Access to Justice Arrangements

Response to the call for initial submissions by the Productivity Commission

Submission by Slater & Gordon

Slater & Gordon
Lawyers

1. Introduction

Slater & Gordon is pleased to provide an initial submission to this important Inquiry by the Productivity Commission. This Inquiry is a timely opportunity to build on our collective understanding of the role of access to justice in contributing to a fair and cohesive Australia.

'Equitable access' to justice means that anyone with a legal problem should be able to participate in the justice system on the same footing as the other party to a dispute, regardless of experience or resources. If the issues in a dispute are complex and its outcome could have serious economic or social consequences, expert legal assistance may be required to ensure that the parties are able to deal with the issues on an equitable basis. Where appropriate and where parties are able to participate on an equal footing, low cost alternative and informal dispute resolution is desirable.

Access to the justice system is facilitated by a mix of public institutions (the courts, statutory dispute resolution bodies, Government Departments, legal aid), private legal services and specialist advocacy and community based services, in particular Community Legal Centres (CLCs). Access to justice is also served by pro bono and volunteer work by the private legal profession, performed in partnership with specialist advocacy bodies and CLCs.

The Commission's Inquiry requires the community to consider whether the mix of services available is facilitating alternative and less costly dispute resolution as far as possible; to what extent the private legal profession and the regulatory settings for the profession are helping or hindering access to justice; and whether Legal Aid Commissions and CLCs are adequately funded to assist people who cannot afford privately provided legal services.

This initial submission by Slater & Gordon makes some general observations about these issues, as well as the foundations on which we believe the Commission should base this Inquiry. We also address specific questions posed by the Inquiry in the context of practice areas in which Slater & Gordon has significant experience.

2. About Slater & Gordon

Established in 1935, Slater & Gordon focused its practice on representing workers and their families - particularly those who suffered a serious injury or illness as a result of an accident or wrongful actions of a third party. Today our clients come from all backgrounds and socio-economic circumstances and are people and businesses throughout Australia and the United Kingdom (UK) who require a broad range of specialist personal injury, family law and personal legal services.

The firm is also involved in class actions, and has initiated a number of ground breaking proceedings - most recently an action to recover loss caused to survivors of the drug thalidomide, which left thousands of children catastrophically and permanently disabled in the 1960s. The importance of class actions to access to justice and to broader questions of social justice is discussed further in the body of this submission.

Slater & Gordon today is Australia's leading national consumer law firm. Our mission is to give everyday people consistent access to affordable, quality legal services. Our corporate values include a social responsibility program involving staff in pro bono and other activities that address inequality and assist people suffering from significant disability or illness.

While our clients come to us as a result of a need for legal services, an important consideration that we draw to the attention of the Inquiry is the fact that many clients seeking legal services often also have unmet housing, financial and psycho-social problems that require a multi-disciplinary approach. Accordingly, the firm now employs a team of social workers to whom our lawyers can refer clients at no cost. If the Commission is interested in our social work services, we would be pleased to provide further information.

Slater & Gordon has over 1,200 staff and 70 offices in all Australian jurisdictions with the exception of the Northern Territory. With a head office in London, the firm has also established a significant presence in the United Kingdom.

We believe some things set Slater & Gordon apart from other consumer law firms. This includes our multi-jurisdictional presence; our commitment to affordable legal services; our size and economies of scale; national systems of quality assurance; as well as our 70 year history of advocating for the socially and economically disadvantaged. Accordingly, we believe we have a unique contribution to make to this Inquiry.

3. Guiding principles for reform

Policy makers across States and Territories should take a coordinated approach to ensuring that people are not excluded from the mix of legal services that are available simply because they lack the information and resources necessary to access assistance.

