A RESPONSE BY THE PRO BONO PRACTICES OF ALLENS, ASHURST AND CLAYTON UTZ

Access to Justice Arrangements,
Productivity Commission Draft Report, April 2014

May 2014

Introduction

This submission is provided jointly by the Pro Bono practices of Allens, Ashurst and Clayton Utz (**the Firms**), the three largest Pro Bono practices in Australia[1]. Our pro bono work largely is performed in partnership or through relationships with Community Legal Centres, Legal Aid Commissions, Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander Legal Services (**Legal Assistance Services**) and pro bono service providers such as Justice Connect and QPILCH.

The Firms support a just and socially inclusive society in which people have equitable access to services which meet their legal needs. Equality of access to the law for all Australians is an essential underpinning of our democracy and the rule of law. As such, we support the Objective at paragraph 15 of the National Partnership Agreement on Legal Assistance Services (**NPA**), of:

> A national system of legal assistance that is integrated, efficient and cost-effective, and focuses on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness.

The NPA describes (in the Outcomes at paragraph 16) a very appropriate set of priorities for Legal Assistance Services:

> (a) earlier resolution of legal problems for disadvantaged Australians that, when appropriate, avoids the need for litigation
>
> (b) more appropriate targeting of Legal Assistance Services to people who experience, or are at risk of experiencing, social exclusion
>
> (c) increased collaboration and cooperation between legal assistance providers themselves and with other service providers to ensure clients receive 'joined up' service provision to address legal and other problems, and
>
> (d) strategic national response to critical challenges and pressures affecting the legal assistance sector.

The Firms congratulate the Productivity Commission on its thorough and incisive Draft Report into Access to Justice Arrangements in Australia.

We support the clear statements by the Commission that:

> "More resources and more efficient and effective practices by legal assistance providers are required to better meet the legal needs of disadvantaged Australians" (page 2).
>
> "Civil law matters are the poor cousin in the legal assistance family. Australia's most disadvantaged people are particularly vulnerable to civil law problems and adverse consequences resulting from the escalation of such disputes. Assistance for civil matters should be funded for the most disadvantaged" (page 609).
>
> "Not providing legal assistance [for unresolved civil problems for disadvantaged individuals] can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure" (page 28).

[1] In FY2013, Allens, Ashurst and Clayton Utz combined provided 120,574 hours of pro bono legal advice and representation, at an average of 51.8 hours per lawyer.

There is significant unmet legal need in Australia, with a significant and continuing shortfall in Legal Aid for civil matters. In the vast majority of instances of people seeking advice and representation in civil matters, including in employment law matters, those who might be expected to meet the socio-economic criteria for Legal Aid in fact are not legally aided.

The Firms also thank the Commission for placing the provision of pro bono work by Australia's private lawyers within the proper context. Although Australia has the strongest law firm pro bono culture of any country outside of the United States, the overall contribution by pro bono to civil legal assistance for low-income and disadvantaged people is extremely modest:

> "Expressed as a measure of the number of lawyers, pro bono from larger firms equates to around 3 per cent of the capacity of the legal assistance sector, and less than 1 per cent of the entire legal market" (page 36).

Pro bono legal assistance is not a substitute for government-funded Legal Assistance Services in Australia. This is much more than a statement of fundamental principle. Not just philosophically, but also as a matter of practical reality, pro bono assistance by private lawyers could not possibly fill the gap which exists.

The Australian experience mirrors that around the world - no country is able to rely upon pro bono work as a solution to access to justice for low-income and disadvantaged people. Pro bono lawyers make an important contribution, but are only a tiny part of the solution. Access to Justice in the civil law space requires nothing less than significant government investment.

In practice, the current funding arrangements for civil legal assistance mean that government largely has vacated the field when it comes to providing representation for disadvantaged people in relation to their civil legal needs and in enforcing their legal rights.

There should be sufficient Legal Assistance Services funding to enable people to access the protection of the law, from Legal Assistance Services which have appropriate skill and expertise.

In reality, this means an increased level of funding. The Firms support a cooperative federalism approach to Legal Assistance Services, which recognises joint objectives by the Commonwealth and the States to ensuring that equitable access to legal services which meet legal needs is available to all Australians.

As the Commission's Draft Report demonstrates, almost all funding at present for civil services to assist disadvantaged Australians is directed into a largely information-only delivery model of 200 small and under-resourced independent community legal centres, each with their own guidelines. Those community legal centres face complex multiple and short-term funding arrangements, must rely heavily on volunteer lawyers, and are not part of an overall national strategy.

The Firms strongly support the model of a single, widely recognised contact point for legal assistance and referral, the creation of a Legal Assistance Service "Civil Law One-Stop Shop".

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Our submission is divided into seven topic chapters:

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1. Single point of entry for civil legal assistance

INFORMATION REQUEST 5.1 - The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

In the Firms' view, extending legal health checks to identified vulnerable groups is an effective and efficient way to identify early those individuals who require legal assistance.

