Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 20
201 Elizabeth Street
Sydney NSW 2000
PO Box A266
Sydney South 1235
DX 13002 Sydney Market Street
T (02) 9261 1488
F (02) 9261 3318

Our Ref: BJS

21 May 2014

Access to Justice Arrangements
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2601

Also By Email: access.justice@pc.gov.au

Dear Sir/Madam

Response to Access to Justice Arrangements
Productivity Commission Draft Report dated April 2014

Maurice Blackburn Pty Ltd provided a submission dated 8 November 2014 in response to the original issues paper on access to civil justice in Australia. We stand by the comments made in that submission.

We make the following comments on the April 2014 draft report. We would appreciate the opportunity to participate in your public hearings when held in any of Melbourne, Sydney or Brisbane. When we appear, the main discussion points that we would like to be heard on are:

- LawAccess;
- Fee regimes (including contingency fees);
- Advertising restrictions;
- Court processes;
- Discovery;
- Model litigants; and
- Litigation Funding.

Chapter 5: Understanding and navigating the system

DRAFT RECOMMENDATION 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

Comment from Maurice Blackburn:

After 20 years of the demand for legal information in NSW being met in an ad hoc and unsophisticated manner through private law firms, Community Legal Centres, Legal Aid, NGO's, the Law Society of NSW, the Bar Association of NSW, Family Court counselling services and other entities, the NSW Attorney Generals Department in association with Legal Aid NSW created a world leader in telephone legal information, advice and referral in LawAccess. Maurice Blackburn recommends that every jurisdiction in Australia should have a service modelled on the LawAccess service.

In the opinion of Maurice Blackburn the service is invaluable. This is reinforced by various statistics. In 2011/12, LawAccess assisted 195,165 customers and provided 19,542 free legal advice sessions with 1,760 customers from culturally and linguistically diverse communities who were assisted by translation.[1] Customer satisfaction ratings are high – generally well over 90% (and 97% would recommend it to someone else). Over 70% reported that it increased their confidence in dealing with the problem. Although it is underutilised,[2] these statistics suggest that this is not due to dissatisfaction but most probably due to lack of promotion and public recognition.

Further research suggests more generally that websites, telephone, video communication and other means of digital communication can, if utilised well, assist in maintaining access to justice, particularly in times of austerity.[3] Most notably, the research endorsed the integrated 'digital first' but not 'digital only' delivery as happens in jurisdictions likes NSW where internet advice is linked with telephones and face to face provision if necessary. Such research adds weight to Maurice Blackburn's recommendation.

Chapter 6: Information and redress for consumers

INFORMATION REQUEST 6.1

[1] Roger Smith and Alan Paterson, 'Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution' (2014) Nuffield Foundation, p.72-3.

[2] C Coumarelos et al, ***Legal Australia-wide Survey Legal Need in New South Wales***, p.110. This independent study of legal aid in Australia found that LawAccess was underutilised: 'Legal Aid was used in 4.9 per cent of cases, court services were used in 3.5 per cent of cases, and CLCs were used in 1.8 per cent of cases. LawAccess NSW was used in under one per cent of legal problems where advice was sought.' This research suggested that LawAccess needed greater promotion: public recognition of its existence was 'very low' despite a creditably large range of promotional postcards, posters, fridge magnets and brochures.

[3] Roger Smith and Alan Paterson, 'Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution' (2014) Nuffield Foundation.

Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?

DRAFT RECOMMENDATION 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

DRAFT RECOMMENDATION 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

DRAFT RECOMMENDATION 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

- ***This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.***
- ***The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.***

Comment from Maurice Blackburn:

Maurice Blackburn notes that Australia's eight jurisdictions impose different regimes on lawyers. This is not consistent with promoting efficient, fair or transparent legal service delivery.

