FURTHER SUBMISSIONS TO AUSTRALIAN PRODUCTIVITY COMMISSION ENQUIRY ON ACCESS TO JUSTICE BY EQALEX UNDERWRITING PTY LTD

Our comments on the Commission's Draft Report dated April 2014 are from our perspective as a member of the Australian insurance market with diversified commercial interests in addition to insurance including representation in the UK. We have extensive contacts and associations with Australian and international insurers, FTSE 250 companies and with many of the largest Australian and UK law firms.

Draft Recommendation (DR)5.1 (Single Contact Point / Law Access Model)

We agree with the Commission that a single contact point for clients would be a useful resource, preferably within the Federal Attorney General's Department (AGD) or alternatively, in all States and Territories' AGDs.

We believe that consumers would also find it useful for contact points to include the URL for a legal auction website as described on pages 3 and 23 below.

Draft Recommendations 6.1, 6.2 and 6.4 (Clients Understanding Billing Information / Uniform Billing Requirements / Over-charging)

In our view, this is one of the primary areas in need of reform as it affects competition within the legal profession together with affordability and efficiency of services.

We agree with Pru Vines of UNSW in her Submission that clients have not been and are not being provided with clear explanations of how fees were and are being deducted from their recoveries without their knowledge or approval in No Win No Fee Agreements.[1]

It is no co-incidence that following the Jackson Report (Jackson) being introduced in Britain, the UK Legal Ombudsman received a large volume of complaints regarding No Win No Fee Agreements[2]. One legal commentator reported that

> *"One strong message emerging from the [Legal Ombudsman's] report is that communication with clients is now more important than ever. Lawyers must make sure that the client genuinely understands what the potential deductions might be from their damages, or what disbursements or costs they may have to pay if they lose. The more clearly the lawyer can set this out – and document that they have done so – the safer they will be if the matter is later scrutinised by the ombudsman or regulator. The obvious commercial downside is that the client may be deterred from bringing the claim – but ultimately they must be made aware of the risks.*
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> *A large question mark is now hanging over the very use of the headline term 'no win, no fee', when it does not always reflect reality in the post-Jackson world. The ombudsman's report questions whether or not the phrase should continue to be used."*[3]

The Ombudsman's Report echoes DR6.1, 6.2 and 6.4.

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[1] See also our comments under DR18.1

[2] *Complaints In Focus : No Win No Fee Agreements :* Report By UK Legal Ombudsman 6 January 2014

[3] The Report referred to "shocking examples involving consumers facing bills of tens of thousands of pounds in cases where the ombudsman found that law firms had contradicted their promises or breached their agreements" : *The No Win No Fee Problem* Litigation Funding Magazine 8 January 2014

These comments mirror the same types of concerns over the operation of No Win No Fee in Australia which in reality, is a misnomer[4]. As the UK is a larger, more mature market with a compensation culture, the numbers of complaints have been higher than in Australia.

We also refer the Commission to our comments regarding the Keddies scandal (see Information Request (IR)6.4 below) and the problems which occurred when Keddies, the largest law firm handling personal injury cases in NSW, failed to explain how they were deducting their fees from clients' gross settlements or damages awards. This occurred in the context of over-charging. As far as we are aware, the incidents involving Keddies did not result in any changes in NSW to billing requirements.

Need For Standardisation

There needs to be standardisation across Australia in clear English[5] (not legal jargon) in 2 - 3 page pro-formas for each version of Retainer Agreements, Conditional Costs Agreements and Bills of Costs used by all law firms. We agree with the Commission that the current versions of each of these documents are written for the benefit of lawyers rather than the consumers they serve. The result is impenetrability, confusion and opaqueness in billing, particularly in No Win No Fee Agreements.

The courts have ultimate jurisdiction over costs. They should approve each pro-forma and issue Practice Directions requiring all legal practitioners in every jurisdiction to use these forms for every client.

Standard-form documents for Retainer Agreements, Conditional Costs Agreements and Bills of Costs should be in clear English of the type used in the UK by the Plain English Campaign.

Pro Forma Explanation Of Billing

Final bills of costs should have a summary of around 10 lines of quantified information on one page.

They should include the charges for each person working on the case ; the time each of them spent, over what period and at what rate ; any additional charges eg photocopying by subject, volume and rate ; any main disbursements eg experts reports ; any further charges such as court fees ; any mark-ups, any success fees, how these are charged and at what percentage rate.

Below that should appear the 100% gross amount of any settlement agreed or damages awarded ; the amount of any costs payable by the opponent ; the 100% total of the recovery and any costs received from an opponent ; the sub-total after deduction of the law firm's charges from the previous total ; the sub-total after deduction of any success fee or the net balance after each deduction has been clearly identified from the gross settlement or damages award.

The invoice summary should be simple to understand and clearly show the amount of settlement or damages recovered by the client with the amounts deducted.

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[4] *End of No Win No Fee Lawsuits* Daily Telegraph (UK) (DT) 29 March 2013 : the realisation in the UK post-Jackson that part of a client's recovery would have to pay for their legal costs

[5] See the Crystal Clear Award and the UK's Plain English Campaign which is used by many British insurers for their policy wordings

Consumers may also benefit from watching an on-line video (prepared by AGDs or regulators) of under 5 minutes duration with their solicitor which explained in simplified terms the deductions to be made from their recovery with specific reference to the pro-forma to be used. At the end of the video, the solicitor would go over the arrangement again using a simplified example of what was proposed and ask the client to certify whether they wished to proceed. A cooling off period could allow clients to consider the proposal or to obtain alternative quotations.

Draft Recommendation 6.3 (Centralised Resource re Legal Fees)
Information Requests 6.2 and 6.3 (Aggregation / Pricing / Directory)

Absence of Competition In Australian Legal Services

One of the major obstacles to access to justice in Australia is the high cost of legal services which restricts affordability.

The Draft Report highlighted the problem of affordability for nearly all clients but failed to discuss the main reason why affordability is a problem : lack of competition.

In our view, this was the most important area for examination by the Report, of the reasons why the legal services sector is highly uncompetitive and how wider competition should be encouraged.

Exorbitant charging is caused by the lack of competitive pricing by the legal profession. This reduces freedom of choice and purchasing power.

The ACCC and the Courts acknowledge that the legal profession is a cartel which controls the price of its members' services. This control over pricing includes Legal Aid as a law firm staffed by lawyers.

Consequently, not only is the pricing of legal services in Australia opaque, it is difficult to make comparisons of the cost and range of services available. By themselves, contact points will not solve these problems nor will standardised billing in clear English. Broader competition is what is needed.

Increased Competition & A Legal Auction Website

We believe that the legal services market in Australia could become far more competitive with a legal services auction website.

Most commercial law firms are already members of panels which are called upon by clients to submit tenders or bids and to justify their charging on a competitive basis. This process is nothing new and has been going on for decades.

We believe that a legal auction website, of the type discussed below at page 23 would attract the interest of most clients and law firms. Client business would be awarded to the lowest bid (or the best bid in comparative terms).

We foresee the practicality and utility of a centralised auction point being of enormous benefit to consumers of legal services with these advantages developing over time.