Effective legal health checks combine simple, holistic assessment with effective legal referral. Examples already in place of a non-legal provider conducting some form of legal health check to identify and address legal issues which impact on their disadvantaged clients include QPILCH's Homeless Persons' Legal Clinic,[2] Cancer Council NSW's Legal and Financial Planning Referral Services[3], some programs of Legal Aid NSW, and the Advocacy Health Alliance project conducted by Loddon Campaspe Community Legal Centre and Bendigo Community Health Services[4].

The role of non-legal agencies is significant because, as recognised by the Commission, non-legal agencies have regular contact with disadvantaged Australians who may not identify that they have a legal problem or need. Even if they do identify a legal problem or need, the studies cited in the Draft Report confirm that many disadvantaged Australians are unlikely ever to seek legal assistance. Legal health checks provide an opportunity for early intervention, which is preferred and can lead to faster, more appropriate, outcomes.

Administering legal health checks is straightforward and something which non-legal agencies can be trained to do (without the need for separate funding).

The success of legal health checks rests upon having an appropriate referral contact point. As such, the Commission's suggestion of a single, widely recognised contact point for legal assistance and referral for each state and territory is supported by the Firms. It would greatly assist agencies administering legal health checks as they could provide simple and consistent information about how to access that single contact point for legal assistance.

[2] http://www.qpilch.org.au/cms/details.asp?ID=692

[3] http://www.cancercouncil.com.au/31192/get-support/practical-support-services-get-support/legal-financial-support/pac/?pp=42839&cc=7244&&ct=35 Patients who require legal assistance across a range of areas are identified for referral by social workers at the hospital, who have been trained by the Cancer Council's in-house legal team.

[4] http://lcclc.org.au/programs/advocacy-health-alliance/

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 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.

The Firms support Draft Recommendation 5.1.

The legal assistance sector as it exists today is fragmented and poorly coordinated. There is not a consistent and readily identified single entry point to access legal services. It is confusing, inefficient and duplicates scarce resources.

On the one hand, individuals may approach multiple and varied service providers simultaneously in the hope of finding assistance. It is not uncommon for the Firms to be a referred a pro bono client who has previously approached Legal Aid, a Community Legal Centre, and a Commission or Tribunal, before obtaining pro bono legal assistance. On the other hand, people may be referred from service to service before finding a Legal Assistance Service which can provide the assistance that they need. Referral fatigue sets in early, and if a person is referred to more than two agencies they are unlikely to follow through with the referral and therefore will not receive assistance at all.

Disadvantaged people requiring legal services tend to have more than one problem, to have recognised clusters of problems, and to be unlikely to persevere in finding legal assistance when referred more than twice[5].

A single contact point - with the possibility of an appropriate referral on for advice and representation - would be easier for non-legal agencies to recommend, easier for disadvantaged Australians to approach, and could result in flow on benefits for that individual and the community.

Legal Assistance Services should be organised such that disadvantaged people who require legal assistance should be able to obtain that assistance and support through a "Civil Law One-Stop Shop".

The Commission notes the LawAccess model in NSW as a working template. LawAccess in its current form cannot refer disadvantaged Australians to a private pro bono lawyer or firm. The Firms suggest that pro bono legal assistance should form part of the referral base for this single contact point (and this could be made available through a Pro Bono Legal Referral Scheme, such as Justice Connect in NSW and Victoria).

[5] See eg research by the NSW Law and Justice Foundation Law Survey: http://www.lawfoundation.net.au/ljf/app/&id=FC6F890AA7D0835ACA257A90008300DB

The features of a single contact point for civil legal assistance and referral:

A Legal Assistance Service "Civil Law One-Stop Shop"

- Adopts a "no wrong door" approach, as a single entry point for accessing the appropriate specialist civil law resource within the legal assistance sector;
- Has a physical, telephone and online presence;
- Provides legal information, basic advice and referral, in addition to representation where appropriate;
- Is well-recognised, with well-understood services by the public, by the Courts and Tribunals, and by organisations responsible for human services delivery. This requires a name which suggests its function;
- Is located in areas determined by demographic data on disadvantage and on legal need;
- Is located in places frequented by the service's target client base, such as in shopping centres or near Centrelink offices;
- For particular groups of vulnerable clients is co-located with services providing for other needs, for example in health precincts[6];
- Operates over extended hours to improve access;
- Supports vulnerable clients to utilise legal assistance. For example, the "Civil Law One-Stop Shop" should provide highly-trained paralegals to identify the client's legal issues and to serve as a single point of contact where the client has multiple legal problems and/or their lawyer/s are not all based in the service;
- Is able to refer pro bono clients to private firms prepared to provide pro bono legal assistance and to pro bono referral schemes; and
- Has advocacy and law reform capabilities, based upon direct casework experience gained through assisting disadvantaged Australians[7].

