NEW SOUTH WALES
BAR ASSOCIATION

# A submission regarding the Productivity Commission's issues paper, *Access to Justice Arrangements*

## 1. About this inquiry[1]/Introduction

1. The New South Wales Bar Association (the association) welcomes the opportunity to comment on issues raised in the Productivity Commission's issues aper released as part of its reference on access to justice arrangements. The association is a voluntary association representing the interests of almost 2300 practising barristers in New South Wales.
2. As an initial comment, the association notes that the Productivity Commission's terms of reference for this inquiry are broad. Rather than address each part of the terms of reference and answer every question raised in the issues paper, this submission focuses upon matters related to barristers' practice in New South Wales which are of particular relevance to the access to justice issues raised, and provides the commission with the bar's perspective on these issues. In doing so, this submission seeks to emphasise the value that is provided to the public and the civil justice system by a strong, independent bar.
3. Justice is not purely an economic good. Legal rights are inherently valuable and should not be commoditised. An accessible and independent system of justice is a measure of civilization, and an essential feature of democracy.
4. The Bar Association acknowledges that justice comes at a cost to government, to litigants and to the public, and supports and encourages those moves that make the system of justice more efficient, without detracting from legal rights. The association fully supports the application of alternative dispute resolution processes in appropriate cases as a means for the quicker and less costly resolution of disputes. However, government needs to acknowledge that if more individuals are to be able to access the justice system then more resources will be needed.
5. An independent bar adds value to, and subsidises, our system of justice. Effective advocacy enhances the capacity of courts and tribunals to deal with complex questions, and leads to greater efficiencies in terms of time and procedure. Barristers, and legal practitioners generally, add value to the civil justice system in this way. Furthermore, barristers in this state contribute thousands of

hours per year through pro bono and reduced fee work in order to aid access to justice for those individuals who cannot meet the costs of legal representation, both through schemes such as the New South Wales Bar's Legal Assistance Referral Scheme and the various court pro bono schemes, as well as of their own motion. Similarly, in fields such as personal injury, barristers frequently work on a contingent basis. These 'no win no fee' arrangements allow litigants access to the civil justice system which would otherwise be denied them, and subsidise the system of personal injury compensation in this state.

## 3. Exploring legal needs[2]

### What is legal need?

6. The Bar Association notes the commission's definition of 'legal need' as 'legal issues that individuals have not been able to resolve effectively by their own means' and the commission's proposal to focus on the need for legal assistance as it relates to solving disputes rather than transactional services.

7. In this regard, the association notes that the real decline in funding for legal aid services in recent years, in both civil and criminal law, has resulted in an increasing strain being placed upon other means of legal assistance, whether through community legal centres, court pro bono schemes, professional organisation arrangements such as the New South Wales Bar's Legal Assistance Referral Scheme and the individual pro bono contribution made by many practitioners. Because of its reliance on volunteers, pro bono and other legal assistance work can never hope to replace a properly funded legal aid scheme.

## 4. The costs of accessing civil justice[3]

### Financial costs

8. The Bar Association notes that the commission's first Term of Reference requires it to have regard to 'an assessment of the real costs of legal representation and trends over time' and its invitation for comment on the financial costs of civil dispute resolution and the extent to which these costs dissuade disputants from pursuing resolution.

9. There is only limited quantitative data available as to the real costs of legal representation in Australia. The Bar Association does not collect data on the comparative financial costs of advisory or advocacy services provided by its members.

10. The practical benefits of early and direct briefing of junior counsel have received judicial support. Courts regularly comment upon the efficiencies of the private bar as opposed to solicitors. The courts are often uniquely placed to make such observations, as they oversee the conduct of litigation before them, including evidence of bills of legal costs borne by the parties. Their Honours Justice White and Justice Nicholas have specifically drawn attention to the costs benefits of early briefing of the bar for in-house counsel, and for the costs of litigation generally.[4]

11. This lends judicial authority for the proposition that, where appropriate, the early and direct briefing of counsel is a cost-effective option for litigants, improving access to justice, both in terms of cost benefits for parties, and efficiencies for the civil justice system. Direct briefing is highly effective in circumstances involving sophisticated clients, such as in-house counsel.

12. The removal of external solicitors from the litigation process can save legal costs. The *New South Wales Barristers' Rules* in some circumstances facilitate the direct briefing of the bar by clients, and set additional professional standards for barristers in these circumstances.

13. The Bar Association has in recent times been examining the advantages, in appropriate cases, of in-house counsel (both corporate and government) briefing members of the bar directly without having to brief an external solicitor to provide instructions to the barrister as well. Any in-house lawyer with a current practising certificate can brief a barrister directly.

14. Such arrangements have the potential to greatly reduce legal costs in suitable cases.

15. The advantages of direct briefing are numerous. Direct briefing provides access to specialist expertise in every area of the law. Strategic, early and direct involvement of a barrister can save time and money.

16. Direct briefing practices are best suited to the following types of legal work from the bar:

    - legal advice – written or in conference;
    - reviewing contracts and other documents for particular issues, for example: tax; human resources/employment, restraint of trade; public relations/media; regulatory/compliance issues;
    - advice on dispute resolution, including strategy and resourcing; and
    - appearing in litigation.

17. By cutting out the need for an external solicitor in these kind of cases, and ensuring early briefing of counsel, direct briefing practices have the advantage of saving corporate and government in-house legal branches considerable legal costs, while gaining access to high quality legal advice.

18. There is an increasing trend among in-house counsel towards briefing the bar direct, in view of the litigation and legal costs savings and access to specialised expertise involved. The 2013 Australian Corporate Lawyers Association Trends Survey of In-House Counsel indicates that 44.9 per cent of in-house counsel have briefed a barrister directly in the last year, an increase of four per cent on 2012.

**Timeliness and delays**

19. In New South Wales there have been substantial efforts to improve the timeliness of civil dispute resolution and to minimise delays. This has been in part a product of the co-operation of the legal profession, including counsel. The objective that civil disputes be dealt with in a manner which is 'just, quick and cheap' (s 56 of the *Civil Procedure Act 2005* (NSW)) has taken hold throughout the court system and is regularly reflected in practice notes, tight timeframes, and judicial decisions on procedural and other interlocutory issues. Counsel's sensitivity to this stated objective, and duties to the court, is reflected in his or her advice and assistance to litigants to seek to meet the court's expectations.

### Geographic constraints

20. Australia's geography is readily acknowledged as posing a physical impediment for many in accessing essential services; the legal system amongst them. The tyranny of distance and consequential sense of isolation has historically been overcome by the establishment of court houses in regional centres and country towns and by courts travelling 'on circuit' to regional centres. However, both the number of regional and country-based courts and the number of circuits has steadily decreased in recent years due, primarily, to cost. The association submits that these reductions are undesirable. The cost is outweighed by the access to justice benefits achieved, which cannot be measured in purely economic terms. The operation of the justice system in local communities raises awareness of legal issues and allows local practitioners to conduct litigation in their own community. There are also the broader associated economic benefits for country towns in having a court, plus various legal practitioners, located in town and of circuit courts travelling and staying for a period of weeks.

21. It is noted that most solicitors in regional centres are generalist practitioners, dealing with a wide array of legal issues. Specialist practitioners are not widely available in these areas, unlike the central business districts of major cities. The availability of the bar as a source of specialist advice is invaluable to those local practitioners and their communities.

## 5. Is unmet need concentrated among particular groups?[5]

### Self-represented litigants

22. Litigants appearing without legally qualified representation is an increasing phenomenon. Self-represented litigants can have a significant adverse impact on opposing parties, courts and tribunals and the parties themselves.