Information Request 6.4 (Legal Complaints System) / DR6.1, 6.2 & 6.4

We refer the Commission to the lengthy investigation by the Sydney Morning Herald (SMH) and Fairfax Press regarding the NSW personal injuries law firm, Keddies (now part of Slater & Gordon). Fairfax's reports on the ongoing saga were over a 6 year period between 2008 and 2013.[6]

In brief, Keddies was found to have grossly overcharged and misinformed around 120 of its clients regarding costs charged to them. Some of these clients included injured children, a paraplegic and a worker with injuries which subsequently proved fatal. In 2011, there were over a hundred clients engaged in proceedings in the NSW District and Supreme Courts seeking refunds.

In June 2012, the NSW Administrative Decisions Tribunal criticised the NSW Legal Services Commissioner for the delays which had occurred in resolving the assorted complaints against Keddies. It took 15 months for expert evidence to be completed after the LSC's claim was filed in August 2009 and a further 18 months for the hearing to begin.

While the LSC blamed Keddies for the delays, the firm's former principal, Russell Keddie, eventually accepted all blame for the over-charging and was struck off the roll of solicitors. This partially absolved two of his fellow partners who were involved in the complaints of over-charging. (One of these partners was a NSW Law Society Council member who subsequently resigned.)

After the clients successfully sued Keddies for the return of $23M of outstanding costs which had been over-charged to them, all 3 partners filed for bankruptcy. In July 2012, the SMH reported that Russell Keddie had sold all of his shares in various properties to his wife for $1 while his former partners had $4.5M in assets frozen by the court. While these actions had limited effect in avoiding the claims, the clients remained out of pocket for a large part of the $23M which was unpaid.

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[6] *Top Law Firm Under Fire In Compo Dispute* Sydney Morning Herald (SMH) 13 June 2008 ; *Angry Clients Accuse Barristers Over* Fees SMH 14 June 2008 ; *Blank Spaces Left In Legal Papers Says Keddies Client SMH 16 June 2008 ; Keddies Ordered To Re-pay $85,*000 SMH 19 June 2008 ; Keddies *Client Charged For Saying Thanks* SMH 1 July 2008 ; *$600 for city tax trip ; regulator requests report on solicitor's fees* SMH 30 March 2009 ; *'Infant' Settlements Under Review* SMH 3 April 2009 ; *Keddies Cost Woman $20,000* SMH 20 April 2009 ; *Keddies Costs Were 'Out Of Kilter'* SMH 20 April 2009 ; *Keeping Legal Costs In Check* SMH 20 April 2009 ; *Lavish legal costs leave trail of unhappy clients* SMH 20 April 2009 ; *Regulator to probe Keddies Conduct* SMH 30 May 2009 ; *Legal Regulator Dismisses Complaints Against Keddies* SMH 2 June 2009 ; *Slater's Keddies Moves Raises Eyebrows* Australian Financial Review (AFR) 29 October 2010 ; *Keddies Boss Takes Blame For Excessive Legal Bills* SMH 26 November 2010 ; *Keddies 'Hopeless' Claim Under Fire* SMH 8 February 2011 ; *Keddies Appeals Ruling* AFR 23 September 2011 ; *Compo Firm A Thorny Bite* AFR 23 September 2011 ; *The Curious Case of the Phantom Settler* AFR 26 November 2011 ; *Injunction Against Keddies Granted* AFR 2 December 2011 ; *Keddies the Class Clowns* AFR 9 December 2011 ; *Mud Flies Over Compo Charges* AFR 20 April 2012 ; *Keddies Principal Struck Off For Over-charging* SMH 5 June 2012 ; *Delays Blasted In Keddies Case* AFR 8 June 2012 ; *Bankruptcy Means Fleeced Keddies Clients Will Lose Money* SMH 18 June 2012 ; *Law Society's Own Breaches Conduct* AFR 22 June 2012 ; *Another blow to Keddies Victims As Former Partners Face Bankruptcy* SMH 13 July 2012 ; *Bankrupt Solicitor Could Owe $23M In* Damages SMH 2 August 2012 ; Second *Keddies Partner Bankrupt, Clients Go Unpaid* SMH 4 August 2012 ; *Keddies Partner Outwits Creditors, Legally* SMH 16 August 2012 ; *Trustees Unlock Funds From Keddies* SMH 26 October 2012 ; *Keddies Pair Not 'Fit and Proper'* AFR 7 December 2012 ; *Keddies Clients Forced To Accept 70% As Estates Are Squeezed* SMH 8 February 2013 ; *Defender of the Overcharged Accused Of Tripling Client's Bill* SMH 10 June 2013 ; *Keddies Lawyer Wins Appeal Over Conduct* AFR 21 June 2013

The Keddies case demonstrates that in NSW as the most populous State, the complaints system is a "toothless tiger" in respect of the powers available to the LSC against solicitors and the Bar Council against barristers. The Supreme Courts in each State and Territory appear to have no reserve disciplinary powers on costs.

We have seen no reference to Fairfax's examination of the Keddies scandal in the Draft Report yet it appears as the most glaring example in recent years of how even legal services regulators have been powerless to respond to serious complaints of over-charging and opacity of billing.

The Keddies case revealed how law firms fail to explain No Win No Fee arrangements in ways that clients can understand. It also demonstrated how law firms can use technicalities to delay or evade disciplinary proceedings within the regulatory system.

Draft Recommendation 7.2 (Removing Bans On Advertising)

Avoiding An Australian Version Of The UK's Disastrous Compensation Culture

There is no reference in the Draft Report to the deleterious effects of the UK's compensation culture which has caused untold damage after advertising by legal services providers was de-regulated in the mid 1990s by the Blair Labour government.

The cost to the UK economy of an uncontrolled compensation culture fuelled by daily, hard-sell advertising has been in the tens of £BNs. The UK government has launched 60 or more regulatory reviews during the last 15 years, with the last review being conducted by Lord Justice Jackson (who adopted changes using the status quo in Australia).

As recently as last year, uncontrolled advertising by the torts sector in Britain including personal injury law firms and claims farmers was proving a national blight[7] : most Britons have at some point received nuisance text messages or calls on their mobile phones of one or more each day (not to mention e-mails and exposure to get-rich-quick television and radio advertising).

In October 2010, Lord Young told the Conservative Party conference :

> *'As a one-time lawyer, I am today ashamed of the depths some in the law have stooped to, with their aggressive "no-win, no-fee" advertising.*
>
> *'We have all seen adverts in the newspapers, on the radio and television, saying if you think you have a claim, come to us and if our solicitor agrees, you will walk away with a cheque for £500, just for putting in your claim. And that won't affect any amount you might be awarded.*
>
> *'This is more than a free lottery ticket ; this is a lottery where you win as you enter. What a temptation this provides to someone watching afternoon television.*
>
> *'This is not access to justice – this is incitement to litigate. And it must stop.*

[7] *Britain's Compensation Culture Is Out Of Control, Insurance Chief Warns* Daily Telegraph (UK) (DT) 4 August 2013 : "The head of one of Britain's biggest insurers has attacked the country's spiralling compensation culture and warned 'it has become a real issue for society'. Whiplash currently costs the insurance industry £2BN (A$3.6BN) each year."

> *That is why we have a compensation culture. If anything happens to you it can't possibly be your fault ; sue someone, it won't cost you a penny. That is why health and safety now looms so large in business, in education, in the health service. Not to stop accidents happening. But to stop being sued."*[8]

The same style of get-rich-quick advertising would be likely to be used in Australia as has occurred in the UK.

UK claims farmers have for some time been attempting to generate business in Australia but have been prevented from doing so, specifically due to the regulations against advertising.