[6] The Firms note the significant possibility offered in Australia adopting a Medical Legal Partnership model, which locates legal assistance services within the public health space, as part of an integrated model. See: *Advocacy-Health Alliances in Australia – Better Health through Medical-Legal Partnership* by Peter Noble at http://advocacyhealthalliances.files.wordpress.com/A5C67C71-3E94-4600-971B-820D75976E3D/FinalDownload/DownloadId-89F497A9580E73423B9A3C0DB4A4318D/A5C67C71-3E94-4600-971B-820D75976E3D/2012/08/aha-report_general1.pdf

[7] The Firms support the Commission's position at p625 that "advocacy should be a core activity" of Legal Assistance Services.

2. Allocation of funding

DRAFT RECOMMENDATION 21.1 - Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

DRAFT RECOMMENDATION 21.2 - The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

DRAFT RECOMMENDATION 21.3 - The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.

INFORMATION REQUEST 21.3 - The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.

The Firms support Draft Recommendation 21.1 that funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure the demand for criminal law assistance does not affect the availability of funding for civil matters. However, we consider that government funding for legal assistance for people who are disadvantaged and marginalised needs to be increased overall and would not support simply moving funding from criminal law to civil law.

The Firms support Recommendation 21.2 as identifying appropriate criteria for prioritising legal assistance by Legal Assistance Services. We submit that the ' basic needs of life' referred to in the criteria should include education, housing and employment. We further submit that freedom from

discrimination and harassment should be listed among the matters having an impact on the applicant's life.

The Firms support Draft Recommendation 21.3, in particular tying financial eligibility for grants of Legal Aid or other legal assistance to an established measure of disadvantage. Eligibility should also, however, take into account the cost of obtaining the legal service from a source other than the legal assistance sector. In considering eligibility relative to disadvantage it must be recognised that the financial impact of obtaining legal services for a lengthy hearing in a superior court is far greater than that of a single appearance in a local court.

We consider that CLC funds (and funding for the legal assistance sector generally) should be distributed on the basis of demographic evidence of economic and legal need.

The location of CLCs is largely a result of historical small group activism. They are there, because that's where their pioneering founders established them 30 or 40 years ago, and not because their locations necessarily reflect the greatest areas of unmet legal need.

Currently in Sydney, for example, 18 specialist or generalist community legal centres (or almost half the total number of community legal centres in the state) are within 10 km of the GPO. Only one CLC or Legal Aid office (Mt Druitt CLC) is situated in the top 41 postcodes in NSW by level of disadvantage.[8]

The Commission's Draft Report forces some compelling observations to be drawn about the reality of civil legal assistance by governments in Australia:

- Civil law matters are the poor cousin in the legal assistance family.
- Australia's most disadvantaged people are particularly vulnerable to civil law problems and adverse consequences resulting from the escalation of such disputes.
- Almost all of the government legal funding to assist disadvantaged Australians in the civil law area is directed towards the Community Legal Sector.
- That government legal funding to assist disadvantaged Australians in the civil law area is delivered by 200 small and under-resourced independent centres, each with their own guidelines. CLCs must rely heavily on volunteer lawyers, face complex multiple and short-term funding arrangements[9], and are not part of an overall national strategy.
- CLCs "focus on providing legal information, minor advice and community education", rather than the LACs "core business" of representation services.

In practice, the current arrangements reveal that Commonwealth and State government funding largely has vacated the field when it comes to providing representation for disadvantaged people in relation to their civil legal needs, and in enforcing their legal rights.

We consider that the ability of CLCs to assist clients and to retain experienced staff would be enhanced by increased scale. Currently most CLCs are small, autonomous organisations. The problems associated with their small scale include:

- Duplication of administrative resources;

[8] http://www.uws.edu.au/equity_diversity/equity_and_diversity/open_fora/dropping_off_the_edge_mapping_disadvantage_in_australia

[9] The example in figure 20.6 at p599, shows that Queensland CLCs had 8 different government funding sources, none higher than 20%.

- Lack of career path for practitioners;
- Insufficient resources to take on large numbers of matters or larger-scale casework. This impacts on both client services and on the ability of CLCs to retain those staff wanting to further develop their legal skills;
- Where there is limited casework, advocacy becomes less informed by client experience; and
- The centres do not function well when there are issues with staff or a role is vacant for a period of time. Small, voluntary management committees are not well-placed to manage staff performance. The small scale of the centres means that they rarely have human resources support to manage performance issues.

Larger CLCs could:

- Service more places through outreach;
- Save on administrative costs and professionalise support functions such as HR;
- Provide a career path for lawyers to advance and develop their skills, retaining and improving expertise in the sector; and
- Act for more clients rather than primarily provide advice and minor assistance.

Local input could be maintained through local advisory committees. The local committees could continue to help build relationships with the local community and ensure the work is responsive to local need. However, they would be relieved of the burden of management.

3. Unrepresented litigants

DRAFT RECOMMENDATION 14.2 - Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.

Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.