The suggestion that the Legal Services Commissioner in each jurisdiction enforce the Australian Consumer Law is likely to further confuse and complicate the delivery of legal services. Maurice Blackburn recommends that the federal government revitalise its attempts to have all eight jurisdictions introduce uniform National Legal Profession regulation.
Maurice Blackburn also recommends that national legal profession regulation provides for consumers of legal services to be able to choose from various alternatives for the payment of fees if time based costing is not the preferred option such as:

- Conditional fees either in whole or in part with or without uplift;
- Stage of matter, fixed fee billing;
- Whole case outcome based fixed fees; or
- Contingency fees (percentage based).

Maurice Blackburn supports greater transparency for consumers in relation to legal costs. A government run on-line resource may be part of a solution which should include removing restrictions on advertising and the introduction of contingency fees.

DRAFT RECOMMENDATION 6.4

In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).

- ***Lawyers should be required to provide access to this information within five days of the request.***
- ***The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.***
- ***Any initial conclusions drawn from the cost information can contribute to an own motion investigation if the complaints body deems that one is warranted.***

Comment from Maurice Blackburn:

The confidentiality challenges and logistical disruption arising from such a systemic approach, are such that it ought not to occur. Existing oversight and remedial measures are sufficient.

Chapter 7: A responsive legal profession

DRAFT RECOMMENDATION 7.2

Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

- ***Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.***

Comment from Maurice Blackburn:

Maurice Blackburn agrees with the draft recommendation. There is no rational economic basis on which advertising bans should be retained, their impact is to reduce information to consumers regarding the availability and cost of legal services. This reduces competition and reduces effective consumer choice. In addition, Maurice Blackburn is a law firm that operates in five of the eight Australian jurisdictions and the differential advertising restrictions have caused great difficulty because:

- The firms' website is national and yet information available on it is constrained by the most restrictive jurisdiction, NSW;.
- The differential standards impact on lawyers who work across jurisdictions as to what they can say publicly about the services they provide; and

Maurice Blackburn therefore supports the draft recommendation which is effectively the Victorian model currently, with taste and ethical boundaries.

Chapter 8: Alternative dispute resolution

DRAFT RECOMMENDATION 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

INFORMATION REQUEST 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to $50 000).

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

Comment from Maurice Blackburn:

Maurice Blackburn supports the use of ADR in appropriate circumstances but is concerned that making mediation compulsory for low value disputes may work to amplify the power imbalances between those less and more powerful, adding yet another step in the process and thereby further delaying the determination of legitimate disputes.

Chapter 9: Ombudsmen and other complaint mechanisms

DRAFT RECOMMENDATION 9.1

Governments and industry should raise the profile of ombudsman services in Australia. This should include:

- ***more prominent publishing of which ombudsmen are available and what matters they deal with***
- ***the requirement on service providers to inform consumers about avenues for dispute resolution***
- ***information being made available to providers of referral and legal assistance services.***

Comment from Maurice Blackburn:

Maurice Blackburn encourages the growth and management of industry funded dispute resolution schemes based on the model of the Financial Ombudsman Service. Such schemes must be properly resourced and the decisions must be binding on industry members and not on consumers that access them.

DRAFT RECOMMENDATION 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

Comment from Maurice Blackburn:

Maurice Blackburn agrees government ombudsmen services need to be properly resourced and as efficient as possible.

DRAFT RECOMMENDATION 9.3

In order to promote the effectiveness of government ombudsmen:

- ***government agencies should be required to contribute to the cost of complaints lodged against them***
- ***ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded***
- ***government ombudsmen should be subject to performance benchmarking.***

Comment from Maurice Blackburn:

Maurice Blackburn agrees with draft recommendation 9.3.

DRAFT RECOMMENDATION 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

Comment from Maurice Blackburn:

Maurice Blackburn agrees with the recommendation 9.4.

Chapter 10: Tribunals

INFORMATION REQUEST 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

DRAFT RECOMMENDATION 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

DRAFT RECOMMENDATION 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to

tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives

Comment from Maurice Blackburn:

Maurice Blackburn strongly disagrees with any suggestion that legal representation at any level of the dispute resolution process should be restricted. Lawyers help those less able to present their case.