For the goal of 'equitable access' to justice in Australia to be advanced, it is first necessary to identify those who most need access but are missing out; to reach consensus on the context in which this lack of access is unacceptable; to examine gaps in the current mix of services; and to agree on what initiatives should be taken to provide greater access to justice in the future. A starting point for principles that could guide policy makers are as follows:-

- Access to justice for all members of the community is a foundation of a fair and cohesive society;

- The justice system and mix of services available should assist individuals and families to overcome inequality and disadvantage that may already be present in their lives because of poverty, age, disability, physical or mental ill health, language or cultural barriers;

- Disadvantage experienced by individuals and some communities should not be compounded by failures of the system to provide access to justice; and

- People who may not otherwise be disadvantaged but who are facing legal problems that could impact severely upon their lives should be able to readily access information to enable them to decide whether or not they need to engage a lawyer or other professional and if so, how to locate an affordable choice of good quality legal service providers.

4. The importance of Legal Aid and an adequately funded community legal services sector

Many Slater & Gordon lawyers are actively involved as volunteers in the CLC sector. Our firm also accepts pro bono referrals from CLCs. In our view this sector provides value for money, not only because CLC staff receive relatively modest remuneration, but because CLCs are able to leverage a significant amount of volunteer private sector legal expertise at little or no cost to Government.

CLCs also provide value for money because of their capacity to provide initial advice on the nature and merits of a dispute, thereby preventing some disputes from escalating or being pursued in an inappropriate and expensive forum. Further, CLCs perform a considerable amount of work that addresses systemic issues. By providing information and education to keep community members better informed about their options, entitlements and low cost methods for avoiding disputes, CLCs not only facilitate access to justice, but reduce pressure on the wider legal system.

Though CLCs also apply eligibility criteria for some services, many provide assistance for people who do not qualify for Legal Aid but may be unable to afford private representation. Investment in the community sector is therefore one critical part of addressing the needs of this group of people. The consequences of underfunding of this sector can include a rise in unmet legal need, potential escalation of otherwise resolvable disputes, and increased demand on the courts.

5. Pro bono and volunteer contributions

Legal work performed on a pro bono basis is an important way in which lawyers can increase equitable access to the legal system. Slater & Gordon, like many larger Australian law firms, supports its lawyers to undertake pro bono work. The firm's pro bono program is expected to cost the Australian arm of the firm approximately $2.5 million in fees forgone in the next financial year. Slater & Gordon also has a dedicated disbursement fund to cover the cost of performing this work.

In addition, every staff member (legal, para-legal and other) is encouraged to utilize up to 15 hours 'volunteer' leave per annum to participate in a broad range of volunteering activities according to their interests. Lawyers perform pro bono work including case work for individual clients and community groups, legal policy advice work and community legal sector volunteering.

It may be of interest to the Productivity Commission to quantify the combined value of pro bono work performed by the Australian private legal services sector and to further examine how to best coordinate and harness this value. In addition, it may be of interest to examine the various initiatives employed by a range of firms to encourage their employees to engage in pro bono work, as well as to consider whether any further steps can be taken to facilitate the provision of pro bono legal services to a greater reach of clients.

6. Affordable Services for people who do not qualify for legal aid or assistance from CLCs

Though pro bono work, legally aided work and the community legal sector make a crucial contribution to access to justice, this does not detract from the need for lawyers in private practice to ensure that their services are affordable. Slater & Gordon has built its reputation on providing a highly professional *and* affordable legal service to clients who come from all walks of life. We have a high degree of client satisfaction as a result of this approach – an approach that is systemically applied across the business on a national basis.

As part of this overall approach, Slater and Gordon has adopted various fee structures which are designed to facilitate greater access to justice for clients - enabling them to access advice and representation while the firm maintains a viable legal practice.

'No win no fee' - Slater & Gordon pioneered the introduction and use of the 'no win no fee' fee structure. This offers a person of limited means access to legal representation to give effect to important rights where they otherwise may not be able to afford to do so. Otherwise known as a 'conditional fee' arrangement, this approach means that, if a claim is unsuccessful, the client does not bear the cost of the legal services. We would be pleased to brief the Commission further on the way in which this arrangement balances the circumstances of each client with the reality of funding a legal matter which can take some time to resolve.

'**Fixed fees**' - the Slater & Gordon Family Law group has developed a 'fixed fee' structure which is designed to deliver greater predictability to clients, making it simpler for clients to see what they are going to pay and how costs are going to be calculated. Fixed fees are effective in some areas of law because they encourage more efficient resolution of issues in a way that is not always facilitated by time based billing practices. They also give greater visibility 'up front' for clients as to the work that will be conducted and its likely duration.