Self-Represented Litigants should more accurately be described as Unrepresented Litigants. In most circumstances, disadvantaged Australians who are before Courts and Tribunals should be represented. Most are not well-placed in any meaningful way to "self-represent".

In the Firms' view, the preferred response to the challenge of access to justice for disadvantaged Australians who are unrepresented before the Courts, is to ensure that duty lawyers be provided from the Legal Assistance Sector in appropriate jurisdictions. Duty solicitors are generally expert in the law and procedure of the jurisdiction and can provide efficient, full-service assistance, advising litigants and representing those whose matters have merit. They are generally also expert in providing legal assistance to people who are disadvantaged.

Nevertheless, Unrepresented Litigants are a reality in our current civil justice system. The Firms support the principles set out in Draft Recommendation 14.2. It is crucial that judges and Court staff are aware of which Legal Assistance providers and pro bono clearing houses are available within their jurisdiction. We are aware of many examples of Unrepresented Litigants who have been recommended by a Court that they seek legal advice, but have not been given sensible or accurate guidance from the Court as to where that assistance is available.

In this respect, the Commission's suggestion of a single, widely recognised contact point for legal assistance and referral for each state and territory would assist in the ability of judges and Court staff to provide basic initial information about how to get access to Legal Assistance.

Referral through such a contact point is generally preferable to Court-based referral schemes for other reasons as well. Once a firm accepts a referral from a Court-based referral scheme (many of which are established through the Courts' Rules) they are generally unable to cease to act without leave of the Court and without disclosing to the Court the reasons they are no longer willing or able to act. Pro bono providers are deeply troubled by such an arrangement where they are obliged to disclose to a Court the contents of their advice to their client as to prospects, before they are permitted to cease to act. If a firm accepts a matter pro bono they should have no greater obligation to continue to act for a person than those provided by the relevant legal professional rules.

The Firms also commends the CourtNav program developed by the Royal Courts of Justice Advice Bureau in London[10] as an example of an effective tool to assist Unrepresented Litigants to understand the procedural requirements of that jurisdiction.

[10] http://courtnav.org.uk/

INFORMATION REQUEST 14.2 - There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?

A duty lawyer scheme provided by the Legal Assistance Sector is always a more effective model than attempting to fill the gaps for Unrepresented Litigants, than attempting to provide unbundled services on a pro bono basis.

In order for pro bono lawyers to participate in " Self-Representation Schemes", it is essential that there is an umbrella organisation such as QPILCH or Justice Connect[11] to provide supervision, overall insurance and practising certificate coverage. Any alternative model which asked a private lawyer without an unrestricted practising certificate to attend at Court without supervision, to provide advice to an unrepresented party (and even to appear for them before the Court), would place that lawyer outside of their professional indemnity insurance coverage and in breach of the restrictions placed on their practising certificate to act only under supervision. It would also put the party seeking to rely on that advice at very real risk.

The answer to the question about self-representing parties with sufficient means, is that they should not have the benefit of access to Legal Assistance Services or to Pro Bono assistance. As the Commission has stated in the Draft Report, " *Assistance for civil matters should be funded for the most disadvantaged*"[12]. Similarly, the limited pro bono resources should not be directed towards parties which have the ability to afford legal representation (but who have chosen not to seek legal representation).

The Firms also note that one of the most effective ways of reducing the impact of Unrepresented Litigants on Courts and Tribunals, is to ensure that legal assistance is available as early as possible in the process. Government policies to limit access to legal assistance - presumably with an eye to efficiency - can actually have the effect of placing greater strain on the time and resources of Courts and Tribunals.

One clear example of this is in the employment law sphere, where there appears to have been a deliberate policy decision not to provide significant Legal Assistance Services resources. As a result, jurisdictions such as the Fair Work Commission are struggling to manage their lists, with many unrepresented parties. The Fair Work Commission is:

> conscious that self-represented parties can be at a disadvantage when attempting to argue these more complex legal matters or to separate them from the merits of a substantive application.[13]

[11] This is the model of the Self-Representation Service operated by QPILCH in the Federal Court in Queensland, and being rolled out in FY2015 by Justice Connect in the Federal and Federal Circuit Courts in NSW, Victoria, Tasmania and the ACT.

[12] at p609.

[13] RMIT University Centre for Innovative Justice, *Report for Fair Work Commission, Review of Unfair Dismissal Pro Bono Pilot*, December 2013, p4

The RMIT University Centre for Innovative Justice's recent report to the Fair Work Commission made clear that even in a jurisdiction which was established with the intention of making unrepresented parties the norm, in some circumstances:

> the use of targeted legal advice can, itself, avoid complexity and expense. Timely legal advice can not only increase a claim's chances of success, but a party's sense of ownership and satisfaction with the outcome; while all parties benefit when a misconceived claim does not need to be pursued, or when the issues in dispute are effectively articulated and identified. Similarly, courts and tribunals benefit from efficient conduct of proceedings. [14]

The experience of a Pro Bono project conducted by Clayton Utz and Redfern Legal Centre to provide representation at telephone conciliation conferences in unfair dismissal matters, confirms that early legal assistance can lead to faster, appropriate outcomes for applicants, as well as resulting in substantial cost savings for the Fair Work Commission and indeed for Respondent parties.

