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Submission – Access to Justice Arrangements

Attached is a submission on the Productivity Commission's *Access to Justice Arrangements Issues Paper*. The submission has been compiled by the following group of academics at the Adelaide Law School, University of Adelaide:

- David Caruso
- Margaret Castles
- Anne Hewitt

The Issues Paper raises many important and complex questions around the accessibility of justice in Australia. We have not been able to address the vast majority of these concerns, but instead have here made submissions regarding access to justice in minor civil jurisdictions. These submissions are informed by our expertise and experience gained through operating the Magistrates Court Legal Advice Service, which has been run by Adelaide Law School since 2002, and the Advocacy and Justice Unit which is based in our law school. In addition, Adelaide Law School has made two additional (separate) submissions, which address the following areas:

1. Improving the accessibility of courts, specifically relating to the reform of the government's model litigant rules; and
2. Funding for Litigation, specifically third party funding.

Yours sincerely

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Submission to the Productivity Commission:
Access to Justice Arrangements Issues Paper

Submission by David Caruso,
Margaret Castles, Anne Hewitt,
the Magistrates Court Legal Advice Service (MCLAS) and
the Advocacy and Justice Unit

Adelaide Law School, University of Adelaide

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Introduction

This submission addresses three issues that arise from the Productivity Commission's *Access to Justice Arrangements Issues Paper*.

We focus on the question of access to justice in minor civil jurisdictions.

Our submissions are informed by more than a decade of experience of operating the Magistrates Court Legal Advice Service (MCLAS), a free legal advice service run by Adelaide Law School, and the work of the Advocacy and Justice Unit based at Adelaide Law School. We argue that recent efforts to create more efficient and streamlined processes in minor jurisdictions have often resulted in the exclusion of the legal profession. We submit that appropriate involvement of the legal profession in these jurisdictions will contribute to, not diminish, efficiency and justice outcomes.

In addition to the submissions set out below, we would observe that access to justice is often, and rightly so, framed as an issue about providing additional services and pathways to litigants, and particularly those most in need, to resolve their disputes. However, it is important to acknowledge that access to justice by less well-resourced litigants is impacted by the use of justice resources by government and well-resourced litigants. This is becoming increasing apparent with the rise of mega-litigation in commercial disputes which can remove members of the judiciary for substantial periods (up to years) from their normal duties. As such, we would urge the Productivity Commission to take into account the impact of providing state-funded justice to well-resourced litigants on the justice afforded to the less well-resourced.

Executive Summary

It is the argument of this submission that appropriate involvement of the legal profession in minor civil proceedings – not its exclusion – will best facilitate efficient proceedings and ensure rectitude of outcome.

We recommend that initiatives are implemented to:

1) ensure that legal advice is more accessible to parties;
2) provide more targeted, matter specific advice regarding the utility, process and benefits of ADR to individuals involved in litigation; and
3) facilitate the provision of legal advice on a 'as needs' basis.

Our arguments, and further detail about our recommendations, are set out below.

The problem of access to justice in minor civil jurisdictions

We wish to consider barriers to justice access arising in minor civil jurisdictions where litigants represent themselves. However, the observations relate equally to minor administrative tribunals in which claimants appear unrepresented. Many people are unrepresented in administrative tribunals such as VCAT at the State Level, and SSAT and AAT at the Commonwealth level. However, it is our belief that where government agencies are involved in such claims the challenges we identify are less acute, because the relevant agency is generally able to articulate the issues arising in the case.

Our observations arise in part from the work of the Magistrates Court Legal Advice Service (MCLAS), a legal advice service operated by Adelaide Law School since 2002. Through its involvement with MCLAS Adelaide Law School is uniquely placed to observe and comment upon the reality of the minor civil claims experience for litigants.

MCLAS is a free legal advice service for unrepresented litigants in the minor civil claims jurisdiction of the South Australian Magistrates Court. The service provides advice on process, merit, compromise and case management to approximately 120 litigants per year. In almost all of these cases it is our experience that the parties do not understand the legal issues involved.