If the value of a dispute is low, it may be that it is uneconomical for a complainant to retain a lawyer or it may be that a lawyer's role will be necessarily limited but, in Maurice Blackburn's experience, restricting the use of lawyers does not benefit the complainant who is fighting an injustice but merely empowers the perpetrator. In practice, defendants are often represented by a person with more sophisticated advocacy skills than the complainant, such as in-house counsel, a landlord, a company director or public sector advocate. If the goal is to prevent defendant corporations from overwhelming poorer complainants, the solution is not to restrict the use of lawyers but to ensure that the tribunal appropriately case manages matters before it.

As dispute adjudication moves at varying paces from mainstream courts to "specialist tribunals" any diminution in right of access to those specialist tribunals places our clients' rights at risk.

Chapter 11: Court processes

DRAFT RECOMMENDATION 11.1

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- ***the abolition of formal pleadings***
- ***a focus on early identification of the real issues in dispute***
- ***more tightly controlling the number of pre-trial appearances***
- ***requiring strict observance of time limits.***

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 11.1. Enhanced case management by the judiciary will greatly reduce interlocutory disputation and the time taken to resolve more complex disputes.

DRAFT RECOMMENDATION 11.4

Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.

INFORMATION REQUEST 11.2

The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration.

DRAFT RECOMMENDATION 11.5

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:

- ***court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available***
- ***courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly***
- ***court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate***
- ***courts should be expressly empowered to make targeted cost orders in respect of discovery.***

INFORMATION REQUEST 11.3

The Commission seeks feedback on the effectiveness and access to justice implications of the approach to discovery in Practice Note No. SC Eq 11 of the Supreme Court of NSW under which the Court will not make orders for disclosure of documents until the parties to proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.

Comment from Maurice Blackburn:

It is by no means clear that discovery is a "problem" in terms of cost and delay outside of the realm of large scale litigation. Policy makers should beware allowing the excesses in a relatively small number of cases involving large scale corporate defendants to dictate an outcome which impacts on access to justice for the rest of the legal system. In larger scale commercial litigation Maurice Blackburn supports strong judicial case management and control of the discovery process. Creating default assumptions regarding what should or should not occur in all cases is likely to be unhelpful. Courts must be very careful to ensure that targeted cost orders in respect of discovery do not unduly frustrate the fair determination of the plaintiff's claim.

Maurice Blackburn notes that in substantial litigation, such as class actions, discovery is a fundamental step in the fair resolution of these claims as noted in our previous submission.[4] It was stated that

> ***Claimants in class actions are substantially disadvantaged by the information imbalance and discovery is an essential step to address this. For example, a class that claims to have suffered loss due to a public company's failure to comply with its continuous disclosure obligations[5] will have enough information to plead wrongdoing but, without discovery, will struggle to identify the date on which the material information ought to have been disclosed to the marketplace and other aspects of the claim.'***

[4] See paragraph 11.15.
[5] See s 674 ***Corporations Act 2001*** (Cth).

The approach to discovery in the NSW Supreme Court (as per Practice Note No. SC Eq 11) is considered likely to frustrate a plaintiff's ability to succeed in complex civil litigation. In these cases, this jurisdiction will be avoided.

DRAFT RECOMMENDATION 11.6

All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently.
All jurisdictions should ensure that, at a minimum, these checklists cover:

- ***scope of discovery and what constitutes a reasonable search of electronic documents***
- ***a strategy for the identification, collection, processing, analysis and review of electronic documents***
- ***the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data)***
- ***a timetable and estimated costs for discovery of electronic documents***
- ***an appropriate document management protocol.***

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 11.6.

DRAFT RECOMMENDATION 11.7

Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 11.7.

INFORMATION REQUEST 11.4

The Commission seeks feedback on the impact of the pre-disclosure requirements in section 26 of the Civil Procedure Act 2010 (Vic) on the conduct of litigation in that jurisdiction.

Comment from Maurice Blackburn:

In Maurice Blackburn's experience s 26 of the ***Civil Procedure Act*** (Vic) has a positive impact on the conduct of litigation in that jurisdiction.

