Law Council
OF AUSTRALIA

Responses of Law Council Constituent Bodies to specific queries raised by Commission

Productivity Commission

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Introduction

1. This paper has been prepared in response to queries raised by the Productivity Commission and addresses the following issues:

    (a) How can the "business of justice" be better conducted? Are there examples of 'best practice' in court procedures and processes?

    (b) How do legal costs accumulate, particularly in family law matters? What rates are commonly charged by lawyers for their services?

    (c) In which areas of the law and on what terms are lawyers most likely to be engaged or required by those with a legal dispute or problem? Which areas of the law is it possible or common to charge on a conditional costs basis or to defer payment of fees until the conclusion of a matter?

    (d) The following responses have been provided by the Law Council's constituent bodies and should not be taken to reflect the views of the Law Council or its other constituent bodies.

2. If there is any further information sought, or if there are any queries about the information already supplied, the Law Council would be very pleased to assist.

'Best practice'

3. The ACT Law Society (ACTLS) advises, in relation to the ACT:

    Family Court

    (a) As a general comment the Committee notes that the continued under-resourcing of the Courts undermines the "business of justice". Under-resourcing has many significant impacts including:

        (i) causing delays which means disputes can become more entrenched;

        (ii) creating the necessity for more interim decision- making;

        (iii) impacting children's well-being whilst waiting for certainty;

        (iv) in children's matters, delays in the preparation of Family Reports which may be a vital catalyst in resolving the matter;

        (v) in property matters, delays mean valuations need to be updated and financial information changes.

    (b) The Application for Consent Orders process in the Family Court is a way for parties to obtain final court orders by completing an application and drafting Orders. Orders may be essential where transfer of a property is involved (to obtain a stamp duty exemption) or where an Order binding a superannuation Trustee is needed. In these instances, formalising arrangements which may have been reached at family dispute resolution, mediation or by negotiation is an essential way of completing the agreement between the parties and the only way of finalising the matter with certainty (apart from a Binding Financial Agreement which requires both parties to be represented). Many self-represented litigants use this process to obtain final orders.

(c) The Legal Aid lawyer assisted family dispute resolution is a valued process in the ACT that is seen to assist settlement of mainly parenting matters. Often there are complicating factors which means that the parties had been screened out of family dispute resolution by the Family Relationships Centres. This process can be a valuable circuit-breaker even where Court proceedings have already been commenced. We note that this process is only available where at least one party, or the Independent Children's Lawyer, is eligible for legal aid.

(d) The Conciliation Conference process in the Family Court has a high settlement rate. The factors which lead to successful settlement are: full and frank disclosure, parties and their solicitors turning their minds to settlement; a directed conciliation process which is outcome focussed. Having the imprimatur of the Court is also seen a positive force in achieving settlement. However, the parties have had to complete and file court documentation and attend a directions hearing prior to this Court event.

Federal Court and Federal Circuit Court

(e) The ACTLS is advised that the performance of the Courts is strong in two ways when dealing with matters at first instance: (a) the Individual Docket System means that practitioners/parties are required to engage actively in the cost-effective, expeditious and efficient conduct of proceedings (the scope to seek multiple adjournments is significantly reduced because the relevant docket Judge is less inclined to allow proceedings to become needlessly protracted); and (b) the Court itself is required to meet performance standards, including case disposition timeframes and judgment delivery deadlines (information on this is contained in the annual reports of the Courts). Similarly, at the appellate level, the Federal Court has put in place very streamlined processes in terms of the settlement of appeal books, the listing of matters for Full Court Callover and the hearing of matters.

(f) At the micro-level, a particularly effective case management tool is the use of short minutes of consent orders for consideration by the docket Judge sitting in Chambers. This avoids the need for parties to attend in person, thereby reducing court lists and waiting times in court. Significant legal costs can be saved in the process.

ACT Magistrates Court and Supreme Court

(g) Part of the cost of accessing courts is the inconsistency of approach adopted, particularly in the ACT Magistrates Court and Supreme Court. These matters are under review and once there is a common approach in all civil litigation, it should streamline those processes and hopefully build in a compulsory and well-funded method of alternative dispute resolution. Whilst ever there is a system where each Judge does whatever they want, there are multiple opportunities for inefficiency to creep in to litigation. The Law Society's members report experiencing much greater consistency and efficiency in the Federal Court.

4. The Law Council is advised by the Bar Association of Queensland (BAQ) and the Queensland Law Society (QLS), as follows:

(a) The Federal Court in Queensland is widely considered to be the exemplar of case-management. The Federal Court uses an individual docket system, but allows for certain matters requiring specific expertise to be referred to a judge

of a specific panel (Intellectual Property/Patents, Admiralty and Tax). The Court also has a fast-track system, primarily for commercial matters meeting certain criteria. Matters can be initiated, added or removed from the list, as deemed appropriate by the Docket Judge.

(b) The Family Court in Queensland runs a *quasi* docket system, which sees a matter assigned to a specific judge once it is set down for trial. Prior to that, the matters are managed by Registrars and only referred to Justices (or the Principal Registrar) when an interim hearing is required. The Family Court also has a specific list, the "Magellan List", for case managing matters where a "*Notice of Child Abuse, Family Violence, or Risk of Family Violence (Form 4)" is filed in a parenting matter,* alleging sexual abuse and/or serious physical abuse of a child. The matter is referred to the Family Court Magellan Registrar, and if included on the Magellan List, the Magellan Judge and Magellan Registrar manage the case. It is the aim of the List that the same Magellan Registrar and Magellan Judge will manage the matter throughout. The Court uses its best endeavours to have Magellan matters determined within 6 months of the matter entering the list, but for reasons beyond the court's control this is rarely achieved in Queensland – the lack of experts (primarily private psychiatrist) available to deal with the matters within this time frame makes for significant delay.

