



**Australian Government**  
**Productivity Commission**

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**PRODUCTIVITY COMMISSION**

**INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS**

**DR WARREN MUNDY, Presiding Commissioner**  
**MS ANGELA MacRAE, Commissioner**

**TRANSCRIPT OF PROCEEDINGS**

**AT SYDNEY ON TUESDAY, 3 JUNE 2014, AT 10.16 AM**

**Continued from 2/6/14 in Canberra**

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**DR MUNDY:** Good morning, ladies and gentlemen. My name is Dr Warren Mundy and I am the presiding Commissioner on this Access to Civil Justice inquiry and with me is my fellow Commissioner, Angela MacRae. Before starting, I'd like to pay my respects to the elders past and present of the Gadigal people, on whose ancestral lands we meet today, and to the elders past and present of all other indigenous peoples who have continuously inhabited this continent for over 40,000 years. The purpose of this round of hearings is to facilitate public scrutiny of the Commission's work, to get comments and feedbacks on the findings and recommendations we have made at this stage, and to gather further evidence to inform our final report.

Following this hearing, there will be further hearings in every capital city in the country. Hearings in Canberra have already been completed. We expect to provide a formal report to government in September of this year and according to the Productivity Commission Act, following the delivery of our report the government can take up to 25 parliamentary sitting days to release it by way of tabling it in both houses of the Commonwealth Parliament. We like to conduct these hearings in a reasonably informal manner but I do remind participants that there is a full transcript being taken, so we do not take comments from the floor as they actually won't be recorded effectively. But at the end of the day's proceeding there will be an opportunity for those people who wish to make a brief statement and obviously people can submit further evidence and advice to us if they choose to do so as a result of what might be said here today or, indeed, if they have other information they wish to draw to our attention.

Whilst our preference to run these hearings informally I would just like to note that under Part 7 of the Productivity Commission Act, the Commission has certain powers to act in the case of false information or a refusal to provide such information. The Commission, since the Act was passed, has not had occasion to use these powers and we certainly do not expect to have to call upon them today. Participants are not required to take an oath but should, of course, be truthful in their remarks and participants are welcome to comment on issues raised by others in submissions or, indeed, in evidence given to us. The transcript will be made available and published on the Commission's website along with the submissions to the inquiry that have been made to date, and will be made in the future.

I'm advised that I'm obliged to tell you under Commonwealth Health and Safety Legislation that in the event that there is an emergency requiring evacuation from the building, you should follow the green exit signs to the nearest stairwell, don't use the lifts and follow instructions of the floor wardens. The emergency evacuation point is at the Westpac building on the corner of Clarence and Market Street, which - I am totally disoriented, so it's out there somewhere. That's the formalities dealt with.

**DR MUNDY:** Our next participant is Law Society New South Wales. I'm sorry we're running a little bit late, but we had a technology hitch. Could you please state your name, position and affiliation for the record and then if you would like to make a brief - and that means single-digit minutes - opening statement?

**MS EVERETT (LSNSW):** Yes, certainly. Good morning, Commissioners, my name is Ros Everett. I'm the president of the Law Society of New South Wales.

**MR TIDBALL (LSNSW):** Michael Tidball. I'm the chief executive officer of the Law Society of New South Wales.

**DR MUNDY:** Off you go, we are in your hands.

**MS EVERETT (LSNSW):** Well, thank you for inviting the Law Society to give evidence at this hearing. The CEO, Michael Tidball, and I both welcome the opportunity to present some further information to you. We represent around 25,000 solicitors in New South Wales and we play an active role in the regulation of the legal profession in New South Wales. We have statutory obligations to maintain and improve the professional standards of the legal profession and also protect the public from inadequate advice and representation and we fulfil these obligations in various ways. We have a large education program, investigation of members and complaints and intervention and support.

We work closely with the Law Council of Australia and obviously we have worked with them in providing the submissions in response to the Productivity Commission's issues paper and draft report. We've also provided the Productivity Commission with a separate submission in response to the draft report which covers the New South Wales specific issues. In summary, these issues are the distribution of the New South Wales public purpose fund, the provision of professional indemnity insurance, the administration of practising certificates and the regulation of the legal profession.

I hope we'll be able to assist you today and answer any further questions you may have in relation to these issues. Thank you.

**MR TIDBALL (LSNSW):** Just very briefly, Commissioners, the province of our evidence today is specific, as Ms Everett has indicated, to the material which is specific to the Law Society of New South Wales' structure and funding arrangements and specifically professional indemnity insurance, public purpose funds, administration of practising certificates and the rest of the substantial material that the Commission has hitherto considered will be covered via the Law Council which will separately submit and I would add, finally, that there is a brief separate

submission provided by our alternate dispute resolution committee which was attached to our submission and as regards to that submission I note that one of the main authors of that material, Mr Lancken, is giving evidence later.

