The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

29 January 2014

Mr Martyn Hagan
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Law Council of Australia
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By email: nick.parmeter@lawcouncil.asn.au

Dear Mr Hagan

PRODUCTIVITY COMMISSION – REQUEST FOR INFORMATION

I refer to your Memorandum dated 29 November 2013 requesting information in response to the matters raised by the Productivity Commission in relation to its Inquiry into Access to Justice Arrangements.

(a) How can the 'business of justice' be better conducted?

(i) Can the Law Council provide examples of particular courts or case management processes which demonstrates best-practice or which are regarded as more or less effective?

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.

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.

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.

Federal Court of Australia
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.

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.

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.

Parties and their lawyers are encouraged to confer early and frequently on both procedural and substantive issues, monitor progress and compliance constantly and to make early contact with the docket Judge through his or her Associate about any emerging issues or concerns.

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

Supreme Court of Western Australia

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.

RSC O 1 r 4B Case flow management, use and objects of, states that matters will be managed and supervised with the objects of;
(a) promoting the just determination of litigation;
(b) disposing efficiently of the business of the Court;
(c) maximising the efficient use of available judicial and administrative resources;
(d) facilitating the timely disposal of business;
(e) 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
(f) that the procedure applicable, and the costs of the procedure to the parties, are proportionate to the financial position of each party.

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.

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.

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

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.

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.

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

District Court of Western Australia

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.

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.

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.

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.

General observations

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.

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

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.

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.

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.

(ii) *Can the Law Council provide examples, by reference to the experience of court users.*

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.

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 A).

(b) Legal costs

(i) What hourly rates do lawyers charge and what variations are there, for example, between jurisdictions, areas of practice, level of experience, geographic location etc?

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

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.

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).

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.

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.

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

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.

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*.

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.

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.

(ii) Is the Law Council able to locate or direct the Commission to salary surveys of the profession?

Annexed to this Response is a copy of a salary survey conducted by the Society in 2013 (Annexure B). It is accepted that not all law firms participated in the survey so the information may not be considered a reliable statistical measure.

(iii) Can the Law Council provide case studies or examples of the way in which costs accumulate in certain matters, eg. Family law and other areas? What factors affect estimates about the range of costs?

It is thought that costs will accumulate due to:

- The number of interlocutory disputes (please see Annexure A);
- Discovery;
- 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
- The length of the trial.

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

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.

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.

(iv) To what extent is charging flat fees in family law matters common-place and which kinds of matters are/are not amenable to non-time-based fees? Are there other areas in which non-time-based billing is common, or which may be amenable to predictable costs calculation at the commencement, or where similar factors affect the estimates around the range of costs?

The Society 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).

Litigation is less amenable to fixed fees.

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) Engaging lawyers

(i) Which kinds of disputes are more likely to lead a person to engage a lawyer or seek legal advice, as opposed to resolving the matter themselves or with the assistance of a non-lawyer, friend or family member? Which kinds of matters are more likely to be resolved via formal dispute resolution?

It is the Society's view that a person should always have access to legal advice when involved in a legal dispute. Non-legal 'advice' is unlikely to lead to a resolution in most cases and may lead to parties not properly understanding their rights (and obligations) and resolving their claim or resolving a claim against them to their detriment. The experience of the Society is that in dispute resolution bodies where "lay advocates" had been permitted to represent parties making pecuniary claims, these parties may have been disadvantaged by the lack of training and qualifications and the need to adhere to ethical requirements by the lay advocates, such as Professional Conduct Rules. However, most disputes benefit from formal alternative dispute resolution.

Relationships Australia was suggested as an example of an alternative forum for resolving certain types of disputes, such as family disputes, which will not require legal advice or resort to legal representation.

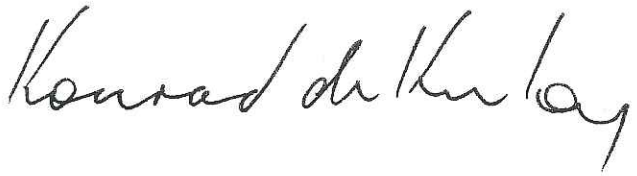
(ii) Apart from personal injury, workers compensation and civil law compensation claims, are there other areas of practice in which conditional costs agreements are common?

Conditional costs agreements are not common in Western Australia.

(iii) Are there areas of practice in which it is common or not unusual for the lawyer to effectively agree to defer payment of fees until the conclusion of the matter (that is, the lawyer effectively acts as the financier, but fees are not conditional on success)?

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.

Yours sincerely,



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