DRAFT RECOMMENDATION 11.8

Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:

- ***a requirement on parties to seek directions before adducing expert evidence***
- ***broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.***

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 11.8.

DRAFT RECOMMENDATION 11.9

Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether:

- ***a single joint expert or court appointed expert would be appropriate in a particular case***
- ***to use concurrent evidence, and if so, how the procedure is to be conducted.***

Comment from Maurice Blackburn:

Maurice Blackburn's experience is that, at least in complex civil litigation such as medical negligence cases and class actions, joint experts and court appointed experts have universally failed to adequately address the issues that have proven to be of value in the just determination of disputes.

On the other hand, experts giving concurrent evidence, if carefully managed by the judge, can often clarify the issues to be determined.

DRAFT RECOMMENDATION 11.10

All courts should:

- ***explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia***
- ***facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.***

Comment from Maurice Blackburn:

Maurice Blackburn has no issue with the establishment of 'panels of experts' in magistrate's courts and tribunals but in more superior courts our comments above regarding court appointed experts should be noted.

Chapter 12: Duties on parties

INFORMATION REQUEST 12.1

The Commission seeks feedback on the effectiveness of current overarching obligations imposed on parties and their legal representatives in litigation processes. In particular, how might the detection of non-compliance and the enforcement of these obligations be improved?

Comment from Maurice Blackburn:

Maurice Blackburn supports the overarching obligations but notes that there appears to be a general judicial reluctance to engage in active case management, at least in the more superior courts, this deters complaints about the failure to comply with these obligations being made. More proactive case management clearly fosters the early and just resolution of civil disputes.

DRAFT RECOMMENDATION 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

INFORMATION REQUEST 12.2

The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.

Comment from Maurice Blackburn:

Maurice Blackburn notes that pre-action protocols tend to frustrate, delay and add to the cost of more complex civil disputes. If there is any possibility that substantial claims are open to sensible extra-judicial resolution, Maurice Blackburn will always facilitate such a resolution, but if not, the requirement to negotiate before commencing proceedings with a recalcitrant and possibly manipulative defendant merely adds to the cost and the time that is takes to resolve the dispute.

DRAFT RECOMMENDATION 12.2

Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

INFORMATION REQUEST 12.3

The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?

INFORMATION REQUEST 12.4

The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?

INFORMATION REQUEST 12.5

The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?

Comment from Maurice Blackburn:

Maurice Blackburn refers to (and repeats) comments made in our 8 November submission.

> ***"Maurice Blackburn has represented plaintiffs and applicants in a number of jurisdictions against Commonwealth, State and Territory agencies and yet it is the exception rather than the norm in which we see any evidence of compliance with the model litigant guidelines.[6]"***

As a first step, the courts in which the government or its agency appears, should be empowered to enforce the model litigant guidelines, and secondly, individual legal officers employed by the government or agency, or retained by it, should be exposed to a finding of professional misconduct if involved in a breach of the guidelines.

Chapter 13: Costs awards

DRAFT RECOMMENDATION 13.1

Australian courts and tribunals should continue to take settlement offers into account when awarding costs. Court rules should require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis.

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 13.1.

DRAFT RECOMMENDATION 13.2

In the Federal Circuit, Magistrates, District and County courts, costs awarded between parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to:

- ***the stage reached in the trial process***
- ***the amount that is in dispute.***

For plaintiffs awarded costs, the relevant amount in dispute should be the judgment sum awarded. For defendants awarded costs, the amount in dispute should be the amount claimed by the plaintiff.

Fixed scales of costs should reflect the typical market cost of resolving a dispute of a given value and length. Data collection and analysis should be undertaken to periodically update these amounts and categories.

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 13.2.