From our insurance perspective, we consider DR7.2 would create an enormous amount of confusion and unnecessary expense for consumers which to date has been avoided. The same problems which resulted in a rampant compensation culture in Britain during the past 20 years would occur in Australia. During 2013, UK liability insurers were receiving thousands of fraudulent claims for whiplash injuries and UK banks were being sued by fraudulent claimants in relation to mis-sold Payment Protection Insurance (PPI)[9], most of which were prompted by get-rich-quick claims advertising.

Opening Pandora's Box

It seems highly ironic that Lord Justice Jackson was sufficiently inspired by the status quo in Australia to recommend the Australian model as the basis for some of his reforms of the UK legal system - and that we here in Australia should then ignore why the UK reform programme was essential in the first place - or even remotely consider duplicating the UK's disastrous mistakes which so far, we have been careful to avoid.

There is further irony that the Commission has drawn on the Jackson Report to suggest changes in Australia without reference to the UK compensation shambles or the reasons why Jackson was appointed. The UK context bears absolutely no resemblance to the Australian one.

Australia has minimal marketing of compensation claims yet the Commission is suggesting that Australia should risk developing a full-blown compensation culture like the US, Canada and the UK.

The Commission's assessment on page 239 of the Draft Report would create an 'anything goes' environment similar to the UK fiasco as there would be untold confusion about the type of advertising viewed as permissible. The legal profession would have a field day interpreting technicalities and voluntary codes of practice. The 'misleading or deceptive' rules have been in place for years but incidents such as the Keddies scandal have still taken place. The regulations prohibiting advertising have been repeatedly ignored by law firms.

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[8] *Lord Young Attacks Personal Injury 'Lottery'* DT 7 October 2010

[9] *The Claims Companies Riding the PPI Gravy Train* DT 5 May 2012 : " ' You too could have mis-sold PPI or unfair charges waiting to be refunded ! Claim your £3,000 from the Banks ! Our largest claim to date is £86,892 ! ' proclaimed a newspaper advert last week for PPIClaimback.co.uk which boasts that it has claimed back more than £100M for its customers….Of course there is only one problem with this. A lot of people were not mis-sold PPI by the banks…..At Lloyds Banking Group, one out of every three claims has turned out to be bogus…..The banks chief executive said 'It is fraud and I think we should stop that.' "

It is unlikely the vast majority of law firms would advertise if restrictions were lifted. Commercial law firms would shun advertising : this has been the UK experience as many lawyers consider there is a certain tackiness associated with advertising. The most likely advertisers would be Plaintiff law firms exhorting consumers to pursue personal injury claims in the same way as in Britain.

Lifting advertising restrictions would not promote greater competition or affordability, rather the reverse. Only large firms would advertise and the cost of advertising would be likely to be passed on to clients in even higher charges. Advertising in the UK has not led to any reduction in charging rates.

If a compensation culture were to take hold in Australia, insurance premiums would rise substantially : it was estimated in January 2012 that the cost of fraudulent whiplash claims alone added £40 to every driver's insurance policy in the UK.

The UK's 'Costs Wars'

In the UK between 1995 and 2013, liability insurers brought satellite litigation in tens of thousands of torts claims which were inflated by the Blair government's *Access to Justice Act* changes and prompted by its de-regulation of claims advertising. This clogged up the courts for over a decade and could potentially be replicated in Australia. The 'costs wars' led to the UK courts developing a separate costs adjudication to deal with these disputes.

To date, Australia has avoided this type of fall-out from the adoption of US-style No Win-No Fee Agreements however the potential exists here for a stand-off between insurers and claimants to erupt in the same way.

All Australian governments view a US-style compensation culture as something not to be encouraged in Australia as it would be bad for our economy and society. The vast majority of Australians also share that opinion.

In our view, the risks to Australia of unleashing a compensation culture will increase exponentially if any one or more of the following occur :

- advertising restrictions are removed (DR7.2)
- No Win No Fee billing is not overhauled to reveal the actual cost to clients (DR6.1)
- restrictions on Damages Based billing are removed (DR18.1)
- caps on success fees are removed (IR18.1)

The Commission should assess each of these risks by examining the following events in Britain during the last 15 years and how they fuelled a compensation culture which the UK has so far failed to extinguish :

- the overnight withdrawal of Legal Aid for personal injuries claims in Britain in 1997
- the *Access to Justice Act* 1997 (UK)
- the development of Claims Direct Ltd[10] during the 1990s, its flotation on the LSX in 2000 with a valuation of £330M and its subsequent crash in 2001
- the growth of The Accident Group (TAG) following the demise of Claims Direct and its subsequent crash in 2003 (leaving a trail of fraudulent claims)

[10] Claims Direct was resurrected as New Claims Direct Ltd and purchased in 2003 by Russell, Jones & Walker (RJW), one of the UK's largest Plaintiff law firms. RJW was in turn bought by Slater & Gordon in 2012 for $80M. Slater & Gordon appear to be the owners of New Claims Direct. With further UK law firms acquired during 2012 - 2013, Slaters are now the largest Plaintiff law firm in Britain.

- the growth of the UK's compensation industry between 1995 and 2014 including :
    - the changes in the UK LEI insurance market, the collapse of various LEI insurers, the history of abysmal underwriting, disputes with the liability insurance market and the 3 or 4 main LEI insurers left standing today
    - the epidemic of referral fees which the Law Society of England & Wales fought for over 10 years to control and which is now outlawed
    - the growth of claims management companies from Claims Direct and TAG to around 500 in the previous decade, how 95% of them have collapsed, the repeated epidemics of fraudulent claims, the repeated failures of self-regulation, the tighter regulations introduced by the UK Ministry of Justice and the slow death of the remaining claims farmers after Jackson
    - how personal injury law firms adjusted to the withdrawal of Legal Aid, their proliferation from the mid 1990s onwards and their decimation after Jackson
    - 100% success fees, refundable ATE premiums and claims inflation : how these proved to be a recipe for disaster
- the role which the de-regulation of advertising by claims farmers played in the growth of the industry and its persistent and widespread fraudulent claims
- the 'costs wars' between UK insurers and claimants between 1995 and 2012
- the *Clementi Report* 2004 and reform of legal regulation
- the *Compensation Act* 2006 (UK) and the 60 half-baked attempts at reform by the British Parliament culminating in the Jackson Report
- the *Legal Services Act* 2007 (UK)
- the *Legal Aid, Sentencing & Punishment of Offenders Act* 2012 (UK)

Draft Recommendation 13.3 (Processes for Managing Costs / Costs Budgets)

Adoption of Australian Innovations By UK

The Jackson Report in 2009 was necessary because the series of catastrophic policy failures by the Blair government between 1997 and 2009 (ie the *Access to Justice Act* reforms in the preceding section) became overwhelming.

These original changes introduced by the Blair Labour government from 1997 onwards included the de-regulation of No Win No Fee agreements, abolition of personal injury Legal Aid, relaxation of rules on advertising by legal services providers and approval of claims management companies to handle litigation.

The compensation culture created by these changes is still causing extreme problems in the UK economy almost 20 years later.

Jackson addressed the urgent problems arising out of the *Access to Justice Act* which were specific to Britain and which have been unknown in Australia. Some of Jackson's changes introduced a number of features from Australia to Britain such as reducing the cap on personal injury success fees from 100% to 25%.