(c) The Federal Circuit Court cases manages its matters through an individual docket system, with the matter staying within the docket of the Judge to whom it is first randomly assigned, through to trial. The Federal Circuit Court also operates Specialist Panels in General Federal Law for Administrative Law, Admiralty, Commercial, Industrial, Human Rights, and National Security. It also has a National Child Support Panel, being a Specialist Panel in Family Law.

(d) In relation to Queensland State Courts, the BAQ advises:

(i) After a lengthy review chaired by the Hon. Justice Byrne to enhance the efficient resolution of civil cases, the Supreme Court of Queensland operates different case management programs, including:

(ii) Case Management in Complex Criminal trials (PD 6 of 2013);

(iii) Case Flow Management – Civil Jurisdiction (PD 17 of 2012) – see also, the helpful "Caseflow Management: A Plain English Guide" which explains when the Court will intervene of its own motion to bring slowly progressing matters to a timely resolution;

(iv) The Planning and Environment Court sets out its Case Management in PD 2 of 2011;

(v) The District Court PD 3 of 2010 established a commercial list in the District Court to effect the expeditious resolution of commercial matters;

(vi) The Magistrates Court's Practice Direction No. 5 of 2008 applies to Multi-Day Hearings Case Management at Brisbane Magistrates Court, and applies a case management regime to requests that listings in excess of three consecutive days;

(vii) The Queensland Civil and Administrative Tribunal (QCAT), has a range of case management techniques, including, for example, PD 8 of 10,

"Directions relating to Guardianship matters" and, PD2 of 10, "Directions relating to the Legal Profession Act 2007"

(e) The BAQ advises that all of the courts in Queensland ought be commended for their regular attention to improving and enhancing the efficient access to justice through their respective case management processes. However, it must be said, that even the best case management process is simply no substitute for sufficient judicial resources.

5. In relation to South Australian courts, the Law Society of South Australia (LSSA) advises as follow:

   (a) Best practice does not always equate to an effective system, further case management is not always the panacea. At the end of the day what works best depends on the nature of the dispute. Courts and Tribunals develop practices and procedures to suit the nature and extent of their jurisdictions.

   (b) For instance in South Australia the Workers Compensation Tribunal is recognised by some to have an effective dispute resolution system. However the workers compensation legislative framework has a role to play in what steps are taken as part of this process. This does not mean that this Tribunals processes are amenable to duplication.

   (c) Conversely the South Australian District Court records that only 5% of civil matters go to trial. By itself that would be viewed as a good result for the pre-trial case management process. However that result is achieved in some cases because parties are worn down by attrition and the costs of continuing are prohibitive.

   (d) We therefore urge caution in promoting one system over another. Rather those that are not working should be scrutinised to ascertain why and specific solutions to suit their needs promoted. The one constant is that market forces will ultimately determine those matters, principally criminal and family law, where the clients are legally aided and the hourly rates are derisory.

   (e) In terms of the experience of court users, Chapter 8 of the Legal Australia-Wide Report contains an analysis of "satisfaction rates". At the end of the day whether a "court user" is satisfied is a very subjective outcome influenced by a variety of personal factors, as the survey results demonstrates.

6. In relation to NSW case management procedures, the Law Society of NSW advises, as follows:

   (a) Effective case management procedures provide opportunities to control the work of the Court, streamline proceedings and reduce costs. To ensure that these benefits are realised, it is important that judges consistently enforce case management directions including, where necessary, by imposing cost sanctions on parties who do not meet court imposed deadlines.

   (b) In appropriate matters, consideration could be given to introducing stricter case management directions which limit the time parties have to lead evidence, cross examine witnesses and make submissions in order to truncate proceedings and contain costs. This approach, known as the

"stopwatch method", is an option available in the Commercial and Technology and Construction Lists of the Equity Division of the Supreme Court of NSW.[1]

7. In relation case management procedures in Western Australian courts, the Law Society of WA (LSWA) advises, as follows:

   (a) With respect to the efficiency of Western Australian Courts, the Law Society of Western Australia has observed that the efficiency of a Court strongly correlates with its level of funding. For example, the Perth Registry of the Federal Court of Australia is considered the most efficient court in Western Australia and coincidentally, is the recipient of the most government funding, albeit Federal funding.

   (b) It can also be reported that the individual docket system of case management is the most effective and efficient, but also, may be the most expensive. This is because the docket system process is subject to the Judge's capacity to manage the case efficiently, which, in turn, will depend on the resources of the Court.

   (c) The Federal Court of Australia and the *Commercial and Managed Cases List* ("CMC List") in the Supreme Court of Western Australia also utilises an individual docket system of case management, which also facilitates the efficiency of the Court.

   (d) Federal Court of Australia

      (i) The Federal Court's *Guide to the Individual Docket System In the Original Jurisdiction of the Federal Court of Australia* ("the Guide"), available at http://www.fedcourt.gov.au, should be read in conjunction with Practice Note CM 1, and the obligations imposed by section 37M and 37N of the *Federal Court of Australia Act 1976* in relation to the conduct of proceedings in the Court consistently with the overarching purpose of civil practice and procedure.