Unfair Dismissal Representation Scheme conducted by Clayton Utz lawyers as secondees to Redfern Legal Centre

Fifty-five applicants who were unable to obtain Legal Aid secured representation at the initial Fair Work Commission telephone conciliation conference during FY2012 and FY2013. On average, each matter involved less than 4 hours legal assistance, including attendance at the telephone conciliation conference.

Not one of those applicants proceeded to a hearing before the Fair Work Commission.

The average settlement outcome achieved was 6.9 weeks pay to the applicant, with a number of applicants achieving reinstatement of employment, or the conversion of their termination to a resignation.

It must be assumed that a substantial proportion of those 55 applicants would have proceeded to hearing had they not had access to early legal assistance. Without question, this relatively modest resource, coordinated through Redfern Legal Centre, saved substantial public funds not taken up by hearing time before the Fair Work Commission, and ultimately saved respondent employers the significant expenses of defending proceedings at hearing.

A relatively modest Legal Assistance spend, early in the process before parties became entrenched in preparation for hearing, achieved a much more effective outcome than if each of the applicants had required Legal Assistance to conduct a hearing.

The Firms act regularly for disadvantaged clients who are before Courts and Tribunals, who have been unable to obtain Legal Aid. The following are real and de-identified 2014 examples of many of our clients who cannot realistically have been expected to represent themselves, and for whom a limited, unbundling service is not an effective option:

(a) A client was referred for pro bono assistance by Legal Aid NSW. She is an elderly woman with dementia, whose daughter and son-in-law engineered an arrangement whereby she signed over 99% of the title to her own home to them. The client was then thrown out of her home, giving her daughter and son-in-law a $1.8 million windfall. She now lives in a nursing home in regional NSW, paid for from the entirety of her pension. No guardianship or power of attorney arrangements are in place for the client.

[14] ibid, p14

(b) A taxi driver in Perth earning $21,000 a year, resigned over safety concerns. His contract with the cab company said that if he resigned early, he was required to pay $5,000 for "the reasonable costs of the hail light, meter, decals and other equipment", even though he returned the equipment in perfect condition. When he refused to pay, the cab company issued proceedings in the Magistrates Court to recover the $5,000 plus interest. Once a pro bono lawyer had filed an appearance, and asked for evidence of the cab company's loss, the proceedings were immediately discontinued. This could not have happened without legal representation.

(c) A client in Broken Hill was ineligible for Legal Aid under their guidelines, although was within the means test. She has borderline literacy, left school at 14 and is very unsophisticated. Due to pressure which she felt to keep her job, the client loaned her employer her life savings (including her inheritance from her mother) of $53,000. The employer ceased operation and failed to repay the loan.

The client commenced proceedings with the aid of a court officer and the defendant filed a cross-claim. At the point that the client's statement of claim was about to be struck out, a sympathetic court officer took steps to track down pro bono representation. Leave was obtained to file an amended statement of claim. The pro bono lawyer appeared for her, had the cross-claim struck out, and secured an order for repayment of the total sum of $53,000 plus interest. A bankruptcy notice was later served on the defendant when he still refused to pay. The client received the total sum owed plus interest 3 days later.

4. Government and pro bono targets

DRAFT RECOMMENDATION 23.2 - The Commonwealth Government, and the remaining states and territories, should adopt the Victorian Government's use of a pro bono 'coordinator' to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.

The Firms support the Commission's Draft Recommendation 23.2.

INFORMATION REQUEST 23.2 - The Commission seeks views on the potential for industry pro bono 'coordinators' to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the 'coordinators' be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?

The establishment of industry pro bono "coordinators" within industry associations (similar to the model operating within the Victorian Government) is not practicable due to the barriers identified by the Commission in its report.

Law firms should not act in matters which raise a direct legal conflict of interest with their existing clients. However in matters which raise a potential "commercial conflict", the Firms support the development of best practice protocols by industry which permit the conduct of identified pro bono work by law firm lawyers in circumstances which do not raise a direct legal conflict. This could be done through the support of industry groups, the Australian Corporate Lawyers Association (the peak national association representing the interests of corporation and government in-house lawyers) and peak pro bono bodies such as Justice Connect and the NPBRC.

Ideally, the leadership taken in the US by the Association of Corporate Counsel and the Pro Bono Institute through the creation of Corporate Pro Bono[15] might be replicated in Australia to encourage a culture of familiarisation and encouragement from industry for their law firms to provide pro bono work.

We note that many commercial clients have already granted limited waivers to firms on their panels to act against them where there is no legal conflict. Those clients recognise the benefit to themselves of the other party being represented and the social desirability of people who are disadvantaged having access to legal assistance.