At around the same time as the Jackson Report, the UK's *Legal Services Act* introduced corporatised law firms and Alternative Business Structures on the Australian model. Litigation funding had also previously been copied in Britain from Australia.

While several of these watershed developments have been copied from Australia by Britain, the reverse has not occurred and Australian jurisdictions have purposefully avoided replicating the UK's *Access to Justice Act* here and for good reason.

Jackson Reforms Designed For Britain Not Australia

Whilst Australia and the UK have many similarities in the parliamentary, legal and cultural spheres, there are nevertheless distinct differences between both countries' legal systems. For that reason and that the Jackson reforms were specifically designed to roll back the worst excesses of the UK's compensation culture, the Commission should be careful not to take Jackson at face value or assume that if something appears to suit the UK, it will also be good for Australia. If anything, the contrary applies.

This may well be the case with costs budgets. While the UK model of budget estimates for costs management agreed at the outset of litigation may appear to be a good idea in principle and one which Australian jurisdictions could consider, it is nevertheless a concept which has been newly-introduced in Britain and is still very much finding its feet at the present time.[11]

Instead of seeking to imitate some of the UK's experiments, Australia could learn a great deal by adopting a 'wait and see' position on how costs budgets evolve in the UK, particularly when they are the most contentious subject which the UK courts, law firms, bar and litigants are grappling with at the moment.

Uncertainties Over UK Costs Budgets

There are areas of gross uncertainty as to how specific procedural rules on budgeting should be interpreted, the value of litigation to which budgeting should apply and precisely how useful the entire budgeting exercise is.

The Commission should be aware of the new area of law and the plethora of cases which have erupted after the English Court of Appeal decision in *Mitchell v News Group Newspapers [2013] EWHC 2355* and the ongoing fall-out. The Appeal judges' hard-line application of the new rules promulgated in *Mitchell*, has been the subject of non-stop controversy, to the extent that a section of the UK bar together with a growing number of law firms, are suggesting that if budgeting goes too far and proves to be impracticable, litigating in the courts should be avoided altogether and parties should refer their disputes for resolution under the UK's *Arbitration Act*.[12]

Obviously, Australia would not want to experience the same problems here : the UK has the unfortunate habit of ramming through half-baked reforms and forcing everyone to comply with them with a rod of iron, only for the entire exercise to go out of control, hence the need for frequent reforms-of-reforms such as Jackson. The 'costs wars' above are an example of this where the UK government pushed the *Access to Justice Act* reforms on liability insurers who then brought the entire courts system to a halt.

Costs budgets may seem worthwhile at first sight but at the present time, the UK model has the appearance of being a 'quick-fix' measure, of a similar character to

[11] *Case Management Conferences - Your War Stories Please* Litigation Funding Magazine 24 June 2013 ; *Cracking the Whip On Costs Budgets* Litigation Funding Magazine 13 August 2013 ; *Court of Appeal Could Trigger Professional Negligence Wave with "Plebgate" Ruling* The Lawyer 28 November 2013 ; *Clients Rail Against Botched Litigation Budgets* The Lawyer 2 December 2013 ; *Mitchell : What Do The Judges Make Of It ?* Litigation Funding Magazine 28 April 2014

[12] *PI Lawyers May Turn To Arbitration Post-Mitchell* Litigation Funding Magazine 8 April 2014

many other failed reforms introduced in the UK and subsequently discarded after they proved disastrous.[13]

Limitations Of The Jackson Reforms

The Commission should also note that several of the Jackson reforms have proved extremely difficult to implement or are unsuccessful : these include the refusal by law firms and their clients to use Before The Event (BTE) Legal Expenses Insurance (LEI) to replace After the Event insurance (ATE) ; a similar refusal to use Damages Based Agreements (DBAs) ; the UK government's refusal to implement a Contingency Legal Aid Fund (CLAF) and the uproar over *Mitchell* and costs budgets.

While patience has been urged that the reforms may require "several years" to bed down, it is perhaps telling that the centrepiece of Jackson - making litigation less expensive - has had no effect on market rates which have been increasing higher than ever before.[14] Like the Woolf reforms which preceded Jackson, it may subsequently be discovered that for many of the changes, the cure was worse than the disease.

Legal services are a market just like any other and ultimately, the market will rule. If costs budgets are eventually shown to increase costs or fail to reduce existing levels of charges, there will be no point in using them. Instead, if clients had greater access to competitively priced services, using costs budgets would not matter either way.

The writer's comments are made from the perspective of having instructed hundreds of Australian and international law firms in all variety of insurance claims in Australia, the UK and worldwide and in some of the largest global claims. In our view, what is needed is greater competition.

Information Request 13.1 (Costs Awarded to Pro Bono Parties)

From a general insurance perspective, we believe that the costs awarded to any pro bono party should go to the legal professional who conducted the work.

This would provide a greater incentive for the legal profession to undertake more pro bono work when there is the strong likelihood over the medium term, that more practitioners will be unable to afford to do pro bono because of pressure on charging rates, market consolidation and increased competition.

Information Request 14.1 (Assisting Litigants In Person)

Self-representation is mostly a consequence of lack of competition within the legal profession, sky-high charges and unaffordability.

To assist Litigants In Person (LIPs), the following changes should be considered :

- LIPs should be required to complete a one-hour, automated, on-line course consisting of videos and multiple choice questions to acquaint them with the courts system and help them understand what will be required of them

[13] The Costs Budget rules are being made on the run : the £2M limit for cases subject to costs budgets was raised in April to £10M

[14] *Magic Circle Hourly Rates Hit All-Time High of £850* The Lawyer 26 November 2013

- the on-line course should be backed up with a guide produced by the Australian judiciary and similar to the "Handbook for Litigants In Person" which was prepared by a group of British judges in October last year
- completion of the course would be a pre-requisite to using the courts system : certification would be automated on-line
- prior to proceedings being issued by or against a LIP, compulsory mediation without lawyers would need to take place
- judges would follow up on the outcome of the mediation, the prospect of settlement and order further mediations where necessary
- open hearings in court should be dispensed with entirely and be replaced by hearings in chambers
- the formal court dress and procedures of cross-examination etc should be dispensed with for the purpose of getting at the issues in dispute

LIPs & The Family Court

Around 40% of parties in the Family Court are LIPs. We believe that a researcher from the Commission should spend one or two days to attend Family Court hearings to see how LIPs are ignored by judges and treated with disdain. Family Court and Circuit judges need to be re-trained at the Judicial College on how to deal with LIPs and there needs to be a proper complaints system in place for any LIPs who feel that they have not received a fair hearing. (At present, any complaints of unfair treatment are swept under the carpet as complaints cannot be made against judges or the courts administration.) LIPs in the Family Court have been ignored for decades.

Draft Recommendation 18.1 (Removing Restrictions on Damages Based Billing)

We consider there is minimal research by the Commission to justify DR18.1.

Irreconcilable Differences Between the UK & US Legal Systems

Both the US and Canada have certain similarities in their legal systems and use Damages Based Agreements (DBAs).

In comparison, the UK's legal system is distinctly different in several important ways from the North American model[15].

The repeated failure of reforms in the UK between 1995 and 2013 arose due to the differences between both the US and UK systems. In particular, the indemnity principle is a central feature of the English common law system. The US evolved its own costs system by omitting any costs reimbursement by Defendants. Consequently both the North American and English legal systems are like chalk and cheese.