      (ii) The Guide posits that the Federal Court uses an individual docket system for the listing and management of civil cases (other than cases in its appellate jurisdiction). Under this system, civil cases are generally allocated to a Judge at the time of filing and managed by that Judge until that case is finally disposed. In some areas of law requiring particular expertise, that allocation is to a Judge of a particular specialist panel.

      (iii) The individual docket system aims to promote the just, orderly and expeditious resolution of disputes and to enhance the transparency of the processes of the Court while providing the flexibility and adaptability that each individual case may require. By promoting continuity of case management it encourages the use of fewer management events with greater results and early settlement through issue identification and narrowing and the use of timely and appropriately structured alternative dispute resolution.

      (iv) Parties and their lawyers are encouraged to confer early and frequently on both procedural and substantive issues, monitor progress and

[1] Practice Note SC Eq 3, paragraphs 50 – 53

compliance constantly and to make early contact with the docket Judge through his or her Associate about any emerging issues or concerns.

(v) The experience of the Society is that the objectives expressed in the Guide are frequently achieved.

(e) Supreme Court of Western Australia

(i) *Rules of the Supreme Court 1971* ("RSC") O 1 r 4A Delays, elimination of, states plainly that the practice and procedure of the Court aims to reduce delay from the date of initiation of proceedings to their final determination.

(ii) RSC O 1 r 4B Case flow management, use and objects of, states that matters will be managed and supervised with the objects of:

- promoting the just determination of litigation;
- disposing efficiently of the business of the Court;
- maximising the efficient use of available judicial and administrative resources;
- facilitating the timely disposal of business;
- ensuring the procedure applicable, and the costs of the procedure to the parties and the State, are proportionate to the value, importance and complexity of the subject matter in dispute; and
- that the procedure applicable, and the costs of the procedure to the parties, are proportionate to the financial position of each party.

(iii) The Supreme Court of Western Australia, *Practice Direction 4.1.2 – Case Management by Judges – the Commercial and Managed Cases (CMC) List*, 2009 provides that cases requiring more intensive supervision than that currently provided by the Registrars pursuant to O 4A of the RSC are managed in the CMC List. Cases in the CMC List will, as far as possible, be docket managed by the Judge likely to hear the trial of the case.

(iv) The general objective of the CMC List is to bring cases to the point where they can be resolved by mediation or tried in the quickest, most cost effective way, consistently with the need to provide a just outcome.

(v) The experience of the Society is that the objective expressed with respect to mediation is frequently achieved.

(vi) Also effective is the Court of Appeal Division of the Supreme Court of Western Australia ("the Court of Appeal"), established on 1 February 2005. The Court of Appeal hears appeals from decisions of a single Judge of the Supreme Court of Western Australia and from Judges of the District Court of Western Australia as well as various other Courts and Tribunals. The Court of Appeal also hears criminal appeals against sentences, such as the length of imprisonment, and appeals against conviction.

(vii) The Court of Appeal is made up of the Chief Justice, the President of the Court of Appeal and five other permanent Judges of Appeal. The President is responsible for the day-to-day operation and administration of the Court of Appeal, subject to the direction of the Chief Justice.

(viii) The Judges of the Court of Appeal actively encourage parties to a civil appeal to consider mediation as a means of resolving their dispute.

(f) District Court of Western Australia

(i) The case management regime of the Civil Procedure division of the District Court of Western Australia is set out in Part 4 of the *District Court Rules 2005* and the District Court of Western Australia, *Circular to Practitioners CIV 2007/1 – Case Management* – revised 1 July 2011.

(ii) The aim of the District Court's case management is to:

- Promote the just resolution of litigation;
- Facilitate the timely resolution of litigation at a cost affordable to parties and proportionate to the value and complexity of what is in issue;
- Maximise the efficient use of scarce judicial and administrative resources;
- Ensure that, where a case proceeds to trial, the issues are clearly defined, evidence is presented in an efficient manner and the materials for the Judge are complete and well organised;
- Avoid undue delay, and efficiently dispose of the business of the Court; and
- Maintain public confidence in the administration of justice by the District Court.

(iii) In practice, in relation to personal injuries cases, it is often up to the lawyers involved as to how efficiently the case is managed. However, in this regard, a distinction needs to be made between claims for damages arising out of motor vehicle accidents, where defendants are represented by the State's sole Third Party Insurer and this insurer promotes and facilitates the efficient disposition of claims. Nevertheless, other personal injury claims, such as medical negligence claims and occupiers liability claims benefit from the pre-trial conference system in the District Court of Western Australia, which achieves a high rate of settlement of claims. Furthermore, parties to all personal injury cases can obtain an early date for trial, with minimum delay between the pre-trial conference and the trial. This is a reflection of the fact that the vast majority of cases settle through the benefits of the operation of the pre-trial conference system.

(iv) In commercial matters the District Court's management of cases may benefit from the introduction of a similar list to the CMC List in the Supreme Court of Western Australia. However, this may result in increased costs, although this may be ameliorated by the introduction of compulsory mediation with respect to commercial matters rather than permitting pre-trial conferences, which, in the absence of an experienced mediator, may not be as effective as pre-trial conferences with respect to the disposition of personal injury claims.

