO Public Transport Ombudsman

PwC Pricewaterhouse Coopers

QAILS Queensland Association of Independent Legal Services

QC Queen’s Council

QCAT Queensland Civil and Administrative Tribunal

Qld Queensland

QPILCH Queensland Public Interest Law Clearing House

RLC Redfern Legal Centre

RMIT Royal Melbourne Institute of Technology

RRT Refugee Review Tribunal

SA South Australia

SACAT South Australian Civil and Administrative Tribunal

SAT State Administrative Tribunal

SBDC Small Business Development Corporation

SEIFA Socio-Economic Indexes for Areas

SRL self-represented litigant

SRS Self Representation Service

SSAT Social Security Appeals Tribunal

Tas Tasmania

TIO Telecommunications Industry Ombudsman

UK United Kingdom

UNSW University of New South Wales

UQ University of Queensland

US United States

VALS Victorian Aboriginal Legal Service

VCAT Victorian Civil and Administrative Tribunal

VCOSS Victorian Council of Social Services

Vic Victoria

VLA Victoria Legal Aid

VLRC Victorian Law Reform Commission

VSBC Victorian Small Business Commissioner

WA Western Australia

WLS Women’s Legal Service

**Explanations**

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| Billion | The convention used for a billion is a thousand million (109). |
| Meaning of ‘civil law’ | In this report, the term ‘civil law’ is used broadly and includes family law matters. It excludes criminal law matters. |