23. Self-represented litigants are at a considerable disadvantage in litigation against a represented party. However, despite frequent efforts by courts to obtain pro bono or reduced cost representation for unrepresented parties in proceedings, there remains a significant core of litigants who prefer to, or must, pursue litigation in person. As this appears to be an increasing trend, the justice system and the profession as a whole needs to be in a better position to understand the needs of, and deal as efficiently and as justly as possible, with unrepresented litigants.

24. In 2000, the Family Court issued a research report, *Litigants in Person in the Family Court of Australia*, which highlighted the difficulties caused by increasing self-representation before that court and, subsequently, the Australian Institute of Judicial Administration issued a report, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, which also explored the issue.

### Impact on the judicial officer

25. Where one or more of the parties is a self-represented litigant, the principal effect on the judicial officer is to increase the time spent on the case, both before and during the trial. Other effects on judicial officers may include more adjournments and delays than usual, increased judicial workload, frustration and stress. By contrast, represented parties result in shorter, more efficient and less costly trials.

## Impact on the court system

26. Litigants in person increase the demand on time, costs and resources in the court system. That impact is felt by all court personnel (ranging from judicial officers to registry staff and court officers) who, while not being able to give legal advice, are required to explain court processes and procedures to the litigant. Further, decisions involving self-represented litigants often need to be documented to a greater degree than in other cases.

27. Self-represented litigants often have difficulty identifying and pleading a cause of action, which may result in more interlocutory proceedings or confused and lengthier trials. Proceedings involving self-represented litigants also frequently involve more mentions and return dates, as well as more administrative tasks, than other cases.

28. Although self-represented litigants place a disproportionate strain on judicial and court resources, it is acknowledged that it is the right of a citizen to represent him or herself in litigation. Faced with the practical reality of litigants in person, particularly in an environment where legal assistance services are struggling to meet legal need in view of declining legal aid budgets, parties could be further assisted to self-represent by the preparation and provision of clear guidelines and user manuals. The Civil Justice Council in England recently released a manual for self-represented litigants. A similar approach in Australia would provide a useful background tool for self-represented litigants. Further comment in relation to self-represented litigants appears in the section on 'Avenues for improving access to civil justice' which follows.

## New South Wales Bar Association Guidelines

29. The New South Wales Bar Association has taken a proactive role in educating its members concerning issues relating to self-represented litigants. Following a first edition in 2001, in 2012 the New South Wales Bar Association released the second edition of its *Guide to Barristers on Dealing with Self-Represented Litigants*, which provides guidelines to enable members of the bar to clearly identify the parameters within which they should work when dealing with self-represented litigants.[6]

30. Under the *Legal Profession Act 2004* (NSW) practise as a barrister is subject to the *New South Wales Barristers' Rules*. The kinds of issues which arise surrounding self-represented litigants mean that some clarification is required regarding the application of the rules in these situations. For example, there is general prohibition restraining a barrister from conferring or dealing directly with the party opposed to the barrister's client. Further, a barrister must take reasonable steps to avoid the possibility of becoming a witness in the case. Very real difficulties may arise where, for example, a barrister deals directly with a self-represented litigant in relation to settlement negotiations and an issue later arises as to what was or what was not said in the relevant discussions and whether or not an agreement was reached in those discussions. The *Guide to Barristers on Dealing with Self-Represented Litigants* serve to assist barristers in balancing these duties when dealing with self-represented litigants.

## 6. Avenues for improving access to civil justice[7]

### Legal aid funding and the increasing trend of unrepresented litigants

31. Presently there is very little legal aid available in civil proceedings. This has resulted in an increasing level of unrepresented litigants in the federal and state court systems. The prevalence of litigants in person in, for example, the Family and the Federal Circuit courts, significantly increases court time to resolve disputes, despite the best efforts of judicial officers and the parties.

32. Whilst the New South Wales Bar Association accepts that there must be a limit to the level of legal aid funding, there needs to be consideration by government as to whether to increase funding to enable the proper representation of individuals in civil proceedings. This may in fact lead to savings for the court system. In that respect, a cost/benefit analysis should be done as to the increased time and costs associated with unrepresented litigants conducting their own hearings as opposed to when similar cases are subject to legal aid funding. By reducing the amount of legal aid available, the cost of conducting unrepresented litigant matters shifts to the budget of the courts and increases legal fees for opposing parties.

#### Existing legal assistance provided by the New South Wales Bar

33. The Bar Association has established processes which seek to improve access to civil justice by facilitating the provision of pro bono or reduced fee legal assistance by its members to persons in need. These formal processes operate in addition to a wide array of other assistance provided informally by members of the bar, whether through individual pro bono work, voluntary assistance to community and non-profit organisations and through mechanisms such as contingent fee arrangements.[8]

34. This assistance is principally provided through two avenues:

    - applications for legal assistance can be made directly to the New South Wales Bar Association via its Legal Assistance Referral Scheme (LARS); and
    - assistance is provided daily at the District and Local Court through the Duty Barrister Scheme at the Downing Centre.[9]

35. These schemes are described in greater detail at paragraphs 116–119 of this submission.

36. However, these schemes are not intended to, nor can they, relieve the government of its obligation to provide assistance for litigants who cannot afford legal representation

#### Appropriateness of funding mechanisms

37. The New South Wales Bar Association is concerned about the appropriateness of funding mechanisms for:

    - the judicial branch of government; and
    - legal aid.

##### *Court funding*

38. The Bar Association notes that in recent times there have been funding cuts and budgetary constraints imposed on state and federal courts.

39. This is of ongoing concern, because it results in, for example:
    - fewer judicial appointments;
    - reduction in provision of key services by registries to both judicial staff and litigants, particularly in regional and suburban areas; and
    - difficulties in maintaining and updating court facilities.
40. The effect of these funding constraints is to increase delays and costs for litigants in accessing the courts to resolve their civil claims. Cuts to court funding affect the quality of civil and criminal justice.

## 8. Effective matching of disputes and processes[10]

41. Barristers' heightened appreciation of the boundaries and benefits of various jurisdictions can be of great assistance in advising clients on the most appropriate venue for a dispute to be litigated. Such specialised advice is a further advantage of briefing counsel early when a dispute arises. This contributes to the effective matching of dispute and process, which can otherwise be difficult for parties to navigate, with resultant cost and delay implications.
42. Obligations requiring legal practitioners to advise clients about the alternatives to a contested adjudication of a case have been established in Australia. For example, Rule 38 of the *New South Wales Barristers' Rules* provides that 'a barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation'.[11] All Australian bars have agreed to adopt uniform rules throughout the country to this effect.
43. Access through dispute resolution bodies such as courts and tribunals to individuals with expertise in referrals to appropriate ADR processes is essential[12] and can be further developed through the implementation of triage and specific case management procedures.[13] These 'multi-door' court processes enable a judicial officer or registrar to make an informed decision as to referral of a matter to the appropriate ADR process, in consultation with the parties. In some Australian jurisdictions, this kind of process has been integrated into court procedures.
44. The *New South Wales Barristers' Rules* defines 'court' broadly to include 'any body described as such and all other judicial tribunals, and all statutory tribunals and all investigations and inquiries (established by statute or by a parliament), royal commissions, arbitrations and mediations'. This move to define 'court' more broadly than traditional court adjudication has an impact on the perception of the role of lawyers as the predominant 'gate keepers of disputes'.
45. The Law and Justice Foundation of New South Wales released a report entitled *Legal Need in Australia* in August 2012 which concluded that 'there is considerable diversity in how people experience, handle and try to resolve legal problems. The research concludes that no single strategy will successfully achieve justice for all people. It calls for a 'holistic' approach to justice, comprising multiple, integrated strategies, to cater for the difference in needs within the community, and suggests tailored, targeted intensive assistance for people with complex legal and non-legal needs.[14]
46. There is a lack of clear referral mechanisms for those who have disputes other than the traditional

pathways through lawyers. Other pathways are ad hoc and are difficult to access. The recent development 'super tribunals' such as Victorian Civil and Administrative Tribunal (VCAT) and the New South Wales Civil and Administrative Tribunal (NCAT) provides an opportunity to develop better methods to access justice or appropriate dispute resolution.