(g) General observations

(i) It also needs to be noted that the parties' approach to the litigation as well as, to some extent, the practitioner's approach is a factor in efficient case management.

(ii) Similarly, in terms of court systems, there is a level of variability in efficiency depending on the formalities involved.

(iii) The need for specialist courts ought to be considered in terms of gaining efficiency, due to Judges having experience in different areas of the law and sometimes grappling with a new area resulting in matters not always progressing efficiently. However, this would need to be balanced against the costs of setting up alternative courts, with separate administration and bureaucracy. In the past, in Western Australia, a separate court system was utilised for motor vehicle accident claims, known as the "*Third Party Claims Tribunal*" but it was ultimately seen to be more efficient to combine this Tribunal's functions with the District Court of Western Australia.

(iv) As a general statement, the least cost to parties and the Justice System is achieved through reaching resolution quickly, through early engagement of the parties by the court encouraging the parties to make an early identification of the true nature of the dispute between the parties and implementing a set of directions for the efficient disposal of the dispute and utilising alternative dispute resolution methods, particularly compulsory mediation.

(v) Finally, in any assessment of the efficiency of any court or its case management processes, consideration needs to be given to the phenomenon of the increasing number of self-represented litigants appearing before the courts, either as plaintiffs or defendants and who require additional assistance by the Court to ensure procedural fairness. It may be necessary to develop policies and guidelines with respect to how courts should deal with self-represented litigants to ensure the maintenance of the efficiency of any court system.

(h) With reference to the Supreme Court of Western Australia and case management generally; strategic conferences held at the beginning of proceedings, the limiting of pleadings and discovery and aspiring to a 'bespoke solution', coupled with compulsory mediation, have been reported by practitioners as examples of effective case management methods resulting in resolutions being achieved more quickly.

(i) Annexed to this Response are two case studies which illustrate the loss of efficiency in the conduct of litigation where it is met with a combination of elongated interlocutory disputes and resort to various levels of appeal (Annexure B).

Lawyers' fees and hourly rates

8. It is noted that there are a number of legal salary surveys available online, which have been conducted by legal recruitment agencies such as Mahlab, Hays and others. Details of existing salary surveys have already been provided to the Productivity Commission, by way of example. The Law Council has received the following

additional advice with respect to lawyers' fees and legal costs from its constituent bodies.

9. The ACTLS advises, as follows:

    (a) Legal salaries surveys are conducted regularly by national recruitment agencies, such as Mahlab and Hays. Some Law Societies and similar bodies also conduct State-specific surveys of their local profession (eg the Queensland Law Society and the Law Institute of Victoria). Such information is available online. On a separate note, the Federal Court issues online a Guide to Counsels' Fees for the purposes of the assessment of such costs on a party-party basis.

    (b) It has been by legal taxing officers that legal costs substantially increase in matters involving numerous interlocutory processes within the same proceeding. Costs also increased in matters concerning a self-represented litigant on the other side, particularly where that party was also responsible for the initiation of multiple interlocutory processes (or even separate substantive proceedings, all of which had a common thread against the same party or parties).

    (c) In relation to family law proceedings, it is noted that hourly rates in the Canberra area range from around $300 per hour to around $650 per hour, depending upon the experience of the lawyer. Lawyers who agree to work at legal aid rates are paid a discounted rate of $160 per hour.

10. The BAQ advises as follows, in relation to barristers' fees:

    (a) There is a considerable variation between the fees charged by Counsel in Queensland, ranging from between $600 a day + GST to $20,000 a day + GST. Market forces assist Counsel in determining the rate they set.

    (b) The *Legal Profession Act* 2007 (Qld) requires Counsel to make disclosure under s309 of the Act, including: setting out the basis on which legal costs will be calculated, including whether a scale of costs applies to any of the legal costs; an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; details of the intervals, if any, at which the client will be billed; and, the rate of interest, if any, that may be charged on overdue legal costs.

    (c) That disclosure is provided by way of a written offer which may or may not be accepted by the solicitors (on instructions from their client). We note that solicitors will often secure several Costs Agreements from various Counsel thereby giving their client choice both as to identity of Counsel, but also fees.

    (d) As to quantum. some courts have scales of costs which assist Counsel in determining their fee. For example, the State Magistrates Courts and the Family Court have a scale of costs which differentiates between solicitor's costs and Counsel's fees. This may be contrasted with the Federal Circuit Court which uses a chronologic or event based scale, with a 50% advocacy loading for certain items on the scale. Neither the Supreme Court of Queensland nor the District Court have a scale for Counsel.

(e) Anecdotally, senior practitioners inform that in jurisdictions where there is a scale setting out rates for Counsel, it is often only the very junior at the Bar who use those rates to set their fees.

(f) It would be fair to say that there is a "going rate" or tariff of charges by areas of practice, further refined by level of experience. For example, in privately funded Family Law, junior juniors typically charge between $1,000-$2,000 per day, + GST. Senior juniors charge between $4,000-$5,000 per day + GST. Silks are between $6,000-$10,000 per day + GST (noting we have several southern family law silks who regularly appear in the Brisbane Registry.)

(g) In taxation/revenue law, the going rate for senior juniors and Silk appears to be between $7,000-$20,000 per day + GST. In criminal law, legal aid rates govern the fees of the majority of matters appearing before the court. Typically, senior juniors in commercial law charge between $4,000-$6,000 a day + GST, with Silks charging between $8,000-$12,000 a day +GST.