Many of the cases at MCLAS have little legal merit and the service proactively advises parties of this sad reality, and directs them towards compromise particularly via ADR or negotiation. However, a great number of cases are meritorious. They often involve complicated legal issues, and MCLAS students and supervising solicitors devote considerable time to assisting clients with such cases to understand the legal issues, gather the facts that are needed to support their case, and then proceed to informed compromise or trial. The vast majority of MCLAS clients achieve fair resolution via compromise. A small percentage proceed to trial, with the benefit of clear pleadings, organized disclosure, and a clear statement of their case for the Magistrate.

Jurisdictions such as the Minor Civil Claims jurisdiction of the Magistrates Court, and numerous Commonwealth and State Tribunals, are designed to minimize involvement of lawyers. The reasons for this include to avoid the incurring of legal costs, which it is argued would be disproportionate to the amount in dispute in these jurisdictions.

The policy goal for jurisdictions such as the Minor Civil Claims jurisdiction of the Magistrates Court appears to be to minimize the costs of proceedings for participants, and to ensure efficiency by streamlining proceedings and ensuring they are uncomplicated by legal argument that is unlikely to be critical to the outcome. To this end many of these courts and tribunals are inquisitorial rather than adversarial, with tribunal members or magistrates having extensive powers to inquire and direct parties during the hearing.

Efforts to render court process more efficient and streamlined are, undoubtedly, necessary. However, it is the argument of this submission that, appropriate involvement of the legal profession – not its exclusion – will best facilitate efficient proceedings, which ensure rectitude of outcome. Responses which restrict parties from having access to the legal profession for guidance and advice, are inadequate and counterproductive to ensuring both access to justice and an efficient and cost effective system.

Below we outline the difficulties faced by litigants in minor civil jurisdictions, including the difficulty of recognising the legal problem, the relevance of law to resolving even minor legal disputes, difficulties in understanding ADR, problems encountered by equating monetary value

with justice and low legal literacy before turning to our recommendations as to how these issues may be addressed.

Recognising the legal problem

It is rare for parties in jurisdictions such as the Minor Civil Claims jurisdiction of the Magistrates Court to understand or address the legal dimensions of their claim. It is the experience of the MCLAS, supported by anecdotal reports from Magistrates and others involved in this jurisdiction, that while parties have a broad understanding of what is legally 'right and wrong', they do not have the capacity to identify the legal principles that underpin this 'intuition' nor the capacity to understand which facts are legally relevant to the issues.

Whilst this lack of knowledge is no impediment to the majority of claims being compromised, more or less, to the satisfaction of the parties, there remains a percentage of claims that cannot be easily resolved without reference to the legal basis for the claim and identification and adjudication of the facts that support it.

Claims that are settled may do so because the process is confusing and time intensive and parties do not understand enough about their rights and obligations to resolve cases fairly. Equally, many claims do not resolve early because parties have unrealistic views of their prospects of success, because they do not understand the issues.

Parties who proceed to trial or hearing without a legal understanding of their claim, and the knowledge necessary to identify legally relevant facts and evidence to prove those facts, are necessarily are significantly disadvantaged. Their capacity to present a simple case relating relevant facts to legal principle is hampered by fundamental lack of understanding of the legal principles involved, and the way that facts and evidence support a legal case.

This lack of understanding not only inhibits the parties from accessing justice in the courts by presenting all relevant material in a manner that is appropriate for their case, but also places an undue burden on the court to, at points, 'run a party's case', or risk decisions which are not informed by a proper analysis of fact and law. Whilst this may be the intention of a more inquisitorial system which seems to underpin reforms to, for example, minor civil claims jurisdictions, it is not consistent with fundamental tenets of the rule of law that have developed and served the Australian legal system and community.

Experience of litigants

The result of reforms in the Magistrates Court of South Australia is that parties engaged in minor civil or administrative litigation focus on their story or narrative, with little understanding of the concept of legal or factual relevance. Parties will attend hearings prepared to 'tell their story' but will not have prepared legally or factually relevant information. They will not have relevant evidence or witnesses ready, and by the time a magistrate identifies that particular evidence as being useful, it is often too late.

The Magistrates Court in South Australia attempts to accommodate such lack of legal knowledge by requiring parties to attend a directions hearing with a Deputy Registrar soon after pleadings are completed. In the very short time of that directions hearing, the Deputy Registrar attempts to isolate the legal issues involved in the dispute and directs the parties to focus on these. In most cases the parties do not attend another directions hearing and their case either settles or proceeds to trial with no further '*legal* information support' from the Court.