47. Development of telephone and internet referral mechanisms provided by government agencies to competent and well defined referral systems requires attention. In this regard, the Law Access NSW model referred to later in this submission provides a single point of contact for legal referral services and is worth further consideration in other jurisdictions.

48. The commission's issues paper seeks to explore the best means of allocating matters to superior and lower courts, and for administrative as opposed to judicial resolution. As a result of lack of comparable statistical data, there is no strong evidence base for Australian civil litigation and ADR reform policy, and it is difficult to construct criteria or benchmarks to initiate or evaluate effective programs. Ad hoc developments based on anecdotal communications are not sufficient to base the development of programs or innovation in the area of civil justice reform.

49. The integration of sophisticated triage processes into case management by judges into courts and tribunals mentioned at paragraph 43 above may provide the case by case intervention and 'holistic' approach to justice noted in the conclusions to the Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey, Legal Need in Australia*.[15]

## 9. Using informal mechanisms to best effect[16]

### Alternative Dispute Resolution (ADR)

50. Many jurisdictions now have established 'overarching obligations'[17] within court legislation to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible or an 'overriding purpose' to facilitate the just, quick and cheap resolution of the real issues in the proceedings before court[18], promoting active case management and incorporating mandatory referral of cases to alternative dispute resolution. The Judicial Commission of New South Wales comments that ADR, including mediation and arbitration, should be encouraged where appropriate to facilitate the 'just, quick and cheap resolution' of the dispute in accordance with the overriding purpose rule in section 56 of the *Civil Procedure Act 2005* (NSW). In New South Wales compulsory court-referred mediation has been available as 'an integral part of the court's adjudicative processes' since 2000. Funding is available for the referral of matters to arbitration in the Supreme and District courts of New South Wales and guidelines for the referral of matters to mediation and arbitration have been developed.

51. The Bar Association supports the development of court processes that encompass appropriate access to a wide range of ADR options as a means of more efficiently and effectively managing disputes before the courts.

52. As noted above[19], there is a lack of reliable data concerning referral to, use and outcomes of alternative dispute resolution processes across Australian jurisdictions. Although information concerning the use of ADR processes is kept by some individual courts and tribunals, this information is not easily comparable across jurisdictions or over time. Accordingly, there is no clear evidence base for ADR-related reform in this country, and the creation of consistent criteria or benchmarks to initiate or evaluate programs is problematic.

53. Accordingly, the extension of a court's jurisdiction to encompass a vast array of different ADR mechanisms and compulsory referral to ADR (now entrenched in most jurisdictions) without a uniform approach is not necessarily the best means by which courts will achieve efficiency in case management or the expeditious disposal of matters.

54. The annual reports of the Superior, District and County courts in Australia since 2008 provide information about the ADR processes adopted in the courts to enhance access to justice which focus on the overarching or overriding obligations of the court to reduce delay and cost in the administration of justice. However, as noted above, comparative analysis is difficult on the data currently available.

55. If a wider range of ADR processes is to be made available within courts and tribunals, it is important that such processes be introduced in a way that maximises their effectiveness. The ADR processes need to be accompanied by clear guidelines for judicial officers, ADR practitioners and disputants, outlining the advantages and disadvantages of each type of process, as well as the types of disputes which each method of ADR is most suited and to clearly identify categories of matters in different jurisdictions which may not be suitable. The referral criteria to be utilised and the method of referral to ADR within courts and tribunals is crucial to the effective provision of ADR services. Within the Australian context this area requires significant development.

56. The commission seeks comment regarding the appropriate balance between the public and private provision of ADR services, and accreditation arrangements for ADR practitioners. The current lack of consistent data regarding ADR mechanisms makes it difficult to comment in any authoritative way on the current balance between public and private ADR services.

57. The issue of accreditation of ADR practitioners requires detailed analysis. Industry and professional bodies currently accredit ADR practitioners in arbitration and mediation. Competencies are assessed, initial training and continuing professional development are criteria used for accreditation purposes. Anomalies have arisen, for example, in the national accreditation of mediators, where legal professionals and non-professionals are compared and accredited under the same criteria with no auditing programs in place. It is submitted that professional bodies with their own assessment and accreditation processes alone should accredit their own members. Professional organisations such as law societies and bar associations have complex and sophisticated accreditation and professional standards governed by legal profession legislation.

58. Others wishing to be accredited without the oversight of established professional bodies may utilise current processes, for example, through the national mediator accreditation regime administered by the Mediator Standards Board. Current developments create anomalies which are difficult to resolve and do not improve consumer confidence. This area requires further investigation.

## 10. Improving the accessibility of tribunals[20]

59. In New South Wales, the state government has passed legislation to establish the New South Wales Civil and Administrative Tribunal (NCAT). More than twenty existing NSW tribunals are to be integrated into NCAT, which will provide a single gateway for tribunal services to the people of New South Wales. The new body will commence operations in January 2014.

60. The Bar Association supports the establishment of the new body, which will bring significant benefits in terms of access to justice. The association has been closely involved in the consultation process established by the state government leading up to the commencement of the new arrangements.

61. NCAT is being established in response to the recommendations of the New South Wales Legislative Council's Standing Committee on Law and Justice, which held an inquiry into opportunities to consolidate tribunals in NSW between October 2011 and March 2012.[21] The parliamentary inquiry found that the existing, fragmented tribunal system can be 'complex and bewildering', and as a result it recommended that tribunals be consolidated where appropriate in order to promote access to justice.

62. The Bar Association considers that a single amalgamated tribunal with flexible procedural requirements will have the following benefits for access to justice:

    - The quick, cheap resolution of a range of disputes. The new legislation requires parties and their legal representatives to assist the tribunal to facilitate the just, quick and cheap resolution of the real issues in the proceedings;
    - Diversion of suitable matters from the complexities of the traditional court system, with the ability to resolve suitable matters by even less formal ADR proceedings; and
    - Greater efficiencies and economies of scale resulting from the amalgamation of the previous complex patchwork of individual tribunals, and through the application of common procedures and rules where appropriate.

63. Tribunals also provide greater flexibility in terms of the application of rules of evidence and legal representation. The point must be made, however, that a number of aspects of the new NCAT's jurisdiction, such as the proposed Occupational and Regulatory Division, which deals with professional discipline matters, need to operate with more formality and the New South Wales Government has - rightly in the view of the association - concluded that there should be a right to legal representation across that Division. The general model adopted for the new NCAT is that parties can have legal representation by leave. Legal representation in many cases enhances the capacity of tribunals to deal with complex questions, and leads to greater efficiencies in terms of time and procedure. As noted earlier in this submission, self-represented litigants have the capacity to consume large amounts of court or tribunal time and resources.

## 11. Improving the accessibility of courts[22]

### The conduct of parties in civil disputes and vexatious litigants

#### Model litigant rules

64. When engaged in any form of litigation, the Crown (in right of the Commonwealth, state or territory), its instrumentalities and agencies have an obligation to act as a model litigant. The model litigant rules promote high levels of ethical conduct from the government agencies appearing in litigation.

65. The obligations imposed by model litigant rules are intended to improve the orderly conduct of litigation involving government agencies, and have clear benefits in terms of court time, efficiency

and access to justice. Properly enforced, model litigant obligations greatly enhance the efficient management of litigation. The nature of the model litigant obligation has been stated by the courts on many occasions. Those principles form part of the common law.[23]

66. The obligations upon government agencies when handling claims and conducting litigation are higher than for ordinary citizens. There is an expectation that government agencies act fairly and properly. The obligation to act as a model litigant may often require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations and the Rules of Professional Conduct and Practice. It requires that the Crown act with complete propriety, fairly and in accordance with the highest professional standards.