DRAFT RECOMMENDATION 13.3

[6] Extreme examples are in our social justice cases, for example, a case taken for Shayan Badraie, a minor, in which a claim for compensation against the Minister for Immigration was aggressively resisted for many years. It was ultimately settled after 6 weeks of trial in the Supreme Court of NSW for which the Commonwealth paid over $1 million in costs; Another is our acting for Dr Mohamed Haneef whose complaints of false imprisonment and injury were settled only after unprecedented publicity and a change of government. More recently, in the matter of ***Konneh v State of New South Wales (No 3)*** [2013] NSWSC 1424 young people who are mistakenly arrested are claiming compensation yet the State has made two strike out applications and has appealed two decision unfavourable to it causing the action to run for years.

Superior courts in Australia that award costs, such as supreme courts and the Federal court, should introduce processes for costs management, based on the model from English and Welsh courts. Parties would be required to submit, and encouraged to agree on, costs budgets at the outset of litigation. Where parties do not reach agreement, the court may make an order to cap the amount of costs that can be awarded.

Comment from Maurice Blackburn:

Maurice Blackburn tentatively supports draft recommendation 13.3 but is concerned that where a defendant's strategies cause budgets to blow out that there ought be a relatively simple process to ensure that the plaintiff is not prejudiced by that conduct and, in particular, is concerned that costs caps can create perverse incentives for well-resourced defendants to run up costs beyond those caps as a means of forcing a plaintiff to settle on unfavourable terms.

DRAFT RECOMMENDATION 13.4

Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.

INFORMATION REQUEST 13.1

The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to:

- ***the legal professional providing pro bono representation***
- ***the not-for-profit body providing or coordinating the pro bono service***
- ***a general fund to support pro bono services.***

The Commission is interested in any other options that could be examined.

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 13.4 and notes that whether pro bono representation be provided by private lawyers, Community Legal Centres or Legal Aid, if the claim is successful costs should be recoverable whether the services are provided pro bono or not.

DRAFT RECOMMENDATION 13.6

Courts should grant protective costs orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 13.6 but notes that a PCO should be imposed only on the government and not on the plaintiff who is representing the public interest as it is. It is essential that the public interest plaintiff's legal representatives have a chance of recovering at least party-party costs on success.

DRAFT RECOMMENDATION 13.7

Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.

These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.

INFORMATION REQUEST 13.2

The Commission invites comment on the most appropriate arrangements for the governance and funding of a public interest litigation fund (PILF), including:
- ***appropriate mechanisms and criteria to govern access to the fund***
- ***whether the PILF should be established as a new entity, or integrated into existing legal assistance funds or bodies.***

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 13.7 and recommends that the PILF be integrated into existing legal aid commissions as these entities are the only entities with the skills and administration capacities to assess applications and process them.

Chapter 16: Court and tribunal fees

DRAFT RECOMMENDATION 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:
- ***in cases concerning personal safety or the protection of children***
- ***for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.***

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

DRAFT RECOMMENDATION 16.2

Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.

The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:
- ***whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body***
- ***the amount in dispute (where relevant)***
- ***hearing fees based on the number of hearing days undertaken.***

INFORMATION REQUEST 16.1

The Commission invites views on the most appropriate means of determining fee contributions to indirect costs, based on the economic value at stake, in cases where a monetary outcome is not being sought, such as a major planning dispute.

DRAFT RECOMMENDATION 16.3

The Commonwealth and state and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2.

DRAFT RECOMMENDATION 16.4

The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.

Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible party is successful in recovering costs or damages in a case.

Fee guidelines in courts and tribunals should also grant automatic fee relief to:
- ***parties represented by a state or territory legal aid commission***
- ***clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.***

Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.

INFORMATION REQUEST 16.2

The Commission invites comment on the relative merits and costs of automatically exempting parties from paying court fees based on:
- ***the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card***
- ***passing an asset test in addition to possessing a concession or health card***
- ***the receipt of a full rate government pension or allowance.***

The Commission also seeks feedback on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.

Comment from Maurice Blackburn:

A strict application of the user pays principle can be a harsh brake on access to justice. We note our previous comments:[7]

[7] Refer to paragraph 11.26 in our previous 8 November submission.