[15] www.cpbo.org

INFORMATION REQUEST 23.3 .- The Commission invites views on whether other larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should adopt a pro bono target, with conditions tied to government tender arrangements. What prevents the use of a single target by multiple jurisdictions? What approaches should be adopted by smaller jurisdictions to pursue similar objectives?

The Firms support every Australian jurisdiction adopting the aspirational NPBRC Target as part of its tender arrangements for the supply of legal services to government. Leadership by both the Victorian and Commonwealth governments has helped to build a strong pro bono culture in Australia.

It makes sense to adopt the common national benchmark which has been created through the NPBRC Target, which applies equally to firms large and small, and which is easily understood. The use of the Target in the Commonwealth Legal Services Directions has proved a very effective method of building a pro bono culture across firms. The Target signatories as a cohort perform more hours of pro bono work, at a higher average rate per lawyer, and at a greater rate of overall participation across their firm, than non-Target signatories.

The Target is a more effective method of building a pro bono culture at firms than a percentage of commercial work formula.

The volume of pro bono work undertaken through encouraging firms to achieve the Target significantly outweighs the amount of pro bono work which might be conducted through replication of the Victorian government arrangement (of pro bono work to be performed to the value of 5 to 15% of the commercial work conducted for the government):

By way of example, assume that a firm has 200 lawyers and will perform $2 million worth of government legal work under a tender arrangement:

(i) If the government asks that a firm performs 15% of the value of the tender work in pro bono work, such an arrangement might be expected to result in $300,000 of pro bono work being performed during the financial year. At an average charge out rate of $350 per hour, this would require **857 hours** of pro bono work.

(ii) However, if that firm instead met the 35 hour Target figure, this would result in **7,000 hours** of pro bono work being performed.

A percentage-based formula ties pro bono work to how much commercial work is distributed each year by a government. If the government briefs out less commercial work to a particular firm, less pro bono work is required of them.

The Target approach on the other hand institutionalises a pro bono commitment across a firm, regardless of the value of government work performed in any given year.

DRAFT RECOMMENDATION 23.3 - Any pro bono targets used by governments as incentives in tender arrangements should remain flexible. Reporting required for pro bono targets should be clear and simple.

In the Firms' view, a pro bono target should be aspirational, but not flexible, or able to be met by "in kind" donations or payments.

A pro bono target is to encourage increased pro bono participation. Pro bono should be tightly defined so that it is simple to determine what is and what is not pro bono, and so that pro bono providers can accurately and clearly report on the amount of pro bono provided (without onerous calculations and requirements).

In this, the Firms support the NPBRC definition of pro bono and the NPBRC's aspirational target.[16]

The Firms support the replication throughout government of the Commonwealth's adoption of the NPBRC Target.

INFORMATION REQUEST 23.4 - The Commission is seeking views on the most efficient form of pro bono targets. How should they be expressed (in hours, dollars or some other means)? How do the reporting requirements of the two current targets (one for the Commonwealth and the other for Victoria) compare in terms of limiting compliance costs?

As stated above, the Firms adopt and approve of the NPBRC's aspirational pro bono target which is expressed in hours.

The Victorian reporting requirements are onerous, and can involve as much as 40 hours of accounts department and pro bono team work to complete. For example, in FY2013:

- one Firm's report to the Victorian Government required the uploading onto the government's systems of detailed financial breakdowns (with time values and chargeout rates per individual lawyer) and descriptions of work performed and referral sources, on each of 196 separate matters; and
- some other firms chose simply to report on the minimum hours necessary to comply with the Victorian reporting requirements, thereby under-reporting their pro bono contribution, because the reporting requirements were so time-consuming.

By contrast, the Commonwealth system is straightforward and simple to report on. A single page is supplied to government, with data which is available easily to firms through its Target reporting to the NPBRC.

[16] http://www.nationalprobono.org.au/page.asp?from=2&id=112#def

5. Costs in pro bono matters

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.

The fact that a firm is prepared to act for a disadvantaged client or in a public interest matter without charge should not prevent recovery of costs from the other party. The sum of costs to be recovered should be determined in the normal course and should not be subject to a special regime such as being limited to a fixed amount set out in court scales. Any costs recovered should go to the legal professional providing the service.

The Firms note that while the issue of adverse costs orders in pro bono matters has been raised at pages 413 to 415 of the Commission's Draft Report, in practice this issue is not a significant barrier for firms in their day-to-day pro bono practices. We are unaware of any pro bono matter ever being refused because of an inability to recover fees. In practice, most pro bono representatives agree to forego the promise of fees from a hearing in a pro bono matter, in order to encourage an early and favourable settlement for their client.

It should be noted that over the five years from FY2009 to FY2013,
the three Firms provided a total of 561,834 hours of pro bono legal assistance.

During that time, the total fees recovered in pro bono proceedings was
less than $500,000.