'Full disclosure of fees' - Slater & Gordon is proud of pioneering transparent disclosure to clients about our pricing policies and about how we arrive at the calculation of our fees. Slater & Gordon started providing written disclosure to clients in 1994 before it was mandated some years later.

Slater & Gordon believes that the time-based method of calculating costs which remains predominant within our profession is not necessarily always aligned with the interest of clients. Slater & Gordon therefore believes that it is incumbent not only on firms, but also on policy makers in terms of the regulatory frameworks that are constructed, to encourage a better alignment between the interests of clients and the interests of their lawyers. Our experience suggests that mechanisms such as conditional and 'fixed fee' legal costs arrangements and efficient delivery of legal services are consistent with that aspiration.

7. Regulatory settings

Slater & Gordon operates in different regulatory environments across each jurisdiction. Regulators of legal services include courts, Legal Services Commissions and professional associations. Different arrangements, regulations, consumer protections and costs apply in each State.

Most Governments, policy makers and members of the profession would generally like to see complexity reduced and differing arrangements in relation to disclosure and costs harmonized. However, it appears that the National Legal Profession reforms have stalled because of the refusal of some state governments to engage in finalization of the reform process.

As a result, a continuing lack of consistency makes it a greater challenge to increase the public's understanding about what they are entitled to expect from a lawyer. While corporate or institutional clients often have the benefit of repeat experience in the legal sector to assist them in assessing whether they are receiving good value, individual legal consumers are usually not as well placed. Inconsistency across regulation of legal practice may compound a lack of awareness on the part of these clients and this in turn can also contribute to a lack of confidence in legal services overall.

Further, a guiding principle in shaping the national regulatory framework should be considerations of affordability for private citizens in accessing legal services. In this respect, Slater & Gordon believes that facilitating use of technology and innovation in terms of business models is an important element to be encouraged by the regulatory settings.

Business model innovation can play an important role in advancing the goals of affordability and choice. Slater & Gordon points to its experience in the UK environment, in which Alternative Business Structures (ABS) established under a recently reformed regulatory regime have created the potential for greater efficiency and flexibility in the way that legal services are delivered.

Under these ABS structures, legal practices can not only be owned by non-lawyers but operated alongside other services that consumers may find convenient to locate through one provider. Reduction of overheads can enable savings to be passed on to clients. Slater & Gordon has recently registered as an ABS in the UK. Whilst the ABS reforms are still relatively new in the UK, they should be examined in the Australian context for the benefits that may be delivered to consumers.

Addressing specific questions from the Inquiry

8. *What more can legal services do to promote affordability and transparency in legal pricing?*

Slater & Gordon's development of a fixed fee arrangement for its family law services was a response to research regarding client needs and expectations. This research confirmed that uncertainty regarding legal costs substantially increases client anxiety in what is already a stressful period in their lives. The firm's response of offering fixed fees is an attempt to alleviate some of this anxiety, as the fees proposed to be charged can be less than clients expect and, when quoted upfront, are something for which clients can accurately budget during the course of proceedings.

The fixed fee arrangement applies in other areas of our business such as military and veterans' compensation. We are looking to develop this approach in further areas of practice as a result of positive feedback from clients.

The Productivity Commission may be interested in examining what other steps firms may take to remove uncertainty in respect of charging practices. This could include examination of whether current regulatory models in fact discourage certainty and whether existing restrictions on billing models also restrict the options available for clients. Certainly, in our experience the current costs regulatory model as it is applied in Australian jurisdictions tends to favor a 'time and materials' approach to the pricing of personal legal services, rather than encouraging innovation in pricing through arrangements such as fixed fees.