**DR MUNDY:** Thank you. Do you want to start?

**MS MacRAE:** Well, you have mentioned a couple of times about the professional indemnity insurance and you will know that we made a recommendation saying that we thought that there was a layer of regulation not required there, so could you just be more specific for me about what you see - what does the additional approval for the legal profession to the existing regulation by APRA?

**MS EVERETT (LSNSW):** If I could just give some background, Commissioner. You may recall in 2002 HIH Insurance Company collapsed and the legal profession were covered by HIH Insurance, so out of the ashes of that rose Law Cover and we capitulated Law Cover about 2003. Now Law Cover has come into its own. It's regulated by APRA. It's doing very well. The funding ratio, as I said, over the years it's become fully capitalised and we're in a very strong position now offering really good premium pricing to the members of the profession. We're concerned if it's open to the insurance market as has happened in England and Wales and also in Europe - I've just come back from a conference, the International Bar Association, in Brussels, and, unfortunately, there are a number of members of the profession in those countries that it's deregulated that the smaller members of the profession can't get cover.

It's limiting the practice in a lot of areas, so people where, for example, if you have a country area, country town, where you've got a solicitor who is providing really good legal services in his or her community and the way the insurance market operates, they're quite happy to cover the top end of the market, the large legal firms, but forget the little shopfront lawyer who, again, is providing a really good community service, but the premium could be just so high that it means that that solicitor can't continue to practice or, indeed, they can't get cover. I was speaking with the Law Society president - Nick Fluck is the president of England and Wales and he was saying they have a lot of solicitors who can't get cover which means they can't practice.

It means that end of the market, the little shopfront lawyers, and even in my practice in Penrith where I'm a sort of small/medium size firm and I pay quite a reasonable premium through Law Cover and it allows me to practice and I do a lot of pro bono work, which is another subject we want to speak to you about, but that allows me to operate and also be there to provide the pro bono services for people in my community who otherwise could not afford legal advice. We think the current system is working really well and Law Cover is in a very strong financial position

and we think the fees really in the open market would be considered very, very competitive as well, so I think Mr Tidball is probably more on top of that than I am so he may wish to add to my comments.

**MR TIDBALL (LSNSW):** I'm not more top of it but can I add some things? Can I take, note and reinforce what Ms Everett has said about the history. The HIH collapsed and there was a view taken in New South Wales that the collapse HIH was an event that should never happen again. To deal with that ultimately and the post-HIH years were precarious years both in terms of ensuring that there was availability of insurance for all solicitors, availability of cover that they could procure, but, secondly, we were concerned about the public and consumers.

To that end a decision was made to obtain an APRA licence and the capital requirements of APRA are such and we hold the only APRA licence of any of the compulsory PII providers in the country is to ensure that we have pretty much a bomb-proof level of capital. That's the first point. The second point is in terms of foundation principles the reality of a statutory scheme is that everybody is in and we've done well with risk management but with everyone in you're not going to be providing the cheapest cover that's out there, but unlike the UK, which has had to revert to the assigned risk pool where a significant percentage of the profession ultimately can't practice after they've fulfilled or sat in the assigned risk pool for as long as they're able because it's time-limited. Our task is to ensure that the profession is entirely covered and ultimately that all consumers are covered.

Can I finally add in terms of the destiny of Law Cover, what we have done since obtaining the licence has been to build capital and if you work on the basis that APRA requires a prescribed capital ration of a hundred per cent, Law Cover current sits at 324 per cent. Our task has been to build capital strength with a view that as capital strength is at a point of optimisation that that capital ratio can to be used in the out years to lower premiums and that will be, having built that complete, as I term it, bomb-proof safety in the out years will now be to look at ensuring that we can take the pressure off premiums and that is where New South Wales will be headed.

**DR MUNDY:** Are these anti-competitive arrangements in place in all other jurisdictions in Australia?

**MR TIDBALL (LSNSW):** I believe that statutory insurance arrangement are in place in Victoria. I'm not a spokesperson for those jurisdictions but, effectively, I know definitely Queensland and I know definitely Victoria and I believe WA, but I can't give a comprehensive response, Commissioner.

**DR MUNDY:** I mean I am interested in your observations about HIH because that

was a general failure of prudential regulation. It was nothing specific to legal insurance, was it?

**MS EVERETT (LSNSW):** I don't know we're in a position really to comment.

**MR TIDBALL (LSNSW):** I mean I remember there being a rule, Commissioner, I remember a scheme for personal injury, so it clearly wasn't just about legal insurance.

