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Productivity Commission
15 Moore St CANBERRA
ACT 2600

Dear Presiding Commissioner

Response to the Productivity Commission's Draft Report on Access to Justice Arrangements

Thank you for the opportunity to provide this submission on the Access to Justice Arrangements draft report released 8 April 2014.

This response takes the following form:

1. Some general comments

2. Responses to specific recommendations

General Comments

By way of background, Quinn Emanuel is the world's largest litigation only law firm. It is also one of the world's leading litigation law firms, with 17 offices across 8 jurisdictions – enabling it to draw on the experiences of market leading litigators – a number of whom are admitted to practice in multiple jurisdictions.

Although its Sydney office is less than one year old, it comprises three very senior litigation partners drawn from Herbert Smith Freehills and King & Wood Mallesons – all of whom have extensive cross-border expertise and insights. Its lawyers are similarly drawn from top tier firms and most have practiced outside of Australia, including in other Quinn Emanuel offices.

We believe that Quinn Emanuel's focus on world class litigation systems gives us a unique perspective on the justice system as compared to many other firms and practitioners in the Australian market.

Quinn Emanuel supports the work done by the Commission in seeking to improve access to justice and commends it for proposing the recommendations in its draft report.

In developing many of its social and economic systems, Australia has routinely looked to the experiences of other developed economies as a reference point / benchmark for improving its own. And it has shown a willingness to act proactively where required.

An example of this is the market regulatory systems that were put in place (after the Hilmer Committee report) to govern third party access to infrastructure that would otherwise enjoy a natural monopoly. Adopting and adapting market and regulatory systems employed by other developed economies created much greater economic certainty and confidence in infrastructure markets – both from an investor and user perspective. Although there was resistance and uncertainty at the beginning – and no doubt some teething problems – the steps taken to bring us in line with other economies has been very successful. And, while there remain differences between the regulatory systems employed in Australia and other countries, ours are sufficiently similar as not to be idiosyncratic, and so are not seen as obstacles to investment or use in a global economic sense.

We see access to justice as needing to evolve in a similar way. Just as our system was based on the common law legal system in the UK – and was embraced by other common law systems in the US, Canada, New Zealand etc - it needs to evolve in line with similar systems – embracing the best of what they employ and maintaining equivalency where possible.

Response to specific recommendations

Private funding for litigation

We broadly agree with the recommendations made, and make the following additional comments:

- Lifting the prohibition on damages based billing would simply bring Australia into line with the other major common law legal systems in the UK, the US, Canada (and other developed countries like Italy, Finland and Japan).

- The UK recently lifted the prohibition on damages based billing and has not experienced a significant flood of unmeritorious plaintiff cases. The nature of damages based billing discourages unmeritorious claims. Lawyers in these arrangements act as gatekeepers because they have a stake in the merit of the action.

- The “loser pays” principle in Australian litigation is a significant differentiator to the US system. It provides a real check to the opportunistic lawyer undertaking work which, in the unmeritorious case, they may not only not be paid for; but where the lawyer may also have to be responsible for the successful party’s legal fees.

- Other common law systems have successfully managed (through regulation and oversight) the perceived duty and conflict issues arising from contingency fees.

- Damages based billing would remove duplication and thus reduce the price of funded litigation. At present, a plaintiff who cannot fund their own action must bear the costs of the lawyer running the case (namely time taken in project management, as well as legal work and profit margin) plus the costs of the separate litigation funder also managing the litigation and its profit margin (recovered as a percentage of damages). In damages based billing there is only one party doing both, one funding margin and therefore this duplication of costs is largely avoided.

- Contingency fees provide a natural incentive on a lawyer to minimise costs, expedite an outcome and maximise the result for their client.

- Remember, it is not just plaintiffs who complain about lawyers’ fees and the time based system of billing, as well as the amount of time necessary to bring a case to trial. Press reports regularly report on corporations who share similar concerns and the need for alternative billing/fee arrangements. Contingency fees minimize such disputes because both lawyer and client have aligned interests in a successful outcome and minimal costs and delay.

- Our expectation is therefore that, if the prohibition was lifted, corporate clients would be early adopters of contingency fees, as it is a well understood way of managing risk and expense (eg success and retainer fees are often used by investment banks).

- In some quarters there has been misconceived commentary that the Commission's recommendations on the private funding of litigation are just about class actions and/or should be assessed by their impact on class actions. This is not correct and private funding, either by damages based billing or litigation funders, will often be appropriate and attractive to other civil litigation disputes, parties and processes.

Thank you again for the opportunity to put this submission.

Kind regards

Michael Mills, Managing Partner