Nevertheless, the principle should be that a lawyer who conducts a matter through to a successful verdict for a disadvantaged client on a pro bono basis, should receive the benefit of a successful costs order.

2.1 **Why costs should be awarded in pro bono matters**

A firm acting for a client on a pro bono basis in litigation in a costs jurisdiction should not be prevented from recovering costs when their client is successful, because:

(a) the fact that the firm's client is represented pro bono does not provide a basis on which the other party should be relieved of their obligation to pay costs if unsuccessful. The pro bono client is almost always represented without charge due to their disadvantage. The other party should not be relieved of an obligation to pay costs due to an attribute of the pro bono client;

(b) if the pro bono client is unsuccessful they will be liable for costs. The other party should carry the same risk; and

(c) the prospect of having to pay costs if unsuccessful can be an incentive to the other party to settle and/or otherwise to behave prudently in the course of the matter.

2.2 **The issue preventing recovery of costs in pro bono matters**

Most lawyers acting for a party pro bono in litigation in a costs jurisdiction enter into a form of contingency costs agreement (where costs are only payable by the client on a successful outcome). Contingency costs agreements are common across jurisdictions and form the basis of the engagement between lawyer and client in many plaintiff firms. They provide an important gateway to the courts for impecunious clients.

The material difference between a typical contingency costs agreement and a traditional pro bono costs agreement is that, in a pro bono costs agreement, a successful outcome alone is not sufficient for a lawyer to recover fees. Matters are not conducted by the pro bono lawyer in the expectation of their fees being paid at the conclusion of the matter.

In a pro bono costs agreement the lawyer generally agrees to recover only what can actually be recovered in costs from the other party. If the other party cannot pay costs or avoids paying costs, or the solicitor/client costs are higher than the party/party costs, the lawyer will not seek to recover from the pro bono client as would generally be the case under a contingency costs arrangement.

The law on solicitors' costs varies in each jurisdiction. In general, however:

- under the "indemnity principle" the purpose of an adverse costs order is to indemnify the successful party for the legal costs incurred in the proceedings;
- if the successful party is not obliged to pay costs, costs cannot be recovered from the unsuccessful party;
- there are a number of recognised exceptions to the indemnity principle; and
- a contingency costs agreement is unlikely to breach the indemnity principle if it contains a contractual obligation on the client to pay fees subject to a condition subsequent that they will not have to pay if they are unsuccessful in the litigation (provided the costs agreement is in writing and entered into in advance of the proceedings).

While the law is not settled, a pro bono agreement which, in effect, only requires a client to pay the costs that can be recovered from the other party, is likely to breach the indemnity principle and therefore be unenforceable.

The legal position is set out in *King v King* [2012] QCA 81 and *Wentworth v Rogers* (2006) 66 NSWLR 474.

In *Wentworth v Rogers* the NSW Supreme Court was divided on whether or not a clause which made the obligation to pay costs dependent on the recovery of costs provided a basis on which an adverse costs order could be made.

Santow JA stated (at 488):

> It is reasonable … to recognise in a costs agreement that the unsuccessful party who is subject to a costs order may delay or defeat recovery. Hence predicating payment on successful recovery is not unreasonable.

He went on to find (at 491) that a costs agreement of that type would not fall foul of the indemnity principle.

In contrast, Basten JA held (at 500 and 505) that:

> …[F]or the purposes of the indemnity principle, there must be a contractual entitlement to charge fees, subject to a condition subsequent, rather than an entitlement which arises as a result of a successful outcome … [as] a successful outcome will usually involve not merely obtaining a costs order, but actual recovery of costs. It is not possible to make the existence of a right to charge dependent on recovery of the moneys from which the charge would be paid.

Hislop J expressed "no concluded opinion" on the matter (at 216).

In the recent case of *King v King* the Queensland Supreme Court considered the issue. Chesterman JA (at 13) preferred Basten JA's view. Chesterman JA's view was supported by White JA. Wilson AJA "[did] not wish to express any view on … the different views expressed by Santow and Basten JJA in *Wentworth v Rogers*".

We note that Chesterman JA's comments are obiter. He noted (at [14]) that "it is not necessary to determine the application for costs on this basis".

2.3 The sum to be awarded in costs should be determined in the normal course

It is unnecessary to set up a separate regime for costs in pro bono matters. Rather, the law should recognise an exception to the indemnity principle in pro bono matters, to enable a firm to enter into an agreement with a pro bono client on the basis that:

> **if the client is successful**, the other party will be liable for costs as assessed in the normal course, regardless of whether or not the lawyer is entitled to recover the full amount of costs from their pro bono client.

An unsuccessful party's obligation to pay costs should not be limited to a fixed amount set out in court scales, for the reasons discussed at 2.1. A lawyer acting pro bono should not, in effect, be forced to subsidise the costs of the other party because of that lawyer's preparedness to act for their client on a pro bono basis.