> ***Court fees including filing fees and hearing allocation fees have become prohibitive for many. For example, in a recent action being conducted in the Federal Court, our commercial client has been required to pay $32,000 to have its claim set down for 10 hearing days from 10 March 2014. The hearing of a class action concerning allegedly defective hip implants has been listed for 10 weeks from 2 June 2014 in the Federal Court. The action is being conducted by Maurice Blackburn on a conditional fee basis for over 1,500 clients of Maurice Blackburn (and three other law firms) and a further 2,000 group members. The representative applicants are natural persons with very low incomes yet it is expected that a hearing allocation fee will be levied in the order of $150,000, a sum which is payable even if the hearing ultimately does not proceed, as it will not if the action settles prior to hearing. Options for waiver of these fees are not available. Fee deferral is not adequate..***

Maurice Blackburn recommends each jurisdiction have clear, simple and accessible criteria and processes for fee waivers and reductions. The criteria should be means sensitive.

Chapter 17: Courts — technology, specialisation and governance

DRAFT RECOMMENDATION 17.1

Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate, and examine whether there should be a presumption in favour of telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 17.1.

DRAFT RECOMMENDATION 17.2

Australian governments and courts should examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, to reduce court administrative costs and to support improved data collection and performance measurement.

INFORMATION REQUEST 17.1

The Commission seeks views on how best to enable courts to identify their technological needs and service gaps, and promote work practices that maximise the benefits of available technologies. In particular, the Commission seeks views on whether, and to what extent, this involves greater use of court information technology strategic plans and/or greater coordination and leveraging of technology solutions across and within jurisdictions. Investment in which types of technologies, including those to better assist self-represented litigants, would be most cost effective? What are the likely costs of addressing the different technological needs of different courts?

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 17.2 and says that significant investment in technology and therefore in electronic procedures, including electronic filing, electronic file management and electronic trials, can only benefit court users and improve efficiency.

Clearly some court users may continue to need to use paper but Maurice Blackburn can see no difficulty in accommodating those needs as the exception rather than the rule.

DRAFT RECOMMENDATION 17.3

Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 17.3.

Chapter 18: Private funding for litigation

DRAFT RECOMMENDATION 18.1

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.

- ***The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.***

INFORMATION REQUEST 18.1

The Commission is seeking evidence on appropriate percentage limits for conditional and damages-based fees. Specifically:

- ***Is the 25 per cent limit on uplift fees for conditional billing appropriate? What are the benefits and costs of changing this limit?***
- ***Is a limit on damages-based fees necessary? If so, what should this limit be or how should it be determined? And should consideration be given to adopting a 'sliding scale' (where the maximum percentage payable to the lawyer decreases as the amount recovered by the client increases)?***

Comment from Maurice Blackburn:

Maurice Blackburn supports draft recommendation 18.1 and notes as follows:

a. It is not apparent that there is any rational economic basis for the current limit of a 25% uplift on conditional billing. Whilst arguably such a limit reduces costs to consumers, its practical consequence is to restrict access to justice in those cases where it insufficiently compensates the practitioner for the financial risks involved in litigation. However, Maurice Blackburn sees no need to review this limit provided a more rational system of allowing damages-based fees is permitted.
b. It is considered that lifting the ban on damages based fees will add a useful option for consumers of legal services. The regime should allow professional fees to be charged with a maximum 35% of the settlement or award (including both damages and costs agreed or awarded).

The argument in favour of lifting the ban on damages based billing appears in the box below:

Lifting the ban on "damages-based billing" or "contingency fees" will help more people to have their claims for compensation heard and determined than is possible at present. It will improve access to justice.

Contingency fees align the interests of the lawyers with those of their clients. Both the client and the lawyer want the largest payout in the shortest possible time. Time billed is irrelevant. Inefficiencies and delay are not only the enemy of the client but of the lawyer as well.