67. The Commonwealth *Legal Services Directions 2005* set out, in broad terms, the requirement that the Commonwealth and its agencies are to uphold the highest possible standards of fairness, honesty and integrity – going beyond the required ethical or professional standards of lawyers appearing before a court or tribunal. The *Legal Services Directions* are legally binding under the *Judiciary Act 1903* (Cth)[24]: Following the introduction of the *Legal Services Directions* at the Commonwealth level, New South Wales, Victoria, Queensland and the ACT introduced their own model litigant policies in the form of guidelines which apply to provision of legal services in matters involving the agencies of those respective jurisdictions. In each case, the guidelines mirror reasonably closely those in the Commonwealth directions.

68. Specifically, the model litigant obligation requires that the Commonwealth and its agencies:

    - act honestly and fairly;
    - deal with claims promptly;
    - pay legitimate claims without litigation;
    - act consistently in the handling of claims and litigation; and
    - consider alternative dispute resolution.

69. The obligation also requires generally keeping costs to a minimum and not taking advantage of claimants who lack resources to litigate a legitimate claim.

70. This however does not require the Crown to take a soft approach to legal proceedings. The model litigant obligation does not prevent the Crown from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation or from testing or defending claims made.

**Enforcement of the Model Litigant Rules**

71. Individual litigants have no standing to allege any breach of the *Legal Services Directions* or to enforce their non-compliance. This is because:

    - the attorney-general has sole power to enforce compliance with the *Legal Services Directions*[25]; and
    - The issue of non-compliance with the *Legal Services Directions* may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.[26]

72. Attempts by individuals to do so have been rejected by the courts.[27]

73. The absence of a right of private action has meant that the primary source of public sanction for departure from the standards has been judicial criticism. In particular, courts expect that government agencies will comply with court orders and should act as a 'moral exemplar'.[28] This expectation arises from the view that the resources available to government are such that courts expect that a government agency ought to be able to comply with court orders or urgent interlocutory applications, for example, urgent High Court injunction applications arising from the asylum seeker agreement with Malaysia.[29]

74. There have been recent observations from the Federal Court critical of government agencies such as the ATO in their conduct of proceedings.[30]

75. The Bar Association recommends that a review be conducted of the current arrangements for enforcement of model litigant standards, with a view to establishing whether the current ramifications of their breach are sufficient and appropriate.

### Obligations of compliance by barristers and enforcement

76. Barristers retained by the Commonwealth are bound to comply with the *Legal Services Directions* (and therefore the model litigant obligations) in the performance of their brief.[31]The Commonwealth attorney-general's *Legal Services Directions* require agencies briefing counsel in matters covered by the 'model litigant' policy to enclose a copy of the relevant directions and instruct counsel to comply with the policy.

77. Where a barrister breaches the model litigant rules, the agency may cease instructing the barrister or the attorney-general may direct cessation.

### Court processes

#### *Discovery*

78. The Bar Association supports the steps taken by superior courts to limit the availability of discovery with the aim of achieving the just, quick and cheap resolution of the real issues in dispute in the proceedings.

79. In the federal sphere, a number of important reforms were contained in the *Access to Justice (Federal Jurisdiction) Amendment Act 2012 (*Cth*).* Among other things, this legislation has provided the Federal Court with greater discretion in relation to the making of orders relating to discovery (i.e. that some or all of the estimated cost of discovery be paid in advance, that security for costs be given by party seeking discovery, and fixing the maximum cost that may be recovered for giving discovery/inspection). The court has indicated that, with a view to eliminating or reducing the burden of discovery, the court will not make an order for discovery as a matter of course, even where the parties consent, unless discovery is necessary for the determination of issues in the proceedings.[32] The association considers that these reforms will bring about significant efficiencies in the processes of the Federal Court.

80. The Equity Division of the Supreme Court of New South Wales has gone further, and will no longer make any order for disclosure of documents until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure. [33] The court

may also impose a limit on the amount of recoverable costs in respect of disclosure.[34]

81. The Bar Association notes that in England and Wales, with the introduction of reforms following the Jackson inquiry,[35] parties in all multi-track claims, other than those which include a claim for personal injuries, are now required to produce verified reports prior to disclosure summarising all the documentation they have. The summary needs to include the number of items; and where, and how, they are held. An estimate for the costs of the disclosure exercise also needs to be provided. That change has been implemented by amendments to Civil Procedure Rule 31.5. However, this reform is expected to increase rather than decrease (at least initial or upfront) costs. The court may also at any point give directions as to how disclosure is to be given, including what searches are to be undertaken, whether lists of documents are required, in what format documents are to be disclosed and whether disclosure will take place in stages. The parties must confirm which type of disclosure will be sought from a prescribed 'menu' in the Civil Procedure Rules. These options include:

    - to dispense with disclosure;
    - to disclose documents on which a party relies, and request any specific disclosure required from the opponent (similar to the approach often adopted in international arbitration);
    - to disclose documents on an issue by issue basis;
    - for disclosure on a 'train of enquiry' basis (the old *Peruvian Guano* test);
    - for standard disclosure; or
    - any other order the court considers appropriate (which could include, in an example given by Lord Justice Jackson, an order that each side should, after removing privileged documents, simply hand over the 'key to the warehouse' – i.e. provide all its documents for the opponent to review and choose which it wishes to use).

82. The Jackson reforms to civil disclosure, like those in New South Wales, have been judge led. The Bar Association submits that any further changes to disclosure should be subject to consultation with the legal profession, who are well placed to advise as to the implications of any such proposals.

### *Expert evidence*

83. By developing practice notes governing the use of expert evidence, the courts can encourage prospective parties to discuss the extent to which they intend to rely on expert evidence before commencing proceedings, ensure parties promptly obtain expert evidence directions from the court, minimise the costs of obtaining expert evidence, and reduce the hearing time of a case. So much is, for example, the express aim of the Supreme Court of New South Wales' *Practice Note SC Eq 5 – Expert Evidence in the Equity Division* - which commenced on 10 August 2012.[36] The Case Management Practice Note for the same division – SC Eq 1 – also speaks of the use of expert evidence where it will be 'necessary' for the determination of the 'real issues in dispute' between the parties.[37]

84. In England and Wales, Civil Procedure Rule 35.1 now imposes a 'duty' on the court to 'restrict expert evidence' to that 'which is reasonably required to resolve the proceedings'.

85. Other means by which the incurring of unnecessary litigation costs associated with use of expert evidence includes court practice restricting the number of experts for each party,[38] directing the

use of a single joint expert, concurrent expert evidence (known colloquially as 'hot-tubbing'). Indeed, the success of concurrent expert evidence in Australia has led to its recent adoption in England and Wales.[39]

86. English reforms have gone further than Australian reforms so far, in that since 1 April 2013, parties are now required to provide an estimate of the costs of expert evidence when making any application for use of expert evidence.

## Reforms in court procedures

### *Case management*

87. Judicial case management has considerably improved the efficiency of the court system over the past fifteen years.

### *Court fees*

88. Court fees can provide a barrier to the civil justice system for clients on low incomes. Many jurisdictions across the country, however, waive court fees for legally aided or legally assisted clients. In New South Wales, specific regulatory provisions have been included to this effect for the Supreme Court, Land and Environment Court, District Court and Local Court. These provisions postpone the payment of fees by 'a pro bono party' until judgment is given, and stipulate that no fees are payable at all if:

    - judgment is against the pro bono party; or
    - judgment is made in their favour but damages are not awarded in their favour (or only nominal damages are awarded) and no costs are awarded to them.