(h) As previously noted, the Costs Agreement regime in Queensland requires that when Counsel provides an estimate of fees (including their hourly and daily rates) they are required to set out the basis upon which the costs are calculated (including whether a scale applies). A retainer agreement only forms if Counsel's offer is accepted.

11. In relation to NSW, the Law Society of NSW has advised:

(a) The Law Society website provides the following information about variation in hourly rates:

(i) Hourly rates may vary between solicitors due to differences in:

Expertise – specialists in a particular area often charge more than a non-specialist

Seniority – work carried out by a partner of a firm will cost more than work done by a junior solicitor

Location – services in metropolitan areas are often higher than in rural or regional areas

Urgency – special fees sometimes apply for urgent work

12. The LSSA advises that:

(a) No studies have been conducted by LSSA. As the question suggests there are very many variables which impact on hourly rates. There are even variables as between court scales such as Magistrates Court scale/District and Supreme Court scale/Federal Court scale/Family Court scale/ various Tribunals. This reinforces the fact that many factors come to play in relation to what hourly rates may be changed. The one constant is that market forces will be the ultimate determinator.

13. The LSWA advises that:

(a) Costs Determinations made by the statutory Legal Costs Committee for each jurisdiction are available at www.legalcosts.wa.gov.au

(b) Costs Determinations are a starting point for a costs agreement. If no costs agreement has been entered into the relevant Costs Determination governs the scale of legal costs permitted to be charged on both a party/party and solicitor/client basis.

(c) Practitioners are able to charge above the scale, subject to a valid costs agreement in compliance with the provisions of the *Legal Profession Act 2008* (WA).

(d) There are no published impartial statistics on hourly rates charged by practitioners for the Western Australian jurisdiction. It is general knowledge that there is a range of rates that relate to the area of practice and level of experience of the practitioner. Generally, the scale does differentiate between < 5 years of legal experience and > 5 years of legal experience.

(e) Using capital cities as a rough guide, Perth practitioners' hourly rates are lower than Sydney and Melbourne, but this is not the case with regard to hourly rates charged by counsel.

(f) It is possible and most likely that country practitioners may charge less than their city counterparts.

(g) Criminal lawyers and Principals of small law firms possibly charge approximately $300.00 - $350.00 p/hr. Large private law firms may charge up to $1200.00 p/hr for senior practitioners providing taxation law advice, for example.

(h) In the areas of workers' compensation and motor vehicle accident claims, lawyers rates are controlled by the provisions of section 87 of the *Workers Compensation and Injury Management Act 1981* and section 27A of the *Motor Vehicle (Third Party Insurance) Act 1943* and any costs agreement entered into between a solicitor and client does not permit charges in excess of the relevant Costs Determination. Legal Aid work is also remunerated according to the Legal Aid costs scale, pursuant to section 41 *Legal Aid Commission Act 1976*.

(i) The Society's Access to Justice Committee has made a proposal to increase the funding to the Society's Law Access Services to provide assistance to community members who are unsuccessful in their attempt to gain legal services through community legal centres, the pro bono service at the Federal Court and Legal Aid.

(j) A feasibility study into the establishment of a Public Law Clearing House in Western Australia was commissioned by the Society and the Community Legal Centres Association of Western Australia in 2013. Funding for the study was provided by Lotterywest. The Council has agreed to develop a business plan in consultation with relevant stakeholders (ie potential partners and funders) to explore the possible expansion of the Law Access Services as a central pro bono clearing house service, for further consideration in 2014.

Accumulation of costs in family law and other areas

14. The ACTLS advises, as follows:

(a) The Family Law system is document intensive which means many hours in preparation of documents for court and documents for settlement. Costs for parties can escalate if:

(i) there are extended negotiations;

(ii) there is not full disclosure;

(iii) there are complex factual and legal issues, for example self-managed superannuation funds may necessitate expert evidence being given;

(iv) there are multiple Court events;

(v) valuation issues;

(vi) the practice of over listing matters, with clients liable for Counsel's fees, solicitor costs and potentially additional preparation costs for the new Court date; and

(vii) there is a litigious self-represented litigant as the other party.

(b) Family lawyers find it difficult to estimate fees for the whole of the matter for these reasons. At best fees estimates are given in stages but the estimates usually contain cautions about the factors which may change the estimate.

15. The BAQ has advised, as follows:

(a) Family law is appearance-intensive; indeed, it is not uncommon for a matter to be mentioned numerous times before being set down for trial:

(b) in the Federal Circuit Court, there will be the first return, often followed by the setting down of the matter at a later date for an interim hearing, followed by a further mention, then perhaps another interim hearing, then a further mention, then trial directions, and eventually the trial. Obviously, if the party is represented, then the lawyer on the record must attend each of these court events along with the client whose attendance is mandatory unless excused by the court.

(c) Similarly, in the Family Court, there will usually be a first return before a Registrar, then an interim hearing, then directions, then a compliance check, then an appearance at a trial call-over list for setting of trial dates, then the trial. Again, if the party is represented the solicitor on the record must attend all court events.

(d) This is a costly process for clients. Unfortunately, it is not unusual that by the time of trial, family law litigants have run out of money for representation and either settle due to litigation-fatigue or a lack of funds, or, conduct the trial as litigants in person.