9. *How has the use of contingent billing improved access to civil justice in Australia, and could it be improved? What regulatory constraints should be used in relation to contingent billing and why?*

Contingent billing takes place in most jurisdictions under a conditional legal costs agreement, (more colloquially known as 'no win-no fee' agreements), as briefly outlined above. Such arrangements have played a critical and effective role in ensuring that people suffering serious personal or financial injuries, many of whom find their livelihoods and capacity significantly diminished, are nevertheless able to pursue their rights to compensation against an insurer or negligent tortfeasor corporation.

People who have suffered injury typically face emotional stress, unexpected costs including medical bills, as well as sudden loss of income. Some risk losing their homes. These people are not able to pay for legal costs as they are incurred, yet are also ineligible for Legal Aid.

Often our clients are the subject of poor and unduly harsh decisions by a statutory or private insurer. Having entitlements to compensation unfairly denied after serious physical injury and financial loss is generally what motivates an individual to seek assistance from a lawyer. Typically, an insurer or tortfeasor corporation will have extensive legal resources to utilize towards contesting responsibility and/or limiting the amount it pays to a claimant for their loss. 'No win no fee' enables some balancing of capacity between the parties to fairly resolve a dispute in relation to compensation entitlements.

Equitable access to justice should mean that people in this position are not precluded from exercising their rights to legal redress or accessing compensation entitlements. This extends beyond awards of financial compensation to recognition of the value of having the loss a person

has experienced through no fault of their own, and the wrong that has occurred, acknowledged by the justice system.

It also extends to deterrence of further wrong doing and future compliance with regulatory and legislative requirements. The capacity for an individual to exercise these rights is an important element of Australia's widely respected common law tradition.

In addition, the no win-no fee model also allows lawyers to act as an early gatekeeper for the judicial system, ensuring that the cases brought forward are those that have reasonable prospects of success. While this model requires that lawyers assume a certain amount of risk over the course of litigation, in some instances lawyers may charge an 'uplift' upon a successful claim, and this accounts for this risk to some degree.

Finally, while we note that 'no win-no fee' arrangements are often utilized in common law personal injuries actions, these arrangements have also been made available in common law class actions, including the claim initiated on behalf of Australian and New Zealand survivors of the drug thalidomide. Plaintiffs in this action clearly could not have afforded the case preparation, which required extensive evidence to be gathered from a number of countries, without this no win-no fee arrangement being available. Spanning five decades, this evidence is necessary to seek to bring the manufacturers and distributors of the thalidomide drug to account.

10. ***How effective are class action procedures in providing access to justice?***

The experience of the past 20 years demonstrates that the class action mechanism has been a powerful means of advancing access to justice, including social justice. The vast majority of claimants Slater & Gordon has represented in class actions have had claims that would not have been viable to pursue individually.

The class action process represents, in many cases, the difference between a civil claim being possible and a victim being forced to bear loss without redress. Were class action procedures unavailable, well-resourced defendants could escalate, or threaten to escalate, the costs in a dispute to the point where it would be uneconomical for individual clients to pursue.

This would represent an unwarranted benefit to entities that would otherwise be found to have contravened common law duties or statutory provisions and caused harm. It would essentially ensure that such breaches would be un-actionable, in turn undermining Australia's consumer protection and corporate regulatory regimes. The availability of an effective private enforcement mechanism is therefore essential to Australia's system of law, to confidence in the corporate sector and to confidence in the justice system.

The most immediate benefit to individuals conferred by the availability of representative proceedings is a shift in the viability of large-scale litigation, particularly (and typically) involving large and well-resourced defendant corporations. In many cases, individual claimants' losses might be comparatively small, while the cost of running and winning a case in court could be substantial. Considering the disparity between the loss suffered and the size of any likely adverse costs order to be faced by a claimant where unsuccessful, almost all such cases would be unviable to pursue individually.

11. ***How effective are general disclosure requirements, such as for cost estimates, in the context of class actions?***

Lawyers owe the same legislative costs disclosure obligations to clients in a class action context as they do in a matter of individual litigation. This encompasses disclosure of costs estimates or expected cost ranges, explanations of factors that will affect the amounts of costs involved, estimates of amounts of recoverable costs if successful and adverse costs if unsuccessful.
It also involves explanation of billing intervals and mechanisms, rights to negotiate, and rights to complain or seek review of bills. The legislation and regulations in place are further supported by a body of case law and the advice of professional organisations.