There is a wealth of information provided to parties about the general *processes* to be followed in the Magistrates Court and equivalent jurisdictions. However, this information seldom assists them to identify the legal or factual issues that will be critical to the outcome in *their particular* case or how they should prepare and present *their particular* case.

In failing to offer parties adequate assistance to identify and assess the legal and factual issues in *their claim*, the system effectively denies meaningful justice for those individuals with more complex cases. The relatively short directions hearing process occurs early in the case and does not afford sufficient time for parties to come to grips with the real issues that the dispute presents. The trial by an inquisitorial Magistrate may uncover relevant facts and issues effectively, but there is a considerable risk that it will by then be too late for parties to effectively address their case and, is again, contrary to the tried and tested regime for resolution of disputes between, or raised by, citizens in Australia. This is an example where resources offered at the start of proceedings (at the Directions Hearing stage) would result in savings in time money and resources further along in the process, and would create just outcomes for parties.

Relevance of law

It is a fallacy that the law is not important in jurisdictions such as the Minor Civil Claims jurisdiction of the Magistrates Court. It is true that in the majority of cases involving disputes between individuals or businesses the parties will resolve the dispute based upon their interests with little reference to legal principle. However, in a good proportion of cases a just outcome requires articulation of legal rights and the calling of evidence or fact to support claimed rights. In those cases justice is not served by parties landing in court ill-equipped to understand the legal parameters of their case and unprepared to argue it effectively. Nor is it served by parties compromising their claim without understanding its strength. The inquisitorial nature of proceedings does not remedy this disadvantage.

Even if an 'inquisitorial Magistrate' does identify the legal issues involved this is unlikely to equip parties, in anything but a very superficial manner, to comprehend the legal implications of the case. Access to justice should mean and include understanding of the legal issues and effectively addressing those issues, not simply being able to walk into the doors of a courtroom. In addition, where significant legal issues are identified at trial, the only way those can be accommodated may be by adjournment. It is clear that adjourning a trial to enable relevant evidence to be called is a drain on resources and, of course, justice delayed is justice denied

Examples of complex legal issues which arise even in a small-claims jurisdiction, which are drawn from the MCLAS experience, include:

- Issues of employee liability for negligent damage to employers property;
- Local Council liability for damage caused by falling tree branches in public areas;
- Foreseeability and indemnity in home building and renovation disputes; and
- Issues of proof and evidence in breach of (verbal and written) contract claims.

These may not be complex legal issues to a lawyer; however they are for most litigants and, indeed, they may be additionally complicated by difficult factual circumstances underpinning them. A client in this position needs a lawyer to explaining the law in the dispute. They may also require a lawyer's advice regarding a strategy for management of the case in light of the legal issues and factual disputes. This advice would invariably include advice about early settlement and compromise. The Court is also assisted by lawyers in this process. Lawyers are officers of the

Court. Their aim is to assist the Court discharge its function; not obfuscate it. In most cases of small claims it would not be particularly time consuming for a lawyer to provide such advice. However, the negative consequences of the absence of such advice are often considerable for the individual litigant and the administration of justice as a whole. It is incorrect to assume that lawyers inevitably complicate and draw out proceedings. More often, lawyers give parties sound advice about the realities of their case, and assist parties to reach compromise settlement. The consequence of de-legalisation of cases and restrictions on lawyers informing court resolutions is to diminish the extent to which these cases allow for clear and full exploration of the relevant legal issues and factual circumstances in a manner that individuals can appreciate and understand with a potential to produce outcomes at the expense of legal fairness. A compromise settlement that is expedient at the expense of legal rights is not a fair outcome. Neither is a trial at which parties could, but for the lack of basic legal understanding, have more clearly made their case.

Understanding Alternative Dispute Resolution

In the experience of the MCLAS, of even more importance than readiness for trial is the need for parties to be able to realistically assess their case early in the dispute so as to facilitate engagement with ADR processes. ADR literacy in the community is low, with few first-time litigants understanding the process, the way to prepare for the process, and the way it might work in their case.