89. A 'pro bono party' is defined as a person who is being represented under a pro bono scheme of the New South Wales Bar Association, the Law Society of New South Wales or a pro bono scheme established by rules of court.

### *Inflexible approach to court fees*

90. The great financial stress placed upon the courts by limited budgets has given rise to inflexible court fee regimes in the various jurisdictions. Subject to the provisions discussed immediately above, the approach to the calculation of court fees presently charged to litigants in the various courts is inflexible with only limited distinctions made, for example, between corporations and individuals. The Bar Association considers that current court fees regimes should be reviewed with a view to ensuring that more appropriate fees are charged in each case. Further, no distinction is drawn between the fees charged to large companies and smaller entities. The same flat rate court fees cover sole director small businesses in the same way that they apply to multinational corporations.

91. The calculation of court fees may take into account matters which include:

- the nature of the dispute;
- the type of relief sought;
- relevant characteristics of the parties; and
- the financial means of the parties by reference to their income and/or assets.

## 12. Effective and responsive legal services[40]

### A responsive legal profession

**Legal education and skills – safeguarding confidence in the bar**

92. The New South Wales Bar Association is responsible for the imposition and maintenance of professional standards for New South Wales barristers. In order to practise at the New South Wales Bar, qualified lawyers are required to complete additional entry requirements. Candidates must achieve a 75 per cent pass mark in the three bar examinations, and successfully complete a formal Bar Practice Course. These requirements distinguish admission to the bar from practice as a solicitor, where only the successful completion of a law degree and practical legal training course are required for entry into that arm of the profession.[41]

93. The aim of the Bar Practice Course is to teach advanced advocacy, mediation, and other barrister skills, as well as provide practical insights into life and practice at the New South Wales Bar.

94. The course recognises the role played by solicitors, barristers and judges in the rule of law and it is designed to provide additional skills that are not readily available in existing undergraduate courses and go beyond the on-the-job training that might be offered to a solicitor in practice in NSW. The course offers members of the judiciary greater confidence in the level of training and expertise of those that appear before them, and clients and solicitors confidence in the barristers that appear on their instructions.

95. The course is run twice a year and currently runs for four weeks, full-time. Each course involves over 140 barristers and judges as coaches, group leaders and in judging moot applications and trials.

96. The most recent Bar Practice Course (course number 47) concluded in September 2013. The first course commenced in August 1990 and since then the course has been completed by 1,970 barristers.

97. New barristers are required to complete the Bar Practice Course as part of a reading programme. The Bar Council's authority to impose a reading program (by way of a condition on a practising certificate) is conferred by section 56 of the *Legal Profession Act 2004* (NSW).

98. On taking out a practising certificate with conditions following the successful completion of the Bar Practice Course, the legal practitioner is termed a 'reader'. The reader embarks on the reading programme, which has as a major element, the Bar Practice Course.

99. The period of reading commences on the issuance of the practising certificate with conditions attached, and continues for at least 12 months.

100. During the 12 month period, the reader remains under the supervision of at least one experienced barrister, 'the tutor'. Depending on the reader's progress, the conditions on the practicing certificate are lifted during the 12 month reading period.

101. Following the successful completion of the reading course, all practicing barristers are required to comply with annual Continuing Professional Development (CPD) requirements to ensure that their knowledge of the law and barristers' practice is kept up to date. The annual CPD requirements must be fulfilled under the following strands:

- Ethics and Regulation of the Profession;
- Management;
- Substantive Law, Practice and Procedure, and Evidence;
- Advocacy, Mediation, and other Barristers' Skills.

102. The entry and CPD requirements for members of the bar are onerous and ongoing. They ensure that barristers in NSW must satisfy professional standards over and above those required for solicitors.

**Billing practices**

103. A number of legislative and ethical restraints exist to regulate the billing practices of barristers and ensure the effective and responsive provision of legal services by the bar.

104. Barristers in New South Wales are generally free to charge for their services on any basis they choose, provided their charges are 'fair and reasonable'.

105. Under the *Legal Profession Act 2004*[42], legal practitioners, including barristers, must disclose their costs to their clients when handling matters under New South Wales law. Most barristers contract with solicitors firms or in-house counsel rather than directly with a natural person or corporation ('direct access'). In either event, a barrister must disclose, inter alia, the basis on which costs will be calculated and an estimate of the total legal costs or a range of estimates with an explanation of the major variables that may affect the calculation of costs.

106. Any barrister's bill must contain or be accompanied by a written statement of clients' rights complying with s 333(1). A 'safe harbour' form of notice is prescribed under s 333(4). There is also an exception in relation to a 'sophisticated client' as defined in s 302A.

107. If a client is not happy with the costs charged by the legal practitioner they are entitled to have the bill assessed by a costs assessor of the Supreme Court of New South Wales.

108. Certain costs are regulated by legislation. The *Legal Profession Act 2004* regulates costs in claims of up to $100,000 for 'legal services' provided by solicitors and barristers in personal injury claims as professional services provided to the client by a solicitor or a barrister but do not include disbursements (for example, expert witness reports, medical reports, court filing fees, etc) incurred by the legal practitioner in the preparation and running of the case.

109. The provisions fixing maximum costs in personal injury damages matters are contained in ss 337–343 of the Legal Profession Act. Costs are also regulated in relation to motor accidents matters by the *Motor Accidents Compensation Act 1999* and the *Motor Accidents Compensation Regulation 2005*.

110. Where the amount of personal injury damages awarded does not exceed $100,000, there is a limit as to what a legal practitioner can charge for legal services as follows:
    - for legal services provided to the plaintiff – 20 per cent of the amount recovered or $10,000, whichever is the greater; and
    - for legal services provided to the defendant – 20 per cent of the amount sought to be recovered or $10,000, whichever is the greater.
111. These sums may be increased in certain circumstances.

### *Exceptions*

112. A barrister is entitled to 'contract out' of the personal injury and motor vehicle costs restrictions, but even in that case their charges must be 'fair and reasonable'. The practitioner *must* disclose to the client the basis of the costs and must enter into a written cost agreement with the client in these circumstances.
113. The court may order certain legal costs to be excluded from maximum costs limitation if the opposing party has created costs which were not reasonably necessary for the advancement of the case, or has taken action to unnecessarily delay or complicate the termination of the claim.

### *Reasonable prospects of success*

114. A legal practitioner must not provide legal services on a claim or a defence for damages, (hence not restricted to personal injury litigation) unless they reasonably believe on the basis of provable facts and on the basis of a reasonable view of the law, the claim or defence has reasonable prospects of success.[43] This obligation overrides the legal practitioner's obligation to the client. The onus is on the legal practitioner to demonstrate reasonable prospects of success.[44].
115. A legal practitioner may provide legal services as a preliminary matter for the purpose of proper consideration as to whether or not a claim or defence has reasonable prospects. In the event that a court finds that a legal practitioner acted without reasonable prospects of success it can order that the legal practitioner be personally liable for the costs incurred by their clients or costs incurred by another party in the proceedings.

## Legal assistance services

116. The Bar Association's legal assistance schemes operate at the coalface, offering legal services to various people in need of help. These schemes embody and reflect the strongly held view of the bar that a person's rights and access to justice should not be diminished because they have little or no money.
117. The Bar Association's Legal Assistance Referral Scheme (LARS) aims to provide legal assistance for free or at reduced rates to persons who would not otherwise be able to obtain legal assistance without suffering severe financial hardship.
118. Since LARS's inception in 1994 barristers have contributed approximately 42,600 hours of work. In 2012–13, barristers contributed approximately 2750 hours of work through the scheme, with 44 matters still in the court system as at the end of reporting year.