Problems have repeatedly developed where the UK has tried to use the American concept of No Win No Fee and ended up with something totally impracticable. The Jackson reforms have brought home the reality of how No Win No Fee actually works and that 100% payments by insurers have ended. Instead (as in Australia), consumers are required to pay a part of their recoveries to lawyers. Unsurprisingly, this has spurred a large number of complaints to the extent that law firms were forced to refund £1M to clients during the past year. As UK litigants become more aware of their rights and how these agreements work in practice, No Win No Fee in the UK is becoming

[15] For a useful overview, see the comments of the Law Reform Commission of Hong Kong Conditional Fees Sub-Committee in its Report on Conditional Funding Agreements 2006

discredited.[16] We foresee the same thing happening in Australia with Conditional Costs Agreements being overtaken by other alternatives.

Despite the inherent differences between both systems, Jackson has risked experimenting with DBAs in Britain as a stop-gap measure : they were intended to replace 100% success fees (one of the many failures of the *Access to Justice Act*.)

Unlike the UK, Australia has had no such problems to overcome or reforms which have been necessary to implement. Despite this, the Commission has interpreted Jackson to mean that if the UK is doing it, Australia should do it too.

Why DBAs Were Proposed By Jackson

In our view, the Commission has ignored the primary reason why Jackson proposed the introduction of DBAs in Britain : DBAs were a trade-off to try and rein in the worst aspects of the UK's compensation culture.

Jackson proposed using DBAs to placate Plaintiff law firms for the abolition of 100% success fees and refundable ATE premiums : both of these had increased the volume of inflated claims which insurers were expected to pay and which had led to the get-rich-quick claims industry producing tens of thousands of fraudulent claims as recently as last year.

As mentioned above, the UK's *Access to Justice Act* debacle can be traced back to the withdrawal of Legal Aid for personal injury claims by the Blair government in 1997 : this was the fons et origo of Jackson introducing the concept of DBAs in the UK. The Jackson experiment in DBAs is yet another attempt to restore the equilibrium lost after the 1997 legislation turned into a catastrophe.

Australia Is Different From the UK

In contrast, Australia has experienced none of this incessant volatility of ill-conceived reforms. We have no compensation culture similar to the US, Canada or UK. Consequently, apart from the insistent calls from Plaintiff lawyers, there is no justification for introducing DBAs in Australia. In any event, there is not the slightest evidence that the UK's DBA experiment has achieved anything worthwhile at all.

We have seen no mention in the Draft Report of any of the points listed in our comments on DR7.2 above nor any discussion of the adverse effects of compensation cultures in the US, Canada, the UK or any other country where DBAs exist.

Instead, the Commission has merely accepted the siren call by the Plaintiff claims industry (including Legal Aid) that DBAs should be unleashed on consumers. This is despite the complete lack of understanding by consumers (as highlighted in DR6.1, 6.2 and 6.4) of how No Win No Fee really works and how clients are blithely unaware of the deductions and hidden charges taken from their recoveries.

Similarly, we have seen no research as to whether consumers will feel comfortable about lawyers taking large chunks of their recoveries of up to 50% or perhaps more.

[16] *Legal Ombudsman's Report on Operation of No Win No Fee Agreements Post-Jackson :* reported in Litigation Funding Magazine 8 January 2014

DBAs have long existed in the US and lawyers there are despised for it. The depiction of US lawyers in the numerous books of lawyer jokes is from the universal view in that country that American lawyers think of their fees first and their clients second.

Higher Insurance Premiums : Lessons Learned From HIH But Apparently Forgotten

From an insurer perspective, DBAs will increase the frequency and valuation of claims (not to mention an increase in fraudulent claims as occurred in Britain) which in turn, will produce much higher insurance premiums for everyone in the country. Obviously, the money has to come from somewhere.

In 2001, Heath Insurance Holdings (HIH), Australia's second largest general insurer collapsed. Following the introduction of No Win No Fee, between 2001 and 2003, there was a staggering increase in personal injuries cases. Both of these events led to the introduction of the regulatory framework which the Commission is now recommending should be overturned.

If the cost of insurance increases in Australia to fund a compensation culture, this will have the same dire consequences which occurred in 2001 when international insurers withdrew many classes of cover and insurance premiums for day-to-day activities went sky-high. Ordinary activities such as school excursions and community events became impossible. Is the Commission seriously suggesting that Australia should go down this path again ?

Keddies & The Hidden Problems With Conditional Billing

The evidence revealed by the Keddies scandal is that there is a serious, unresolved problem with consumers' failure to understand the full implications of conditional billing in No Win No Fee cases and what is being taken out of their recoveries. (This mirrors the UK position, the only difference from Australia being that in the UK a preliminary regulatory investigation has already taken place.)

The Commission baldly asserts that conditional billing and No Win No Fee arrangements have operated "successfully"[17] and relies on this as justification for going even further with DBAs.

The Keddies scandal tells a different story. As revealed in the reports in the Fairfax Press between 2008 and 2013, the full scale of the problems with conditional billing have yet to surface at all. No wider investigation was carried out by the regulators, the courts or the NSW government.

Keddies may only be the tip of the iceberg and these problems could well be endemic.

Keddies were the largest Plaintiff law firm in NSW prior to being bought by Slater & Gordon for $30M. One of Keddies' bankrupt partners was on the governing council of the NSW Law Society. If the largest firm with the biggest income and represented on a supervisory body has these types of problems, what is the position likely to be in smaller law firms ?

The legal regulators have not received thousands of complaints because clients do not know how to make them (according to the NSW LSC). The use of conditional billing for categories of claims where liability is invariably not in issue such as in workers

[17] Draft Report p.537

compensation, is an area where the effect of No Win No Fee arrangements has not been examined.

Jackson's Recommendation Of DBAs : A Success ?

Aside from the unanswered points above and how a UK-centric review of an explosion of costs due to the UK's compensation culture, can somehow fit a totally different Australian context, the UK is currently the only common law country with a legal system similar to Australia's which is experimenting with DBAs.

The Draft Report is silent on the use of DBAs in Britain to date and how they have been received.

All that is said is that the "take-up of damages-based billing by law firms has been very limited to date."[18] Has the experiment been a success ?

Like other areas of Jackson, the answer is a resounding "No".

A blog by a solicitor to a UK article[19] described DBAs in this way :

> *"In my experience so far (before they have even been used!) DBAs have been met with almost universal derision, particularly in the PI [Personal Injury] world. Only if the case is high value, unlosable, and requires little work, will it actually be worth it when compared with a CFA [No Win No Fee Agreement]. Once the client is signed up there is no going back, and that gamble is unacceptable."*

Some legal commentators have labelled DBAs as "Don't Bother Agreements"[20]. UK law firms are completely avoiding them because the UK regulations require 100% DBAs rather than any hybrid being used : the reason is that clients baulk at the prospect of lawyers grabbing up to half of their recoveries.

The fact that the UK Ministry of Justice is having to tinker about with all of this is an indication that features of the North American legal systems are not being welcomed by British consumers with open arms. As the UK legal services market is plagued by a compensation culture, clients are more demanding and object to a large share of their recoveries going to lawyers.

In any event, the market will rule : everything would depend on how DBAs (as with conditional costs) were explained to clients in absolute, simplistic terms and whether consumers truly understood how much they would be giving away to lawyers.