In practice, the lead applicant in a representative proceeding will typically be the only client providing instructions and accepting an adverse costs risk. Accordingly, the scope and form of the costs disclosure will be different for that party compared to other represented group members.
Further, it should be noted that the opt out nature of representative proceedings means that group members will not necessarily be known to the lawyers, and may not in fact be aware of the existence of a class action at the time of settlement or judgment.

Accordingly, aside from the general costs disclosure obligations owed by lawyers to their retained clients, control over legal costs in representative proceedings is exercised by the Court, with the applicable legislation providing that legal costs assessments and payments require court approval. This process ensures that legal costs to be deducted from any settlement are limited to those that the court determines were reasonably and appropriately incurred in the conduct of the litigation, ensuring that settlement funds available for distribution are not inappropriately depleted to cover the legal costs incurred.

This process has been undertaken rigorously by Australian courts and, combined with the existing legal costs disclosure regime governing legal practitioners, has proved to be an effective and appropriate mechanism in protecting the interests of parties and represented group members in class action litigation in respect of legal costs.

12. ***What are the benefits of litigation funding? In what areas of civil justice is it appropriate to consider use of litigation funding? Is the availability of litigation funding encouraging a growth in the amount of litigation in some sectors, with a consequent adverse impact on access to justice for other litigants? What risks are posed by litigation funding arrangements and how do these differ from the risks posed by contingent and other billing practices? What proportionate and targeted regulatory responses are required to manage these risks, and is more uniform regulation required across jurisdictions on this matter?***

Historically, defendants have objected to litigation funding, suggesting that the 'interference' in litigation by commercially-interested third parties would potentially result in speculative claims that were motivated by another's profit. This line of argument was addressed by the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, in which the majority of judges held that litigation funding did not constitute an abuse of process as alleged, rather it may increase access to the courts.

Certainly, in some circumstances, litigation funding is the only avenue via which claimants can access the legal system when they have been wronged. As such, the market for litigation funding is created by three converging considerations – the prohibition on lawyers charging a percentage

contingency fee (one calculated by reference to the damages that might be obtained in a proceeding); the fact that losing parties to litigation in the Australian context face adverse costs orders; and the requirement (particularly in representative proceedings) that plaintiffs proffer security for a defendant's costs.

This is particularly the case in class actions, as discussed above, in which a defendant's costs are likely to be of a considerable order, while the total value of a representative party's claim for damages will be a fraction of that amount. Accordingly, while the threat of adverse costs orders contributes to the fact that the Australian legal system is relatively free of speculative and unmeritorious litigation, in the context of class actions, the only people usually willing to act as a representative party without some form of indemnity are usually motivated by a depth of feeling for a cause, or are sufficiently well resourced to assume the financial risk.

Though litigation funding allows cases to proceed where they otherwise would not for lack of resources, it does not increase the volume of unmeritorious litigation. Litigation funders are selective in the cases that are brought. They assume a significant adverse costs risk, pay expensive legal costs up-front, and must often provide security for costs on a periodic basis. Accordingly, they are motivated to examine potential cases thoroughly to ensure that they are making good investment decisions and that claims being pursued have considerable merit.

A point to consider further is the fact that, to date, a significant number of funded class actions have been 'shareholder class actions', which allege that listed companies have engaged in misleading conduct and breached their continuous disclosure obligations. These claims are often highly complex and attract significant attention given that they involve public institutions.
However, they represent a small proportion of the total volume of commercial litigation conducted in Australian civil courts in any year and have affected a small proportion of the companies listed on the Australian securities exchange. There is no apparent evidence that funded shareholder claims have crowded the courts at the expense of other litigation.

Nevertheless, there is increasing debate about whether litigation funders ought to be subject to some form of greater prudential regulation. In our opinion, there is an important policy balance to be struck in this respect and the following factors are relevant:

- **Superior courts regulate individual funded proceedings by making security for costs orders.**
  Plaintiffs are required to disclose litigation funding agreements at the commencement of proceedings, which are used by defendants in support of security for costs applications. These are brought by interlocutory applications in which defendants outline their estimated party/party costs. The amount required, and the timing and method of payment, are subject to a court order.