119. The Bar Association's Duty Barrister Scheme has been operating at the Local and District courts at The Downing Centre, Sydney since 1994. On a daily basis, two barristers volunteer their services to assist members of the public who have court appearances on that day. It is estimated that over 4,000 members of the public are assisted each year under the scheme.

120. A number of courts provide court-appointed legal assistance schemes, which operate on the basis that referrals are made by the court if to do so is in the interests of the administration of justice. The Bar Association is not involved in these referrals but provides to these courts a list of barristers who have offered to assist.

121. The Federal Court Rules set out the procedures governing court appointed referrals for legal assistance. The central aspects of the scheme are embodied in Order 80 of the Federal Court Rules.

122. Part 12 of the Federal Circuit Court Rules establishes a scheme to facilitate the provision of legal assistance to parties who are otherwise unable to obtain assistance where the court determines it is in the best interests of the administration of justice to do so.

123. The Supreme Court of New South Wales operates a scheme to facilitate the provision of legal assistance in appropriate cases where the court determines it is in the administration of justice to do so. The central aspects of the scheme are embodied in Part 7, Division 9 of the *Uniform Civil Procedure Rules 2005*.

124. The District Court of New South Wales operates a scheme to facilitate the provision of legal assistance in appropriate cases where the court determines it is the administration of justice to do so. The central aspects of the scheme are embodied in Part 7, Division 9 of the *Uniform Civil Procedure Rules 2005*.

125. In addition to these formalised legal assistance schemes, individual barristers contribute countless hours of pro bono work of their own motion, for individuals, local clubs and other not-for-profit organisations. The Bar Association does not collect data on the number of pro bono hours provided by individual barristers to meet the level of demand for legal services, apart from the statistics kept for its Legal Assistance Referral Scheme.

126. While recognising their different strengths, one of the greatest issues surrounding the effective provision of legal assistance services is the potential for lack of co-ordination between service providers. In New South Wales, apart from the association's own schemes, similar profession-based services are run by the Law Society of New South Wales and the Public Interest Law Clearing House, along with the work done by community legal centres, Aboriginal Legal Service and the like.

127. In order to avoid overlap, the community legal sector in NSW has established the New South Wales Legal Assistance Forum ('NLAF'). The forum, on which the association, Law Society, PILCH, Community Legal Centres, the Aboriginal Legal Service and Legal Aid NSW are represented, among others, has played an important co-ordinating role in the legal assistance sector. NLAF has brought about the better alignment of legal assistance services, along with improved co-operation and collaboration between organisations.

128. In New South Wales, a government agency, LawAccess, plays a major practical role in the co-ordination of legal assistance. LawAccess falls under the auspices of the New South Wales Department of the Attorney General and Justice, although it is managed by an independent

board consisting of representatives from Legal Aid NSW, the New South Wales Bar Association, the Law Society of New South Wales, Community Legal Centres NSW and a community representative, as well as the director general of the department. LawAccess provides a first port of call for many people seeking legal assistance. LawAccess works extensively to raise community awareness of its services, and the levels of client satisfaction and performance are uniformly high.

129. The Bar Association works closely with LawAccess on legal assistance referrals and participates in training of LawAccess staff.

130. The existence of LawAccess NSW is a crucial difference between pro bono arrangements in New South Wales as opposed to other states such as Victoria, where the legal assistance schemes involving the Law Institute of Victoria, the Victorian Bar Association and PILCH Victoria have been combined into a single 'one stop shop' designed to be the first point of contact with people seeking legal assistance. A similar system exists in Queensland.

131. In New South Wales LawAccess fulfils this role, and then provides qualified referrals to a range of legal assistance providers, including LARS.

132. In considering the role played by legal assistance schemes, it is important to recognise that undue strain is placed upon the legal assistance sector by the chronic underfunding of legal aid in this country.

133. The underfunding of legal aid prevents legal aid commissions from realising their goals. This failure is evidenced by the strict application of eligibility criteria and the reduction of services offered by legal aid commissions which in turn have contributed to levels of unmet demand for legal assistance. This demand is being met, in part, by pro bono assistance provided by the private sector and through schemes such as the association's Legal Assistance Referral Scheme. There is no other profession which undertakes a similar level of pro bono work, and in no other area are governments, state and federal, so dependent upon voluntary contributions as they are on the legal profession.

134. The pro bono contribution of legal practitioners is important, but it should not be relied upon to remedy major deficiencies in the legal aid system. Pro bono work, no matter how well co-ordinated, cannot be an adequate substitute for legal aid and can never provide a comprehensive solution to wider access to justice issues due to its voluntary and, in many cases, undocumented nature.

135. Furthermore, reliance upon pro bono programmes in law firms to assume work previously undertaken by legal aid is also an incomplete solution, due partly to the regular conflicts of interest experienced by these firms which prevent them from providing legal assistance.

136. The Bar Association also has concerns in relation to the existing means test and contribution policies of Legal Aid NSW. The shortcomings of these policies, which in the association's view serve to highlight the difficulties experienced by people on low incomes in accessing legal services, are directly attributable to the low level of legal aid funding in this state.

### Catering for diversity

#### *The cab rank principle*

137. Members of independent referral bars (such as the New South Wales Bar) are subject to the cab rank rule, which ensures that a barrister cannot refuse a brief within that barrister's capacity, skills and experience, except in limited circumstances involving conflict of interest and the like. In NSW these circumstances are specified in the *New South Wales Barristers' Rules*[45].

138. The cab rank principle ensures that the full range of the bar's expertise is available to anyone who needs it. No client is disadvantaged by being unable to brief a barrister because that barrister is in partnership with the opponent's lawyer. The 'cab-rank' rule ensures a barrister's independence. The individual barrister is available to be instructed on behalf of the clients as the need arises and to bring to bear the barrister's specialist advocacy and advisory legal skills to the client's particular and individual problems. The barrister is the 'servant of all'.

## 13. Funding for litigation[46]

### Contingent billing

139. The legal profession makes a substantial contribution in providing access to civil justice through the willingness of thousands of practitioners to provide their services to litigants on a conditional basis. No other profession is engaged in such widespread provision of service based upon the prospect rather than the promise of payment.

140. Although conditional billing arrangements are particularly prevalent in personal injury matters, they are also available in will disputes (family provision) and defamation. These are all areas where the ordinary person would not be able to access the justice system if required to pay in full and upfront.

141. Under a conditional fee agreement between a client and legal practitioner, payment is contingent upon a successful outcome. At the successful conclusion of proceedings (most frequently a settlement rather than a verdict) legal fees are charged on the usual basis of hourly and daily rates. Such fee agreements are also known as 'no win/no fee agreements', 'speculative fee arrangements' or 'contingent fee agreements'.

142. There are two variations to a basic conditional fee agreement. In some jurisdictions, the legal practitioner can charge an uplift or premium on the regular legal fees as acknowledgment of the risk being taken by the legal practitioner in undertaking the case. In New South Wales, s 324 of the *Legal Profession Act 2004* provides for an uplift fee of up to 25 per cent in a litigious matter. However, s 324(1) prohibits a law practice from entering into an uplift fee agreement in relation to a claim for damages.

143. Secondly, some jurisdictions outside Australia (such as the United States, Canada and the United Kingdom) allow percentage-based conditional costs agreements. These arrangements allow a legal practice to charge a percentage of damages recovered, contingent upon a successful outcome. Such agreements are currently prohibited in all Australian jurisdictions. Any change in this area would require a thorough examination of the benefits and disadvantages of implementing such a system.

**Disbursements**

144. In addition to conditional fee arrangements, many law firms in the personal injury sphere either fund or participate in funding arrangements to cover the costs of disbursements. The costs of medical reports, court filing fees, interpreter services and the like are beyond the means of many litigants. Many firms working in this area carry debt facilities to cover the day-to-day costs of disbursements for periods anywhere between three and five years.