Proportionate charging is surely superior to the "tyranny of the billable hour". It is consistent with the "overarching purpose" that governs our superior courts; the purpose being the just resolution of disputes as quickly, inexpensively and efficiently as possible. It is also consistent with the "***object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute***".[8]

Arguments against contingency fees are, essentially, that they:

(a). will prompt an increase in frivolous and unmeritorious "US style" litigation; and
(b). create an insuperable conflict between the lawyers' fiduciary duty to the client and their financial interest in the outcome of a case.

But there is no link between charging contingency fees and unmeritorious litigation. On the contrary, in Canada and the UK which have retained the adverse costs rule there is simply no evidence an outbreak of "unmeritorious" litigation.

Conversely, without contingency fees injustices will go unchecked without lawyers who are willing take great risks to see that justice is done. T

In Australia, the loser pays costs rule is a significant deterrent to the frivolous claim. This rule does not apply in the US. The risk of being ordered to pay the winning opponent's costs deters unmeritorious claims, as does the risk of having to meet a security for costs order. As well, our courts rarely award exemplary, aggravated or punitive damages whereas such orders are relatively common in the United States where the chance of an enormous windfall may encourage speculative litigation.

A lawyer on a contingency fee agreement in Australia is far less likely to accept instructions to sue on a doubtful case than a lawyer for a corporate defendant who insists on paying for the conduct of a dubious defence.

Lawyers are presently allowed to charge their ordinary fees, with an uplift (except in NSW), conditional on success. Conditional costs arrangements govern the vast bulk of plaintiff litigation in Australia and have done so for many years. In the many thousands of conditional costs cases run and settled every year the financial interest of the lawyer in the outcome of the litigation does not present any insuperable difficulty in relation to conflict of interest, nor is there evidence of such difficulties in those countries which permit contingency fee arrangements.

[8] Section 60 ***Civil Procedure Act (NSW) 2005***

Unfortunately, many examples remain of meritorious cases in which the economic incentives of conditional fee arrangements are insufficient to attract even the most determined lawyers. About 10 years ago third party litigation funders identified this market failure as an opportunity. Funders funded actions which otherwise would not have been possible on a simple conditional fee basis. The Bank Fee cases are one such example. Shareholder class actions another.

But funders only fund cases in which the upside is measured in the many millions.

Contingency fees will introduce much needed competition into the litigation funding market where barriers to entry are substantial. Currently, funding commissions are in the range of 25% to 40% with lawyer's fees (at least in class actions) averaging about 12% of the damages won. If lawyers are permitted to charge contingency fees the overall costs to the consumer are likely to be substantially less than the combined costs of a third party funder and lawyer. Commercial litigation funders, driven by their need to cover their substantial risks, are constrained to fund actions that are predicted to recover at least three times their estimated outlay. If a class action, for example, is likely to cost a funder $4million to conclude, it will not be underwritten by a commercial litigation funder unless the recovery is likely to be greater than $30m. A law firm considering an action, the costs of which may total $4million, should be willing to conduct a meritorious claim on a contingency fee basis if the expected recovery is greater than $16million, as party and party costs should also be recovered on success.

The comprehensive analyses, which predated the recent introduction of contingency fees in the UK warrant close scrutiny. Contingency fees will also enable the profession to conduct smaller claims that may not be funded on a conditional fee basis at present. The legal assistance sector is starved of funds and unable to assist any but the most marginalised. Contingency fees offer one further avenue of promise for those who will otherwise be denied access to justice.

DRAFT RECOMMENDATION 18.2

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

Comment from Maurice Blackburn:

Maurice Blackburn supports the availability of third party litigation funding but repeats its concerns raised in its 8 November submission that calls for increased regulation for litigation funding should not create unnecessary barriers to entry and/or unreasonable restraints on competition. The best way to ensure financial adequacy for litigation funding is through the mechanism of security for costs. This ensures an appropriately individualised response to the circumstances of a particular case rather than the imposition of a "one size fits all" approach.

It is appropriate for proper ethical and professional standards to be considered although, in practice, it is not apparent that these should go beyond existing requirements under general consumer law and the current conflict of interest regulations.

Yours faithfully

Ben Slade on behalf of Greg Tucker, CEO
MAURICE BLACKBURN