The focus of these jurisdictions is, as it should be, on early settlement. However, the resources to facilitate early settlement are scant and consist almost entirely of written pamphlets and written instructional material. In addition, there is an assumption that parties will want to talk to each other to resolve the dispute pre-trial. The experience of MCLAS is that this assumption is wrong. Parties are very often averse to talking to each other, they distrust each other, they lack the vocabulary to negotiate effectively, and do not appreciate that compromise is part of negotiation.

In addition, it is out experience that parties often do not understand that mediation is not a 'mini-trial' but a process in which discussion and compromise is key. They do not understand that even at the negotiation stage, they must be able to identify the issues and address them in terms of rights and obligations, in order to present a persuasive argument. Parties often believe that negotiation must be positional and based on zero-sum outcomes, and are ill-equipped to engage in more imaginative and extensive bargaining.

We find that giving clients at MCLAS more detailed and practical explanations of ADR, couched in terms of how it might work in their case, usually results in willingness and even enthusiasm to negotiate or mediate. We believe that there is a systemic barrier to be overcome to persuade people to prepare for and engage in effective mediation. Once in the hands of a skilled mediator parties will very often "come around" to a reasoned settlement. Getting parties to the mediator is the real challenge. Lawyers are key to meeting this challenge for the guidance and explanation of the process they can provide to their clients. Parties who seek advice from MCLAS always receive detailed advice on the value of mediation *for their case* and are assisted to engage in the process. Some form of active advice/intervention for parties at an early stage in proceedings and ready availability of mediators *and* pre-mediation advice is required for those who cannot use our services.

Equating monetary value with justice

There is a direct correlation between the value of a dispute, commitment to dispute, the desire for "justice" and the resources parties will allocate to a case.

The Minor Civil Jurisdiction in South Australia has recently increased its jurisdiction from $6,000 to $25,000. This exponential leap exposes a number of assumptions about small claims that bear scrutiny. Those assumptions include:

- Cases involving small amounts of money can easily be compromised without much disadvantage to either party and at little procedural cost.
- Law or legal principle has limited relevance in cases for small monetary amounts.
- Even if law is involved in cases of little value, it is not worthwhile allocating resources to resolve such cases.
- Litigants can easily manage small claims themselves.
- Inquisitorial court process provides adequate safeguard in the case of any complex legal issues arising.

These propositions inaccurately generalise the nature of many matters falling within the now enlarged small claims jurisdiction.

A more accurate series of statements would read:

- Some cases involving small amounts of money turn on complex legal issues.
- A minor matter, for example involving a claim of $3,000, may be critical to person's ability to get to work, continue their small business, or feed their family.
- Litigants with limited English, low literacy, limited personal or organizational resources, or low confidence, find the processes of accessing even a jurisdiction with streamlined procedural rules almost insurmountable.
- Competent litigants seldom have even a basic grasp of legal principle and the relatedness of law to fact.
- The insights of an inquisitorial adjudicator at trial are too late to enable parties to understand the issues to inform either compromise or preparation for trial.

Legal Literacy

Legal literacy falls far behind medical and educational literacy in Australia. Very few people comprehend legal concepts beyond the obvious propositions of tortious or contractual liability. Very few litigants understand that they must prove allegations by calling evidence of fact. Most litigants believe their narrative will suffice.

This means that litigants may be capable of completing the 'forms' a jurisdiction may require to be filed, but are not capable of framing their case in relevant legal terms. In a case involving a verbal contract entered into between friends for a commercial enterprise that subsequently goes sour after complicated payment arraignments, it is unlikely that personal narrative without documentary support will be sufficient. However, without legal knowledge and/or advice it is overwhelmingly likely that the parties will not know to bring with them ordered documents that disclose the terms of agreement and financial dealings over the years.

Conclusion

There are several structural issues that contribute to this mismatch between resources and outcome. They are:

1. Educational guidance provided to litigants is limited to how to get into the jurisdiction and use the relevant forms and processes. It does not assist parties to identify the legal and factual issues involved in their case. Nor does it assist them to present their case when they get to court or during negotiations.
2. ADR information provided to parties presupposes understanding of the philosophy of ADR and the necessity to engage in ADR with a view to compromise.
3. Legal support that is proportional to the complexity of the case and the needs of the litigant is not readily available.