**Why is legal representation important in compensation matters?**

145. Compensation systems around Australia have become increasingly complex and technical, with the result that the average litigant has little prospect of navigating their way through such systems unaided.

146. In public liability and medical negligence claims, the injured parties deal with a private insurer. In the case of workers compensation and compulsory third party (motor accident) claims, different jurisdictions have a variety of schemes ranging from fully government owned and operated systems (such as the Victorian TAC), government funded systems with insurers as agents (NSW Workers Compensation/WorkCover) through to the fully privately underwritten NSW compulsory third party scheme.

147. Whatever the nature of the scheme, individual claimants need to deal with experienced claims officers, who have an incentive to take technical points and minimise claims payment.

148. The common experience is that unrepresented parties do poorly when it comes to the settlement of claims. The reality is that most injured people do not properly access their lawful entitlements (i.e. have real access to justice) without legal advice.

149. Data from the New South Wales Motor Accidents Authority shows that claimants with legal representation recover significantly more than unrepresented claimants with comparable injuries. Only a small percentage of the difference in payouts comes from the first group recovering legal costs that the second group does not incur.

150. Those with legal representation are more likely to access the full array of damages to which they are entitled. Without legal advice, many injured people would not claim the full costs of, for example, future surgical requirements or their entitlement to payments for past and future care and domestic services.

151. In reality, unrepresented parties subsidise the various compensation schemes by not claiming their full and proper entitlement to damages, thus keeping down the cost of premiums.

152. The willingness of the legal profession to act in personal injury and other forms of civil litigation on a conditional basis delivers substantial and distinct benefits in terms of access to justice.

153. First, these arrangements give those who lack the knowledge, capacity or resources to pursue their legal rights the ability to do so.

154. Second, those who would otherwise have pursued their entitlements unassisted are far more likely to recover the full and proper measure of damages to which they are entitled. Access to legal advice and legal representation balances what is otherwise a lopsided contest between a private citizen and an experienced and well-resourced insurer.

155. In the absence of legal aid funding of civil litigation for those who cannot afford it, government now relies upon the willingness of the legal profession to enter into conditional fee agreements in order for ordinary citizens to access the courts when injured through the fault of another. Any measure to restrict or reduce the availability of conditional costs agreements would have a profoundly negative effect upon access to justice.

156. Despite suggestions to the contrary, conditional costs agreements do not promote unnecessary litigation. In reality, barristers and solicitors dispense significant amounts of free legal advice explaining to potential claimants why they may not have a claim. Those who may otherwise become unsuccessful litigants in person are deterred from entering the legal system by the provision of free professional advice.

157. Further, the use of conditional costs agreements encourages rather than deters settlement. The risks of litigation are shared between the client (who may not recover damages) and the lawyers (who may not recover their time and disbursements). There is an incentive for the client to resolve claims by way of settlement, but there is just as much incentive for the lawyers to compromise and settle.

158. Legal fees under conditional costs arrangements are frequently discounted as practitioners prefer the certainty of a reduced payment and recovery of some costs by way of settlement rather than the speculative risk of litigation and the delayed payment of costs.

## Litigation funders

159. Unrepresented or under-resourced claimants in complex proceedings are at a disadvantage in an adversarial process matched against well-resourced respondents. The 'equality of arms' is a necessary adjunct to the need to afford litigants access to the courts in pursuit of genuine claims[47].

160. Litigation funding arrangements have a number of benefits. The Federal Court has pointed out that they spread the costs and risks of complex commercial litigation, which in turn help to support the enforcement of legitimate claims. Secondly, litigation funders, knowledgeable in the costs of litigation, can inject an element of commercial objectivity into the way in which budgets are framed and the efficiency with which litigation is conducted.[48] Other cases have recognised the positive outcomes for the administration of justice by providing impecunious litigants with access to the courts they otherwise would not have.[49]

161. There is no available evidence or statistical data to support the suggestion that the availability of litigation funding is encouraging growth in the amount of litigation in some sectors, with a consequent adverse impact on access to justice for other litigants. However, it is clear that the development of litigation funding in Australia over the last 15 years has provided access to the courts for those who otherwise may not have had sufficient resources to commence proceedings.

162. As the commission's issues paper points out, however, 'concerns have been raised over the adequacy of litigation funding regulation in relation to addressing conflict of interest issues, consumer protection in the event of default or misconduct, and whether litigation funders should be required to hold an Australian Financial Services Licence'.

163. There have been calls for stronger regulation of litigation funding from the Law Council of Australia[50] and the Australian Institute of Company Directors[51], among others.

164. As a starting point, it is noted that courts in some jurisdictions have been provided with an effective oversight of litigation funding arrangements, with the ability to scrutinise the individual funding arrangements of each case and to avail the rules relating to abuse of process, if required.[52]

165. ASIC has promulgated *Regulatory Guide 248: Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013)[53], which is useful in identifying relevant conflicts. ASIC notes that potential conflicts could arise if the lawyers are retained to act for both the funder and the claimants. Regulation 248.11 states that 'the nature of arrangements between parties involved in a litigation scheme or a proof of debt scheme has the potential to lead to a divergence between the interests of the members and the interests of the funder and lawyers because:

    (a) the funder has an interest in minimising the legal and administrative costs associated with the scheme and maximising their return;

    (b) lawyers have an interest in receiving fees and costs associated with the provision of legal services; and

    (c) the members have an interest in minimising the legal and administrative costs associated with the scheme, minimising the remuneration paid to the funder and maximising the amounts recovered from the defendant or insolvent company.

    The divergence of interests may result in conflicts between the interests of the funder, lawyers and members. These conflicts of interest can be actual or potential, and present or future.'

166. These precepts have created a common regime or set of rules which apply to all litigation funders operating within Australia.

167. However, the question that remains is whether these current regulatory requirements are sufficient to guard against potential difficulties. It is noted that the Law Council of Australia prefers the requirement that litigation funders hold an Australian Financial Services Licence (AFSL). An AFSL requires litigation funders to comply with a formal reporting framework regarding conflicts of interest:

> 7. The Law Council wishes to make clear that it has advised the Commonwealth Treasury that it would be a better approach to simply require litigation funders to hold an Australian Financial Services Licence (AFSL), subject to appropriate conditions. This would establish a formal reporting framework regarding conflicts of interest, which would be preferable to the approach currently proposed. While substantial risks involving funded litigation have not yet emerged, the Law Council considers that the AFSL regime would offer greater certainty, reduce the potential for collateral attacks on funded litigation1 while, at the same time, enhancing consumer protection. [54]

168. Consideration may need to be given to the need for regulation in areas which include being capital adequacy and other issues addressed by the AFS Licence Regime, the retention of independent lawyers by the claimants who are owed unfettered fiduciary duties, disclosure and duties to the court and disclosure and duties to claimants.

### Class actions

169. Class actions can provide an effective means of providing access to justice where a number of parties have a claim arising out of similar circumstances.

170. Recently, the Australian class action regime has been characterised as 'plaintiff friendly'[55] in that the Australian class action regime does not impose a certification requirement (unlike the position in the United States).

171. Security for costs applications continue to be made against lead plaintiffs in class actions, however, the effect of the new Rule 59.11 *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') will be to limit the use of security for costs applications in any representative proceedings for judicial review. Rule 59.11 states that a plaintiff in judicial review proceedings is not to be required to provide security for costs except in exceptional circumstances[56], and that in the case of representative proceedings, a court is not to treat the plaintiff as bringing proceedings for the benefit of a third party for the purposes of considering whether exceptional circumstances exist.[57] It is expected that this provision will remove barriers to representative proceedings in this context, with benefits for access to justice.