The evidence from the Keddies fiasco is that clients (including paraplegics and terminally ill clients) failed to comprehend at all what deductions were made from their recoveries in their conditional costs cases. Before indulging in a similar experiment as the UK, the primary problems of hidden deductions and obscure terms and conditions buried in fine print in conditional billing needs to be examined by the courts, the regulators and governments in Australia.

As deductions in conditional costs cases would amount to far less than in cases where DBAs might be offered, DBAs would therefore incite far more controversy and require

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[18] Draft Report p.534
[19] *Firms Are Getting Cold Feet Over DBAs* Litigation Funding Magazine 26 March 2013
[20] *Litigation Funding : Calling For Back-Up* : Litigation Funding Magazine 3 March 2014

far greater scrutiny and much tighter regulation than conditional fees, if implemented. The latter nevertheless requires further in-depth investigation before addressing the question of whether DBAs would be in the public interest.

Information Request 18.1 (Limits for Conditional & Damages-based Fees)

Changes to the 25% Cap on Conditional Fees

Jackson was first and foremost, an attempt to restrain and turn back the UK's compensation culture which has been out of control since 1997. How successful this latest attempt has been to close Pandora's Box remains to be seen.

One of the cardinal errors of the *Access to Justice Act* was to allow law firms to claim a success fee of up to a 100% in conditional costs cases. Although this was payable by Defendants, the concept was unworkable from the start as UK liability insurers raised every conceivable technical point to delay or reject payment which led to thousands of cases being held up in the courts system, consumers suffering and the courts administration becoming unworkable.

This state of affairs continued for several years until a crisis point was reached[21] and Lord Justice Jackson was requested to review the entire system. During the preparation of his report, he travelled around Australia and met with local judges, academics and lawyers to gain a working knowledge of the status quo and differences between the Australian and UK legal systems.

One of the main features of the Australian system which impressed him was the limit of 25% on success fees paid to law firms by clients in cases where conditional billing was used. There was no evidence in Australia that clients were being turned away in droves because success fees were not high enough. Australian clients were willing to pay up to an additional 25% of costs compared to the UK where clients paid nothing. (Whether Australian clients have been fully aware of the deductions made from their damages by lawyers is another matter.) There was no evidence of thousands of Australian law firms having gone out of business by taking on countless loss-making, unsuccessful cases.

With that in mind, we believe the Commission has ignored

- the UK's catastrophic compensation culture in which 100% success fees played a prominent role and
- that these fees were payable by Defendants (not claimants) and
- the basis for Jackson's recommendation that the UK copy the 25% cap on success fees which has been the status quo in Australia for quite some time

The Commission has given no reasons for disregarding the disastrous events in Britain over the past 15 years and why it should recommend 100% (or higher) success fees when

- consumers have not been independently consulted in any way and

[21] See *Straw Seeks 'No Win No Fee' Cap'* Daily Mail (UK) 23 September 2008 : "Jack Straw attacked 'no win no fee' lawyers yesterday for claiming costs that were 'nothing short of scandalous'. The Justice Secretary spoke as he launched a review into such agreements to look at limiting how much lawyers can charge in such cases… Mr Straw said "I am….going to consider whether to cap more tightly the level of success fees that lawyers can charge."

- the UK's mistakes have been conscientiously avoided by Australia, Hong Kong[22], New Zealand, Singapore and other countries

In particular, the 2006 Report on Conditional Fees by the Hong Kong Law Reform Commission contains further irony : Australia is complimented for its low success fees compared to Britain and the stark differences between the North American and English legal systems are emphasised.

The Commission needs to explain why the same mistakes made by the UK would not be repeated here, what evidence there is that consumers will agree to pay more than 25% for success fees and why there would not be a high probability of a compensation culture being fuelled in Australia if the cap on success fees was removed.

Absent Complaints About No Win No Fee & Failed Regulation

The Commission states that "there is little controversy regarding the operation of conditional billing - stakeholders generally agree that it promotes access to justice"[23], that the "regulations seem to provide a proper framework for consumer protection…" and that the operation of conditional billing is "successful".[24]

All of these are unfounded assumptions based on glowing reports given by the principal "stakeholders" - Plaintiff law firms - and without reference to consumers, governments or insurers. The unpaid clients of Keddies who were reported to be owed almost $7M (post-bankruptcy of the partners) would obviously disagree that there is "little controversy" or that conditional fees are "successful".

The Commission's comments at page 537 of the Draft Report also contradict DR6.1, 6.2 and 6.4 : the regulatory system which is supposed to protect consumers is obviously not working at all : clients do not complain because they are unaware of the procedures to follow or to whom their complaints should be made.

Keddies was the largest personal injuries law firm using conditional billing in Australia's most populous state. Their 100+ disputed cases involving over-charging and hidden deductions may well point to an industry-wide problem.

Widespread Complaints in UK v No Complaints In Australia

The UK regulators have only become aware of the same issues as in DR6.1, 6.2 and 6.4 during the past 12 months. Meanwhile, Australian regulators, although aware of the same problem between 2008 and 2013 did nothing or were prevented from doing anything due to the absence of complaints which are apparently a pre-requisite to taking action.

While the *Access to Justice Act* was in operation, there were no widespread complaints by clients about hidden deductions from their recoveries in conditional fee cases, specifically because no deductions by Plaintiff law firms were made : the 100% recovery together with up to 100% success fee and the ATE premium were all paid by Defendants (usually insurers).

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[22] See *The Law Reform Commission of Hong Kong Conditional Fees Sub-Committee Consultation Paper* September 2005 Section 2. Contingency Fee Arrangements in the USA and p.119 Criticisms of the American Contingency Fee

[23] Draft Report p.536

[24] Draft Report p.537

The disputes which occurred about this were between the Plaintiff law firms (or claims farmers) and insurers when the latter identified countless cases where excessive amounts had been charged by the former. This was the subject of the 'costs wars'.

The same type of costs auditing or verification has not occurred in Australian No Win No Fee cases. The gross recovery and costs payable by Defendants are paid direct to law firms who then deduct their conditional costs, disbursements, success fees and any other amounts. Only in a few cases such as Keddies have excessive deductions been identified.

Thus in Britain, for the same types of cases, there were tens of thousands of instances of over-charging[25]. In Australia, there are hardly any, the difference being that in Australia, there is no system[26] in place for clients to scrutinise whether they have received their correct entitlement or whether their net payment was what they had been promised at the outset of the arrangement.

Limits on DBAs

As stated above, DBAs are currently a notable failure of Jackson in the UK.

Since Jackson came into operation in April 2013, almost no law firms have offered DBAs to their clients as they will not risk losing money on high risk cases and clients will not agree to large portions of their recoveries going to lawyers.

When serious questions already exist in Australia as to unclear explanations on costs being given to clients in cases involving conditional billing, the Commission's own findings and recommendations indicate that this area is a mess and requires enhanced regulation.

How could DBAs possibly be used without there being proper reform of law firm Retainer Agreements, Conditional Costs Agreements, Bills of Costs and an explanation of billing which is simple to understand and thorough in its disclosure ?

Transparent No Win No Fee Before DBAs

The outcome of reforms in DR6.1, 6.2 and 6.4 for conditional fees would need to be monitored for some time before DBAs could even be considered as to do otherwise would be compounding the same problem.