(e) Family law is a difficult area for an accurate estimation of costs, as it is not unusual for the other side's material to contain allegations that had been not contemplated when the estimate was given. It is also not unusual for matters to appear simple on the surface, but once subpoena are issued and documents then inspected from, for example, the Police or Department of Child Safety, that the matter takes a more complicated and time consuming shape.

16. In relation to NSW , the Law Society of NSW advises as follows:

(a) In NSW, court fees have increased drastically in recent years and represent a significant part of the cost of litigation in this State. Costs can also accumulate during the discovery process, particularly in large cases involving large amounts of documents, and because of forensic accounting and data storage costs. The requirement to depose of evidence by affidavit or witness statement may also lead to increased cost in cases, particularly where evidence is required from a number of witnesses, as these require considerable input from practitioners to prepare.

(b) There will be many factors affecting an estimate of costs in any particular case, for example, the nature of the proceedings, the complexity of the issues in dispute and uncertainty about the approach to be taken by the client, counsel, the other parties and the court. The introduction of stricter case management directions which provide for more certainty as to timeframes, combined with greater and uniform judicial control of this process, would mean that practitioners were better able to undertake what is an inherently difficult task of predicting the costs of proceedings and therefore provide clients with a more accurate estimate about the range of likely costs. Further consideration could also be given to the relative efficiencies and advantages of the use of oral and written statements during proceedings, particularly in relation to evidence and submissions.

17. The LSSA advises that:

(a) Costs accumulate as a combination of:

(i) Client instructions and terms of retainer agreements.

(ii) In litigation matters, Court imposed timetables.

(iii) Defined stages in litigious matters (i.e. pre-action, pre-trial, trial).

(iv) Attitude of the parties.

(v) Conduct of the solicitors.

(b) All of these factors effect estimates as to the range of costs likely to be incurred. It is not necessarily the accumulation of costs that then becomes the issue but rather “bill shock” when interim accounts are not rendered or clients are not kept informed.

18. The LSWA advises that:

(a) It is thought that costs will accumulate due to:

(i) The number of interlocutory disputes (please see Annexure A);

(ii) Discovery;

(iii) Delay on the part of lawyers prosecuting or defending a claim. Whether this is an issue of competence and whether accreditation would assist is a matter to be considered; and

(iv) The length of the trial.

(b) Delay in the efficient distribution of cases because of lack of resources will also affect estimates about the range of costs.

(c) A year ago the delay for a trial date in the Family Court of Western Australia was two years. Subsequently, the appointment of Judges and Magistrates has reduced the delay but the Court remains under-funded and under-resourced.

(d) Despite the efficiencies of the Supreme Court of Western Australia, the State Attorney General has chosen not to replace a Judge who retired last year. This led to the Chief Justice Wayne Martin AC publicly warning of a reduction in the standard of service by the Supreme Court. Consequently, underfunding of Courts and the availability of Court resources because of funding, clearly have an impact on the efficiencies of a Court and the costs which will be associated with the resolution of a dispute.

Use of flat fees and alternative fee structures

19. The Law Council notes that one area it is presently looking closely at is the ethical and regulatory structures which might support “limited scope representation”, sometimes referred to as “unbundled” legal services. This form of representation might involve a legal practitioner agreeing to assist a client with a specific aspect of their matter, such as preparation of a document or certain documents, such as affidavits or statement of claim, but not to appear as solicitor on the record or counsel on behalf of the client. Such a model can facilitate a more flexible approach to the provision of legal services, in which the client meets the cost of limited assistance but is otherwise unrepresented. Proponents of these forms of retainer suggest that limited scope representation is essentially directed at promoting access to justice for middle-class litigants, who do not qualify for legal aid but can seldom afford the cost of full representation.

20. There are legal and ethical implications for this form of retainer, which are being explored by the Law Council’s Professional Ethics Committee and Access to Justice Committee. It is likely that amendment to the Australian Solicitors’ Conduct Rules may be necessary to facilitate these forms of retainers, if not to the Legal Profession legislation.

21. In relation to flat fees and other alternative fee structures, the Law Council has received the following advice from its constituent bodies.

22. The ACTLS advises that:

(a) Time costing is the most prevalent form of costing in family law matters. It is very difficult to estimate accurately the time that will be involved in a family law matter. In these circumstances, a fixed fee may encourage over-charging to build in contingencies. The Society is advised that at least one firm offers a choice between fixed fee and time charging.

(b) The Society is also advised that charging non-time-based fees is becoming more common in commercial and business matters and should be encouraged as it provides certainty to clients, as well as efficiency in production of legal services. However, some members have expressed concern that the Legal Profession Act does not properly allow for such a methodology in providing legal services and, if challenged, still enables a client to revert to an hourly rate or itemised basis for assessing work carried out. It would be timely for

that question to be raised and for focus on possible amendment to the legal profession legislation. Although fixed pricing may not be suitable for litigation, or at least not all litigation, it certainly has application in other areas of the law.

(c) In the experience of the Family Law Committee of the ACT Law Society it is increasingly rare for firms to agree to defer payment in family law matters. At least in part this is due to the delays in the family law system which means that resolution of matters can take some time. This includes delays in both the court and non-court sector. There are also external factors, such as the delays in sale of rural properties for example, which make it impracticable for legal firms to act as financier.

(d) There are litigation lender options, with interest rates of around 16%-18%. Litigation lenders have many restrictions, for example, many will not lend if a rural property is the security.