172. Under both the Supreme and Federal Court class action regimes, the court is required to approve any settlement of the proceedings, and in exercising that power, exercises principles 'said to be those of the protective jurisdiction of the court'[58]. Similarly, in *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, Finkelstein J commented 'When it comes to a settlement it is the court that assumes responsibility for protecting the interests of the class members.' Such a discretionary approach allows the courts to scrutinise the fairness of proposed settlements of class actions on a case by case basis.

## Conclusion

173. The Bar Association wishes to provide the utmost assistance to the Productivity Commission in the course of its work on this important reference.

174. The involvement of the independent bar in the justice system enables barristers with specialist expertise to assist parties, the courts and the justice system generally.

175. The specialist legal training undertaken by barristers, through the association's Bar Examinations, Bar Practice Course and reading program are essential in developing the expertise required to assist in the resolution of disputes of varying complexity.

176. The Bar Association notes that the continuing development of alternative dispute resolution processes enhances access to the civil justice system.

177. The contribution of the bar to access to justice, through formal legal assistance schemes and less formal avenues such as individual pro bono projects, is substantial and ongoing. The provision of legal services through conditional costs arrangements provide many with access to the justice system that otherwise would not exist.

## Endnotes

1. *Access to Justice Arrangements: Productivity Commission Issues Paper*, September 2013, pp. 1–3.
2. Ibid., pp. 5–6.
3. Ibid., pp. 7–10.
4. In *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd* [2009] NSWSC 867 at [27] and *Ashington Capital Pty Ltd & Anor v Parissen Capital (Project X) Pty Ltd & Anor* [2012] NSWSC 410 at [15] respectively. See also White J in *Motor Trade Finances Prestige Leasing Pty Ltd v Elderslie Finance Corporation Ltd & Ors* [2005] NSWSC 921 at [28].
5. Issues paper, pp. 10–11.
6. The guidelines can be found on the association's website at http://www.nswbar.asn.au/docs/resources/publications/self_reps_14112011.pdf
7. Issues paper, pp. 11–12.
8. See 13: 'Funding for litigation' in this submission.
9. Further details of these schemes is provided later in this submission in the section 'Effective and responsive legal services'.
10. Issues paper, pp. 13–14.
11. Rule 38, *New South Wales New South Wales Barristers' Rules*, 8 August 2011 and for example New South Wales Law Society Advocacy Rule 17A.
12. LCA Expert Standing Committee on ADR, Symposium on the Multi-Door Court House, 2009, Canberra; R. Nickless, *Australian Financial Review*, Legal Affairs, 'Triage for disputes mooted', 31 July 2009.
13. Op.cit., 11; see also the outcomes of the Multi-door Court House Symposium held by the Law Council of Australia, Expert Standing Committee on Alternative Dispute Resolution, 2009; M. Walker, 'Review of the Integration of ADR into courts and Tribunals in Australia and Key Emerging Issues', 20 August 2013.
14. Law and Justice Foundation of New South Wales ,'Legal Australia-Wide Survey (LAW Survey), Legal Need in Australia', August 2012.
15. Ibid., 11; see also the outcomes of the Multi-Door Court House Symposium held by the Law Council of Australia Expert Standing Committee on Alternative Dispute Resolution, 2009.
16. Issues paper, pp. 14–17.
17. Section 37M *Federal Court of Australia Act 1976*.
18. Section 56 *Civil Procedure Act 2005* (NSW).
19. At paragraph 48.
20. Issues paper, pp. 18–19.
21. The committee's report can be found at: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/d7563a349d93087dca2579c8007b50c6/$FILE/120319%20Final%20Report.pdf
22. Issues paper, pp. 19–27.
23. See, for example *Dyson v Attorney-General* [1911] KB 410 at 421; *Deare v Attorney General* (1835) 1 Y &C Ex. 197 at 208; 160 E.R. 80 at 85; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, at 342.
24. See ss 55ZF and 55ZG; *Scott v Handley* (1999) FCA 404.
25. See *Judiciary Act 1903* (Cth) s 55ZG(2) as amended by *Judiciary Amendment Act 1999* (Cth).
26. Judiciary Act s 55ZG(3).
27. See eg *Croker v Commonwealth of Australia* [2011] FCAFC 25 at [19].
28. See *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90.
29. *Shah & Ors v Minister for Immigration and Citizenship & Anor* [2011] HCATrans 196 (8 August 2011).
30. See, for example, *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2)* [2010] FCA 1224; Phillips, in the matter of *Starrs and Co Pty Limited (In Liquidation) v Commissioner of Taxation* [2011] FCA 532 per Lander J at [3].
31. *Judiciary Act 1903* (Cth) s 55ZG(1)(f).
32. Practice Note CM 5, paragraph 2(a).
33. See SC Eq 11 Disclosure in the Equity Division (22 March 2012) paragraph 4. This practice note applies to all new and existing proceedings in the Equity Division, except in the Commercial Arbitration List.
34. Ibid., paragraph 7.
35. R. Jackson LJ, *Review of Civil Litigation Costs: Final Report* (London: Judiciary of England and Wales, 2010), and R. Jackson LJ, *Civil Litigation Costs Review – Preliminary Report* by Lord Justice Jackson (London: Judiciary of England and Wales, 2009).
36. SC Eq 5, paragraph 5.

37. See eg SC Eq 1 *Case Management in the Equity Division*, paragraph 8.
38. SC Eq 5 – *Expert Evidence in the Equity Division*.
39. See Practice Direction 35 – Experts and Assessors, 'Concurrent Expert Evidence' paragraphs 11.1–11.4.
40. Issues paper, pp. 27–36.
41. National uniform admission procedures are proposed under the National Legal Profession Bill.
42. See Part 3.2 of the *Legal Profession Act 2004* (LPA) and the *Legal Profession Regulation 2005*.
43. s 345 Legal Profession Act.
44. s 349 Legal Profession Act.
45. Rules 21–24B *New South Wales Barristers' Rules*.
46. Issues paper, pp. 36–39.
47. *Hamilton v Al Fayad* (No 2) [2003] QB 1175 at 1201 [65].
48. *QPSX Ltd v Ericsson Australia Pty Ltd* (2005) 219 ALR 1 [51] to [54] per French J.
49. *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455 at [23], citing *Ram Coomar Coondoo* at (1876) 2 App Cas 210, *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 at 267, *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 at 451.
50. See for example Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia: Position Paper*, June 2011, Law Council of Australia 'Guidelines on managing conflicts of interest in litigation schemes and proof of debt schemes' Submission to ASIC dated 21 September 2012.
51. Australian Institute of Company Directors, *Consultation Paper 185: Litigation Schemes and Proof of Debt Schemes – Managing Conflicts of Interest*, submission to ASIC dated 21 September 2012.
52. The Supreme Court of Western Australia amended its rules to compel parties to notify the court (and all other parties in a case) of the identity of any 'interested non-party' who provides funding or other financial assistance and who exercises control or influence over the conduct of the case. Insurers are included with litigation funders as 'interested non-parties' when they exercise control or influence over the conduct of the case. See Order 9A – 'Interested non-parties', *Supreme Court Act 1935* (WA), Supreme Court Rules (WA) 1971, *Gazette* 12 Jun 2012 p. 2447.
53. See Consultation Paper 185 (2012).
54. The Law Council of Australia in submissions to ASIC dated 21 September 2012, *Guidelines on Managing Conflicts of Interest in Litigation Schemes and Proof of Debts*.
55. Chris Merritt 'Courts stand by for rising wave of class action litigation flowing from US' *The Australian,* 18 October 2013.
56. UCPR r59.11(1).
57. UCPR r59.11(2)(b).
58. *Oasis Fund Management Limited and Royal Bank of Scotland NV & Ors* [2012] NSWSC 532 (21 May 2012), Sackar J [37].