Instead of clients currently assuming that No Win No Fee was "free"[27], that they would not have to pay anything and that a large payment would be heading their way at the end of the process, there would be a simplified explanation of percentage success fees and deductions and that clients would be free to shop around. This would promote greater competition than at present and benefit consumers.

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[25] Pre-Jackson. After Jackson, there have been the further complaints reported to the UK Legal Ombudsman.

[26] An independent audit of conditional fee settlements or damages awards could be carried out by the courts for a small fee at the conclusion of the case with a simplified statement of account for claimants.

[27] Most consumers believe that they will never be called on to pay anything in a No Win No Fee Agreement. The UK Legal Ombudsman suggests that the term is a misnomer and should not be used. In Australia, this has not been tested under the false and misleading rules. Is the term "No Win No Fee" misleading consumers ?

A legal services aggregator or an auction website would create much more of a market than currently exists so that consumers could see exactly how law firms charged and whether they were expensive or not. At present, this information is clouded in the mists of legalese. Some firms might quote high success fees while others wouldn't. Consequently, in advocating DBAs at this stage, we consider the Commission is putting the cart before the horse.

The evidence that DBAs appear to operate acceptably in the US (where no costs are payable win or lose) applies differently from the legal systems operating in Australia and the UK which do not have punitive damages, jury damages, extremely active appellant courts or damages awards inflated to stupendous levels.

We believe that a minimal number of Australians would be willing to sign away a large part of their damages or settlements if DBAs were available and were explained in a simplified, transparent, 10-line summary.

The culture surrounding No Win No Fee has to change. In our view, the Commission is proposing the extension of an existing problem when the original problem hasn't even been examined, let alone sorted out.

DBAs & Absent Competition On Pricing

If DBAs are adopted before No Win No Fee is overhauled, they will make the Australian legal services market more uncompetitive because

- lawyers' actual charges will not be explained properly or understood by consumers
- the legal profession controls the way in which explanations on charging are delivered to the public (in legalese, jargon and legal terms and conditions)
- the explanation of charges needs to be removed from their hands altogether by an independent government body such as a Legal Costs Ombudsman or Consumer Rights Advocate (in Keddies, the NSW LSC was powerless to address clients' complaints, investigate what had occurred or punish any wrongdoing)
- the No Win No Fee format has been discredited in the UK, Australia and other countries and there are alternatives
- law firms will have absolutely no incentive to reduce their charges as DBAs will be in their interests, not the client's

Information Request 19.1 (Legal Expenses Insurance)

We are a member of the Australian insurance market and a specialist in legal risk. We have contacts with all Australian insurers and brokers supplying LEI and we know the international LEI market. We have up-to-date market knowledge on almost all Australian insurers, Australian LEI products and LEI available internationally.

In our view, the Commission's assessment of Legal Expenses Insurance (LEI) in Australia is generally correct.[28]

Australians view insurance as a wasted purchase. They resent having to pay the high cost of car and home insurance as a result of successive governments over the past 50 years imposing community taxes on policy cover such as fire-fighting levies. Some of these have resulted in a tax-on-a-tax-on-a-tax.

[28] Draft Report, Section 19 Bridging the Gap, Key Points page 551

Australian insurers have made repeated representations to all governments for decades about this but have been ignored because politicians view insurance as a way of raising quick revenue by indirect taxation. Minimal progress has been achieved but the problems largely remain.

For these reasons, on a comparative basis, the cost of insurance will remain high in Australia in relation to other countries and Australians will continue to avoid paying for any insurance which is not essential or compulsory.

Federal, State and Territory governments have shown complete disinterest in using insurance to offset risk for consumers in accessing the civil justice system.

Many politicians are lawyers or former lawyers who represented clients in claims against insurers. Many of them view the insurance industry in the same way as Plaintiff lawyers.

This failure to accept the utility of insurance as a social good is part of the broader problem of why Australia lags behind Singapore and Hong Kong in financial services.

Even with scaled costs, fixed fee schedules and predictable costs guides (page 567 of the Draft Report), the public would refuse to buy LEI.

There is complete apathy by Australian and international insurers for using LEI in Australia which is viewed as an extremely tough market to penetrate and in many ways “unique” (ie unfathomable compared to the US, UK and EU).

Existing forms of LEI will change dramatically as the cost of legal services decreases. In the US, UK, Australia and many other countries, there are too many lawyers, merging into larger groups, chasing less work for less payment.

The UK market has returned to its pre-*Access to Justice Act* indifference to LEI and now has a closer resemblance to the Australian LEI market. Before Jackson, ATE and No Win No Fee agreements were ubiquitous ; now, both markets have collapsed.

<u>Increasing Competition In Civil Legal Services</u>

Australia started the global revolution in legal services which is now being taken to its next stage by the UK with Alternative Business Structures and the *Legal Services Act*. Australia is being left in the slow lane and missing out on opportunities and efficiencies being pursued by other countries.

Australian lawyers are uncompetitive and unaffordable. This is damaging for consumers and businesses and wasting government funding. It is also holding back growth in the Australian economy and preventing expansion in new markets. Increasing competition should be the number one priority for all governments in Australia.

New developments in productivity are being suppressed due to absent competition such as alternatives to No Win No Fee and Australian equivalents of UK-style Alternative Business Structures.

In our Submission, the Federal government should have a dedicated, open channel within Infrastructure Australia, the Federal AGD, the ACCC or another area of government for actively promoting greater competition in the public and private legal

services sectors. This sector is one in which Australia has excelled and yet there is no co-ordinated area of government, regulation, courts system or legal profession which can advance the need for greater competition.

The reform programme arising out of the Commission's Final Report in September should begin the process of increasing competition rather than merely duplicating experiments from the UK. It would not cost the government anything to do this and there would be extensive benefits to Australia's economy. Australia is the global leader in innovation in this area and should be maintaining that lead by opening up competition further.

Information Request 19.2 (Legal Expenses Contribution Scheme)

In contrast to the Federal government's austerity programme, the Commission has proposed at 19.4 a Legal Expenses Contribution Scheme (LECS) which could only succeed if an enormous amount of additional funding was allocated by the Federal government, even though private funding arrangements are already available, albeit at greater expense.

In a time of austerity, this proposal seems almost impossible to justify. The most important element of the plan, the cost, has not been identified or evaluated.

This idea is nothing new and was first proposed in an alternative form in the 1960s by the English bar. It was most recently dredged up again by Jackson. During the past 50 years, the concept has been repeatedly side-lined as no past or present government in the UK has been willing to put up the huge amount of funding required to implement it.

The most recent version of a CLAF as proposed by Jackson, drew on the Hong Kong experience of CLAFs. Neither the previous British Labour government or the existing Conservative-Liberal coalition government has been willing to allocate funding for such a scheme.

A LECS would have no effect on exorbitant legal charging which is the greatest obstacle to extending legal services more widely. If anything, a LECS would reinforce the current cartel system which thrives on uniformity and lack of competition to maintain unaffordable costs.

With the pursuit of budget cuts and reduced spending, the government could hardly justify splurging huge amounts on excessive lawyers' fees in such a scheme when spending in other areas such as the ABC and CSIRO is being cut to the bone.

Information Request 21.3 (CLCs / Funding Distribution / Competitive Tendering)

Legal Aid's Failure To Be Competitive & Withdrawal Of Services

Legal Aid entities around the country employ the largest number of lawyers on a group basis. Collectively, they receive around $0.75BN in public funding each year. As statutory authorities, this money is allocated exclusively to them. They have no competitors. It is a one-horse race.