Recommendations

We consider these structural issues should be addressed in, at least, the following ways.

RECOMMENDATION ONE: Ensuring parties receive adequate legal advice

The experience of the MCLAS in working exclusively with claimants in the minor civil jurisdiction is that assisting litigants to understand the legal and factual issues at the outset is critically influential in enabling them to progress (and usually compromise) their case. This advice can come from a service like MCLAS which will spend sufficient time with a client to identify the parameters of the dispute and direct further preparation. Services like this however are rare, and will never be able to meet the legal need in the community, nor have the resources to provide high level support if needed. There is an important role for the legal profession to play in ensuring appropriate support is accessible if required.

Being able to articulate the nature of the case with reference to simple legal principle and relevant fact both confines the matters to be pursued and provides a roadmap for litigants to follow.

RECOMMENDATION TWO: Providing parties with better education regarding ADR

It is our experience that information regarding ADR is not currently conveyed in an effective manner. Statements about the value of ADR do not address the mind-set of parties. Parties invariably need to be introduced to the ideas of compromise, reminded that there are two sides to every story, that the court will be required to see both sides and so too should they.

Information about ADR that is readily available does not address these fundamental issues of preparation. In the same way that lawyers will coach their clients to be prepared for mediation or negotiation, so too should educational information that addresses this fundamental issue. Our feeling at MCLAS is that generalised paper based information is not particularly persuasive, as clients cannot see it in the context of their dispute. More personalised discussion is far more effective.

RECOMMENDATION THREE: Facilitating the provision of legal advice ‘as needs’

We appreciate that small claims may require more limited legal assistance than larger cases. It must be stressed that lawyers, as officers of the court, are best placed to and should be charged with assessing the extent of counsel and advice that a litigant requires in the circumstances of the particular case. Those decisions are based on adherence to the rule of law as well as the commercial and personal interests of the client.

However, the traditional structure of legal advice services, in which a lawyer is responsible for a client's whole case, results in time sometimes being spent by lawyers at all stages in a case when only some require legal assistance. Services like MCLAS provide 'as needs' services. A typical MCLAS case might involve the service:

- taking instructions,
- discussing settlement options with the client,
- drafting pleadings for the case
- and providing concise written legal advice outlining: the law, the issues, and the prospects of success, information about how ADR processes could work, an explanation of the facts needed to support the client's legal position, and the evidence they should gather.

In some cases much more work is needed. But in the majority of cases this approach is sufficient to ensure a litigant is well prepared for negotiation or trial.

There are very few community based legal services that offer this type of "as needs" legal support. Duty solicitor services that provide advice, drafting, and pre-trial counselling are an effective option, but unlikely in the current legal aid funding climate.

Private solicitors can be reluctant to act on limited retainers on account of risk management issues. Providing advice for specific purpose without knowing the nuances and detailed background of the matter (which may not be addressed in order to save the client costs) can place the legal advisor at legal risk and for that reason will not be a preferred option. Structures that enable lawyers to provide as needs services and address risk management issues, such as unbundled legal services, provide a workable option which should be pursued so as to ensure the legal profession offers to all actions, major or minor, the service appropriate to the resolution of the case in a complete and efficient manner.

We believe that if legal services are appropriately accessible, and that lawyers are facilitated to provide 'as needs' advice, many clients could see the benefit of paying a small sum to assist them navigate the court system efficiently and effectively, Paying for whole of case representation for a case worth $20,000 is unlikely to be cost effective. However, paying for limited or task specific legal advice for a $20,000 claim is much more likely to be a cost effective option. This also reflects the reality that in this jurisdiction there is much work that litigants can do themselves. Legal advice on key points is useful, but legal representation for the whole of the case is not required.

Our point is that exclusion of lawyers from the process is not the answer. Attention should be directed to refining the role of lawyers within the process to ensure access to justice means more than 'having your day in court'. A day in court unprepared and unapprised of the relevant issues affecting the resolution of the case in accordance with principles of law and equity, is no day to quest after at all.

This submission was jointly prepared by David Caruso, Margaret Castles and Anne Hewitt.