23. The BAQ has advised as follows:

(a) It may be that solicitors prepare and appear in divorces on a flat fee basis. In a no fault divorce regime, requiring only 12 months apart, that makes sense, but it is not a matter about which the Bar Association of Queensland can comment.

(b) Other than a divorce, the charging of flat fees in family law matters is fraught with danger for the reasons set out in the final paragraphs of the previous response.

(c) According to several senior practitioners, a handful of Brisbane solicitors' firms sought to offer flat fee arrangements for their clients; that is a matter for them about which we make no comment. However, according to the same practitioners, a couple of barristers agreed to also charge on a flat fee basis, only to be met with a case that evolved in a more complex and time consuming way than had been anticipated.

(d) It is noted that use of conditional cost agreements is prohibited under the *Family Law Act* and in criminal proceedings.

(e) It is not unusual for Counsel to be asked to defer the payment of their fees in *Family Law Act* property proceedings either until an item of property sells (usually the former matrimonial home), or, a litigation funding order is made (i.e. where one party is ordered to fund the other party's litigation in addition to their own lawyers), or the matter is concluded either at mediation or by Court Order.

24. The Law Society of NSW advises, as follows:

(a) There will also be many factors which impact on whether a fixed fee will be appropriate in any particular case. Flat fee billing is not suited to litigation or some commercial transactions where the amount of work involved is uncertain or the issues involved are complex.

(b) Conditional costs agreements are common in pro bono matters. For example, the Law Society's Pro Bono Scheme precedent costs agreement contains the following provisions:

The services provided to you will be on a free or substantially reduced basis (state which). However, if (a) an order for costs is made in your favour; or (b) a settlement is reached which includes payment of your costs; we are entitled to recover from you the full amount of fees and disbursements that another party is required to pay under this order or agreement. We will accept this amount in full and final settlement of your costs.

(c) We confirm that we will be retained in this matter on a pro bono basis and our right to payment of fees will arise upon a successful outcome. Successful outcome means: obtaining a verdict, award or settlement in your favour inclusive or exclusive of costs as the case may be.

(d) One example of an area in which a deferred payment option may be available is certain trust disputes where costs are likely to be paid from the trust.

25. The LSSA advises as follows:

(a) Time based billing is in itself a form of "flat fee" charging. The traditional court scales are based primarily on item costing with hourly rates as the default.

(b) What is now becoming more prevalent is either event costing or fixed price costing which are also types of "flat fee" charging. These rely on the completion of defined tasks/events or the completion of the retainer for the account to be triggered.

(c) All aspects of legal work are capable of being undertaken under a flat fee model. It is the calculation of the fee so as to produce an equitable rate for the work performed that poses difficulties.

(d) Flat fees have been used in transactional work such as contracts, mortgages, wills, etc. In the criminal arena Legal Aid work is generally based on a flat fee model (by event). Some other criminal work, such as guilty pleas, is carried out on a flat fee basis.

(e) In civil litigation, flat fees based on event costing are not uncommon particularly with insurers. Similar practices occur in family law with flat fees for divorces and similar "routine" tasks.

(f) Barristers who charge "day rates" is another example of "flat fee" charging.

(g) The general argument in favour of "flat fees" is that they produce certainty in terms of cost. The difficulty is that the more complicated the transaction the less likely it is that the ultimate equitable cost can be calculated.

Conditional costs agreements and deferred payment

(h) Conditional costs agreements are often used in insolvency and debt collection, as well as in the personal injury compensation areas. Other than that they are only occasionally used in other types of claims although there is an increase in their use in "outcome" based transactional retainers.

(i) In disputed matters most personal injury matters, most family law property matters, commercial litigation disputes, succession law disputes are dealt with by at least some if not all of the fee being paid (by the non-insured client) at the conclusion.

(j) A large majority of commercial transactions may only have fees rendered at their conclusion.

26. The LSWA advises:

(a) The LSWA does not believe that it is common-place for flat fees to be charged in family law matters. A number of practices are charging fixed fees for probate applications (now a fixed fee in the Legal Costs Committee's Probate Costs Determination). However, litigation is less amenable to fixed fees.

(b) It is clear that there would be some areas of legal practice which would be amenable to fixed fee arrangements and probate applications is a good example. Other examples would probably be found in the drafting of routine commercial documents such as trusts and contracts for the purchase and sale of property and businesses. However, fixed fee arrangements in litigation matters, where the resolution of the dispute depends upon a wide variety of factors, already referred to in this Response, are not readily amenable to fixed fee arrangements.

(c) Conditional costs agreements are not common in Western Australia. Deferred fees are common in personal injury cases, such as workers' compensation and motor vehicle accident claims and in some contested inheritance claims. Although fees are not (contractually) conditional on success, in many instances a claimants' financial position means that if the claim is unsuccessful the lawyer won't be paid.