  Security for costs orders are typically *prospective* (that is, it is the defendant's responsibility to protect itself in relation to costs that it will likely incur in the future). If security for costs is not provided pursuant to a court order, then the proceedings are stayed until the point at which such an arrangement is forthcoming. This provides a basic but effective measure of protection to both defendants and to indemnified plaintiffs who each incur risk in terms of whether a litigation funder has adequate means to pay an adverse costs order in the event that one is made.

- **Plaintiffs are in a different position to defendants**
  Defendants must participate in litigation due to their alleged wrongdoing. Plaintiffs participate in litigation funding arrangements by agreement. From the plaintiff's perspective, the existence of adequate resources on the part of litigation funders is a 'consumer protection' issue which, in our submission, would be best regulated by imposing disclosure obligations on litigation funders to ensure that plaintiffs are fully-informed at the point at which they contract. This would require only a straightforward extension to the regulations already in place.

- **Appropriate levels of capital adequacy/insurance**
  The creation of a competitive litigation funding market relies on funders having the opportunity to achieve an appropriate and reasonable return. It should therefore recognise that the cost and risk involved in funding a portfolio of large, complex shareholder class actions does not equate to the precise multiple of the risk involved in funding single claims, as risk has been diversified.

  The suggestions of some commentators that litigation funders should maintain sufficient cash reserves in order to fund 100% of all possible adverse costs orders in all claims are unrealistic and not only misconceive the role of litigation funders, but sit at odds with the practice of other financial institutions and insurance companies.

  Any prudential requirements should therefore take a genuinely commercial approach to risk, including the possibility that it could be insured and reinsured. This means it is critical that regulation should not be influenced by arguments which may, in fact, be motivated by a desire to prevent viable causes of action from being litigated at all.

- **Is there evidence that firms are settling more cases due to the availability of litigation funding?**
  For the reasons outlined above, shareholder class actions are extremely difficult to commence without the support of litigation funding. Because the availability of litigation funding has allowed shareholder class actions to be commenced where they otherwise would not, and because every shareholder class action commenced to-date has settled, clearly there is evidence that more cases are settling due to the availability of litigation funding.

- **Regulatory adjustments should be given an opportunity to operate**
  The *Corporations Amendment Regulations (No. 6)* (Cth) introduced a series of requirements designed to address concerns about funded litigation specifically in relation to the potential for conflicts of interest and the adequacy of disclosure. These regulatory interventions followed extensive consultation with all stakeholders and function in addition to the extensive supervision that the courts already provide in the context of both representative proceedings and insolvency proceedings (additional to the jurisprudence concerning security for costs).

  Given that the convergence of these regulatory and oversight mechanisms is a recent occurrence, Slater & Gordon believes that they should be given a reasonable opportunity to operate and be carefully assessed before further regulatory responses are considered.

Overall, both class actions and litigation funding are practical and procedural mechanisms through which legal causes of action can be brought. Broad statutory prohibitions on misleading conduct, as well as the imposition of continuous disclosure obligations on listed companies, reflect legislative choices about the best way to regulate commercial behaviour and financial markets in Australia. These legislative intentions are rendered ineffective if it is impossible for those who are injured by breaches of these provisions to exercise their legal rights.

13. Conclusion

We look forward to further assisting the Productivity Commission as this Inquiry progresses. This initial submission from Slater & Gordon is intended to provide some early suggestions in areas most relevant to the firm's practice and experience.

More broadly, we believe that access to justice can be delivered through a combination of affordable private sector services, work performed by the profession on a pro bono basis, an adequately funded dispute resolution and court system, and an adequately funded legal aid and community legal sector. We are hopeful that the Productivity Commission will use this Inquiry to highlight the ways in which this mix of services can collaborate to ensure that Australians in need of legal assistance are not missing out.

A justice system which is fair, efficient, accessible and affordable is something from which an entire community benefits.

Please do not hesitate to contact us if we can be of further assistance.