Much of the information quoted and relied on in the Draft Report has come from within the Legal Aid community or the legal profession. None of it says that Legal Aid is doing a bad job or that its work should be subject to budget reductions or that its case-handling should be more efficient. Because there is no public tendering system and

almost no objective scrutiny or monitoring, Legal Aid could hardly be expected to say anything else. Once again, the legal profession makes its own rules and sets its own requirements.

The result is a moribund, uncompetitive system incapable of being more productive for less cost.

The cost of Legal Aid operating its services is unrelated to any quantifiable need for those services. According to NSW Legal Aid and the NSW Attorney General's Department

> *"there is no link between the volume of funding and the cost associated with providing specified services. Funding is indexed annually using 'Wage Cost Index 1', which is based on 75 per cent of a wage cost factor and 25 per cent of consumer price index."*[29]

This lack of competition in public legal services has led to an inability by Legal Aid to help what should have been its largest group of clients in the country - the low to middle income-earners whose taxes pay to keep it running.

The Civil Legal Aid Vacuum

Since 1997, Legal Aid has limited itself to assisting the under-privileged and poor while most income-earners have been turned away.[30]

If any re-structuring has occurred in the past 15 years, it has not made Legal Aid more efficient or competitive by reducing its cost to governments. On the contrary, Legal Aid has never ceased complaining that it needs more funding.[31] It has been supported in this by external law firms and the bar.

Australia may not be the biggest spender on Legal Aid compared to many other countries but its legal services market is the most commercialised in the world. Australia should therefore be at the top of the list for spending the least money as its legal services sector is the most dynamic of all countries. In addition, the Legal Aid services available in some countries are more extensive than those in Australia.

In our view, Legal Aid has had the ability, certainly for the past 10 years or more, to assist income-earners to a far greater extent, even with less funding than it has received during all of that time.

The fact that it has been incapable of doing so, demonstrates that the system has been dysfunctional over a very long period.

After the 1997 cuts, Legal Aid continued opening new offices. With a national network the envy of any large law firm, only the under-privileged have received any help with less than ten per cent of households likely to qualify for assistance.[32]

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[29] Draft Report page 646
[30] Draft Report pp 670, 671
[31] *Cuts Will Put Human Rights At Risk : Lawyers* AFR 9 May 2014
[32] Draft Report page 25

Opening the Legal Aid Budget To Public Tender

We agree with the Commission that "there needs to be a move away from the historically based distribution of funds" for the Legal Aid system. We also agree that "a competitive tender whereby potential providers indicate the level and types of services they could provide…" is a step in the right direction.

However, tendering should not be limited solely to the non-profit sector, LACs and CLCs if the same objectives of improved services, reduced cost and higher efficiency can be achieved : there should be full, open market tenders conducted by the Federal AGD in consultation with the SCLJ.

We believe that specific areas of civil Legal Aid could be handled more efficiently and for less cost outside of Legal Aid. As in the UK, the Australian Legal Aid budget should be open to a full, public tender and all Legal Aid providers including LACs and CLCs should have to compete for their funding.

Our commercial specialisations are not limited to insurance and we are represented in the UK, hence our detailed knowledge of events there. In the event that full public tendering was possible, we and our joint venture partners (which may include Australian and/or multinational consortia), would wish to submit a tender in relation to specific areas of Legal Aid.

The true cost of Legal Aid (as a law firm) making its services available has never been tested against any rival on the same publicly-subsidised playing field. It only has its own uniform charging rates within the highly uncompetitive legal profession.

Whilst the Commission has relied on information generated from within the Legal Aid community, that information is inherently stilted as it has completely ignored whether Legal Aid should cost the government as much as it does or indeed, anything at all.

Whether criminal and civil Legal Aid together consume 0.14% of total government spending is beside the point : these services are subsidised by governments which are answerable to taxpayers for optimum-value spending and if the services are outdated and inefficient, they should be changed.

In our submission, it is indisputable that greater competition and less cost are capable of being achieved by full and open public tendering and that Legal Aid should be put to the test. The potential savings could amount to tens or hundreds of $Ms.

We are not advocating privatisation of Legal Aid which is wholly dependant on government funding and which no-one would buy (as it has no assets and its value is less than zero). Our proposal involves opening up areas of the Legal Aid system to competition so that services are improved, government expenditure is reduced or eliminated and access and affordability of services is widened. On an objective basis, in all of these areas at present, Legal Aid is deficient.

In a time of austerity and with the Federal Budget having been delivered on top of the recent findings of the Audit Commission, there is no reason why Legal Aid should be viewed as a sacred cow.

Our submission is that full and open public tenders should be advertised for any or all areas of the total Legal Aid budget in which savings to governments could be secured

by provision of equivalent or better services and that this be agreed between the Federal government and members of COAG.

Draft Recommendations 5.1, 6.1 - 2, 6.3, 7.1 - 3, 13.1, 21.2 - 4, 23.3

Increased Competition & A Legal Services Auction Website

We consider the legal services market in Australia could become more competitive with a legal services auction website. With reference to IR21.3 above, a tender by our consortium could include the operation of such a website.

Auctions of legal services business would take place in the open market. The NSW and Victorian State governments already auction their procurement services.

An auction website would enable the lowest bid (or the best bid in comparative terms) to receive client business.

Increased Affordability With An Auction Website

Increased competition will fill gap areas and encourage affordability for consumers who have difficulty paying exorbitant legal fees.

We are confident that all lawyers will eventually grow accustomed to bidding for work in the same way that legal panels have always required lawyers to bid for work. Insurers all have panels whose members know what their competitors charge and which is not a secret to anyone. If commercial law firms are required to disclose information on their fees, then why shouldn't all law firms ?

An auction website will be beneficial for clients who are seeking the best price and terms of service from lawyers in the open market. In the context of DR6.1, 6.2, 6.4 and 18.1 above, greater transparency would develop in charging.

The Commission's Draft Report & Government Austerity

The Federal budget released in mid-May represented a watershed in public spending.

In December 2013, the Federal Treasurer warned of the need for "serious policy change" as the Mid-Year Economic & Fiscal Outlook forecast a combined deficit of $123BN over the next 4 years and for gross debt to hit $667BN in a decade.

The Treasurer warned that "returning the budget to sustainable surpluses will not be achieved by piecemeal cuts here and there. It will require a sustained and structural overhaul of expenditure and the elimination of waste".

Since that time, the Federal government refused to continue funding for programmes such as motor vehicle manufacturing (Toyota and GM Holden), food production (SPC Ardmona) and air travel (Qantas). In addition, spending on the CSIRO is to be cut by 20% and the pension age is set to be raised to 70.

A correction is already occurring in the Chinese economy this year. Australia is highly reliant on trade with China. As Australia is already experiencing recession conditions in the non-mining sector, the government has no choice than to cut inefficiency and waste as far as possible otherwise taxes will increase and unemployment will rise.

We believe that future reductions in government spending on public legal services will be unavoidable : this is already occurring. In our submission, the Commission's recommendations should give greater recognition to this fact and to ways of reducing government expenditure on publicly funded legal services. Australia should be focusing on ways to make our economy more resilient and internationally competitive. Legal services is an area where we can be not only world class but the global leader.

In view of this document being posted on the internet by the Commission, we reserve all our rights in relation to the contents of this Submission.

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