Engaging lawyers

27. The ACTLS advises that:

(a) It is important for the Productivity Commission to understand that seeking legal advice or engaging a lawyer is not necessarily opposed to early resolution or early intervention. In most cases, obtaining legal advice before engaging in dispute resolution processes helps clients:

(i) to better understand the issues, prepare for formal dispute resolution and have a reality check about what is possible. For example, there is still a perception in the community that parents are entitled to 50/50 shared care upon separation regardless of the age of a child. Legal advice which explains the presumption of equal shared parental responsibility, best interests and developmentally appropriate care may assist in resolution or agreement between the parties. Each party's individual circumstances are unique and it is important that their advice comes from a professional and not, for example, from a family member or friend. That advice also includes options for resolution; and

(ii) to be informed about options for resolution of their dispute and the costs and consequences of those options. Agreements reached in these circumstances are more likely to hold. In the ACT there are good working relationships and referral relationships between lawyers, family dispute resolution practitioners and other practitioners involved in the family law system.

(b) There are many clients who are either screened out of family law matters (risk screening) or one party refuses to engage in discussions. This is common in

the context of family law due to the emotional and psychological factors at play in separation, or the parties wishing to finalise matters at different times (or not at all). In these cases, lawyers can play a vital role in negotiating resolution for parties or exploring different options for resolution, such as lawyer-assisted mediation. Family lawyers have a long history of negotiating for their clients and should not be seen as oppositional to early resolution. In fact, there should be active encouragement for people to seek legal advice and information in family law matters.

28. The Law Society of NSW has noted that the Legal Needs Survey[2] published by the Law and Justice Foundation in August 2012 found that consumer and credit/debit problems were more likely to be handled without advice whereas advice was more likely to be taken in relation to family and personal injury problems (see Figure 5.7). The Survey also found that family problems were most likely to be finalised via court, tribunal or complaint handling processes (see Table 7.6).

29. The LSSA advises, as follows:

    (a) Theoretically all matters can be resolved by dispute resolution. Contract negotiations are a form of dispute resolution. Contracts contain "dispute resolution clauses". The more contentious the dispute the more likely it is that a "formal" dispute resolution process may be required.

    (b) A party's choice to seek legal assistance is generally dictated to by:

        (i) Their understanding of the law to be applied.

        (ii) Affordability

        (iii) Their ability to state their position without assistance.

        (iv) Whether their lawyer is funded by an external source.

        (v) Whether legal assistance is permitted (i.e. some Tribunals).

[2] Coumarelos, C, Macourt, D, People, J, MacDonald, HM, Wei, Z, Iriana, R & Ramsey, S 2012, Legal Australia-Wide Survey: legal need in Australia, Law and Justice Foundation of NSW, Sydney available online from: http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: Case studies for Productivity Commission

Case study one: ***Jubilee Road Pty Ltd v STP (Gas) Retail Pty Ltd* – CIV 2367/1996**

04.12.1996	Proceedings instituted.
Early 1997	Defendant seeks particulars of why fuel tanks not fit for purpose but Case Management Registrar decides no further particulars are necessary.
15.08.1997	Defendant appeals but Master Bredmeyer decides against the defendant.
07.11.1997	Defendant appeals to Full Court (Kennedy and Murray JJ) which decides that there should be some particulars.
Early 1998	Further particulars provided but defendant applies to Master Sanderson for more detail. Sanderson agrees.
Mid 1998	More detail provided but defendant applies to Master Bredmeyer saying that what has been provided is in accordance neither with what the Full Court ordered, nor with what Sanderson ordered. Bredmeyer dismisses application.
17.09.1998	Full Court (Ipp and Owen JJ) refuses defendant leave to appeal saying that enough particulars had been given and that more than a year has been taken up with this interlocutory dispute which is "*highly undesirable*".
NB:	Seven judicial officers involved in making this decision; only Bredmeyer dealt with it twice.

Case study two: ***Donnellan v Public Trustee* – CIV 2419 of 2004**

17.10.2005	Mediation.
12.03.2007	Case management hearing before Registrar Powell, during which defendant foreshadows application (out of time) to stay/strike-out paras 8, 9 and 14 of statement of claim.
09.05.2007	Application filed.
07.09.2007	Newnes J hands down Reasons for decision refusing to strike out but proposing some "helpful" amendments to the statement of claim, "*I will hear the parties on the appropriate orders*".

14.11.2007	Orders made by consent (endorsing a re-amended statement of claim 13 November 2007).
05.06.2008	Defendant appeals to Court of Appeal from consent orders. Court of Appeal does not formally decide the appeal but persuades the plaintiff that it would be best if the pleadings were revisited. Counsel for defendant states that his client regards itself as a "model litigant".
29.07.2008	Further version of statement of claim circulated but multiple objections on pleading points.
15.01.2009	Special appointment before Newnes J for him to rule on new draft statement of claim. Newnes suggests that there might be some merit in some of the defendant's objections but merely adjourns the matter suggesting that the parties should be able to reach agreement. The matter was admitted to the CMC List on that day.
25.02.2009	Further minute of amendments circulated but no agreement could be reached.
11.05.2009	Matter comes before Newnes J once again but again, there is no formal decision but simply an indication of a half-way position which the parties should be able to agree on, the matter being adjourned.
Rest of 2009	Delay caused by failure to agree, and Newnes going to Court of Appeal.
29.04.2010	Matter taken over by Kenneth Martin J who grants plaintiff leave to amend statement of claim subject to some adjustments.
03.05.2010	Final version of statement of claim filed.
25.05.2010	Defendant files new version of original 2007 strike-out/stay application.
25.06.2010	Kenneth Martin J hears application.
18.08.2010	Kenneth Martin J decides application, staying paragraphs 8, 8B and 8C.
29.04.2011	Mediation at which matter settled for more than 20 times the amount offered at 2005 mediation.