2.4 Costs should be paid to the legal professional providing pro bono representation

If costs are awarded in a pro bono matter they should be paid to the legal professional providing representation. In most cases, firms use any costs paid in pro bono matters to further their pro bono practices (for example, to pay disbursements in other pro bono matters) or donate the costs to their not-for-profit pro bono clients. In other cases, allowing the legal professional to receive the costs may encourage pro bono work.

We do not support a requirement that fees be paid to the not-for-profit body providing or coordinating the pro bono services. Firms can pay the money to such a service if they choose. However:

(d) There is often no body providing or coordinating the pro bono service, particularly for work done in smaller firms. Even in Ashurst, for example, fewer than 5% of our matters last year were referred by a not-for-profit body providing or coordinating pro bono services;

(e) Such a regime may skew the work of those not-for-profit bodies toward finding cases that will result in payment of costs to those bodies as such costs become a funding stream;

(f) Matters that would otherwise be run by plaintiff firms may be referred by coordinating agencies to pro bono firms in the pursuit of costs, using valuable pro bono resources on matters where there is another option for legal assistance; and

(g) If the legal professional is prepared to take the matter pro bono they should receive the benefit of the costs.

In particular, we strongly oppose any requirement that costs be paid into a general fund to support pro bono services, similar to the Access to Justice Foundation established under s194 of the *Legal Services Act 2007* (UK). That model is very unpopular with firms in the UK, is not well-utilised and discourages firms from entering into pro bono arrangements in litigious matters. Firms want control over how costs earned by their labour in pro bono matters are spent.

6. Exemption from Court fees

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.

The Firms support Draft Recommendation 16.4. While firms make available many hours providing pro bono legal assistance, budgets to pay external disbursements are limited. Court fees are a cash cost to firms. In our view, such fee waivers would encourage pro bono assistance in litigious matters.

Automatic fee relief should also be granted to parties represented by an Aboriginal Legal Service.

While we support the granting of automatic fee relief to clients of pro bono schemes, the definition of 'pro bono schemes' should include the pro bono schemes of firms that adopt financial hardship criteria commensurate with those used to grant fee relief, not just pro bono referral organisations.

Pro bono referral organisations such as Justice Connect and QPILCH are member-based organisations which charge law firms significant fees to be members. They refer matters only to their members. Not all law firms are members of a pro bono referral organisation, and even for those firms which are members, not all of their pro bono work comes from a pro bono referral organisation.

A person who would otherwise receive a fee waiver should not miss out on that waiver because they were not referred to their pro bono lawyer by a pro bono referral organisation. Nor would it be appropriate to create a regime whereby such a person had to be "referred back" by their pro bono lawyer to a pro bono referral organisation, in order that the matter could be "re-referred" to that same lawyer so as to allow eligibility for a fee waiver.

7. Evaluation of funding to pro bono service providers

DRAFT RECOMMENDATION 23.4 - The provision of public funding (including from the Commonwealth, state and territory governments, and other sources such as public purposes funds) to pro bono service providers should be contingent upon regular, robust and independent evaluation of the services provided.

The Firms support Draft Recommendation 23.4.

Commonwealth, state and territory governments fund a range of pro bono organisations, including Justice Connect, QPILCH and the National Pro Bono Resource Centre. The funding is generally for the purpose of facilitating pro bono legal services. They have also from time-to-time funded positions in community legal centres to facilitate pro bono work.

Government funds should only be spent to facilitate pro bono services, where it can be demonstrated that this results in a greater level of access to legal assistance for disadvantaged people, than if the funds had instead been paid directly to Legal Aid. Many this demonstration will be able to be made. We suspect that on some occasions it will not. What is required is a level of robust and independent evaluation.

Evaluation of pro bono services is often commissioned by the pro bono organisations themselves. In our experience there is little rigour in the governments' examination of the efficiency and effectiveness with which government funds are spent on facilitating pro bono work.

The Firms are concerned that a common feature of evaluation of services which utilise pro bono resources is to the effect of:

> "*Government funding of $200,000 per annum was significantly boosted by an estimated pro bono contribution from legal firms of $2 million*".

In evaluating services funded to facilitate pro bono assistance, the commercial value of the time of the pro bono lawyers is not a useful measure. The estimated hourly rate value of the pro bono contribution does not reflect the actual cost of providing the service. It simply represents the commercial chargeout value of the time the lawyers spent on the pro bono work. That time often includes time spent in training to provide the services and in travelling to clinic locations to deliver the service.

In evaluating government-funded programs utilising pro bono legal services, a better measure would be to compare the number of people assisted, the level of expertise of the lawyers providing the assistance and the nature of the assistance provided through the program, against the same measures **had the program been provided by lawyers employed by Legal Aid**. In our experience, it can be the case on some projects that more clients would have been assisted, the assistance would have been more comprehensive and by a lawyer who is more expert in the area of law, had the government funding been applied to employ a lawyer within Legal Aid to provide that assistance, rather than paying to facilitate pro bono legal services.