**MS EVERETT (LSNSW):** Oh, no. No.

**DR MUNDY:** So it was a general failure - - -

**MS EVERETT (LSNSW):** The general insurer.

**DR MUNDY:** - - - and my recollection is the then chairman of APRA essentially lost his job over it.

**MR TIDBALL (LSNSW):** Correct.

**DR MUNDY:** There were dislocations in insurance markets after September 11, I remember them vividly. Construction of the Australian reinsurance led to the existence of the Australian reinsurance agency. The commonwealth provided all aviation insurance at the time. It now provides none. So insurance markets can recover from these events and there's examples even more recently with the collapse of AIG and on line insurance for the bond market, so the fact that a response was put in place to a prudential event or a capital event does not necessarily, of itself, lead to an argument for a competitive restraint to ensure a market functions, whatever that market is.

I mean, similar issues occur in directors' and officers' insurance and occurs in medical insurance as well, but I guess what we're trying to get at - and I am interested in what the decision making around this is, because presumably if you are building up capital in excess of the APRA requirement, then to meet the APRA requirement you would need to charge lower premiums. It follows, the money must come from somewhere if the capital is being built up. Then if the capital was less than the demand on the insurers' policies would be left and those costs could be passed on to consumers today who may not benefit from the premium reductions you are contemplating in the future.

**MS EVERETT (LSNSW):** We've had to capitalise and get to the strong position, which we are now in, and it means that we are able to - from my knowledge - we're able to avoid the very expensive reinsurance market and we're in a position now that

we can really start passing on those savings to our members.

**DR MUNDY:** Because these costs are really - these insurance costs are, ultimately, borne by the consumers of legal services and effectively they have no say in this matter, do they?

**MR TIDBALL (LSNSW):** They do not have a say in it, Commissioner. If I may respond. One of the costs is attached to the fact that if you moved to an open market the view taken has been that there may be, as the president indicated - - -

**DR MUNDY:** Sorry, the view taken by who?

**MR TIDBALL (LSNSW):** My president; by Ros Everett in her evidence. There may be parts of the profession that can't get insurance - - -

**DR MUNDY:** Yes.

**MR TIDBALL (LSNSW):** - - - if it's an open market. So that's a risk and that's a risk which I think policy makers, as in government policy makers, in partnership in the profession have considered to be a very undesirable outcome in New South Wales. There is a cost associated with that. Secondly, though, during the establishment years there has been a need to have a high degree of reinsurance in place and that has - that has - led to premiums which are higher, but always with the recognition that having, in a sense, obtained the APRA licence and built that capital strength that ultimately there would be benefit that would flow down the track with lower premiums.

**DR MUNDY:** Okay. Anything else on that?

**MS MacRAE:** No.

**DR MUNDY:** What do you want to move on to?

**MS MacRAE:** I was thinking we could talk about pro bono.

**DR MUNDY:** Yes.

**MS MacRAE:** You also mentioned in your opening statements about pro bono and I think you were keen to tell us a bit more about that.

**MS EVERETT (LSNSW):** Yes. Every solicitor I know does a lot of pro bono work and does it willingly, and we don't talk about it. It's something that we just do and it's something that I think is innate in the profession. I talk about it from my own



experience being out in Penrith and I come from country New South Wales, so I know the great need for the provision of local legal services in the country because the distance we travelled to access legal services in the country, especially if you've got people in the lower socio-economic markets who perhaps do not have a car and there is no public transport, so to speak. So it's important that local solicitors do provide that pro bono service and I certainly know that happens.

There was some discussion about people who are practising only in pro bono areas are not to pay practising certificate fees, licensing fees, but that then does bring in the problem of insurance, professional indemnity insurance, payments to the fidelity fund and also ongoing legal training, the CPD requirements. So what I find happens is - and I have done a lot of time in community legal centres myself and I know we do provide some funding for that - but it's something we're not really opposed to but we just don't know whether it is necessary and is something which, you know, we're open to discussions about.

**DR MUNDY:** We have had a large number of submissions saying it is necessary.

**MS EVERETT (LSNSW):** It's necessary.

**DR MUNDY:** Coming from CLCs in the main. That is where the issue came from. We did not cook this up on a Saturday afternoon. It came to us in discussions with particularly their peak bodies, not so much the individual ones, but their peak bodies. I think in some jurisdictions it is available. South Australia springs to mind but I might be wrong.

**MS MacRAE:** Yes, that's right.

**DR MUNDY:** Probably a South Australian sort of thing.

**MS EVERETT (LSNSW):** Well, look, as I said, I think it's working well now. I think the experience of some of the centres is that they probably don't see that there's so much pro bono work happening - as I said, we don't talk about it. It happens. We don't have a community legal centre in Penrith where I am, but I know all my colleagues there and we do an awful lot of pro bono work.

**DR MUNDY:** I think one of the things that is being - I mean we do understand the issues around insurance and those questions - - -

**MS EVERETT (LSNSW):** Yes.

**DR MUNDY:** - - - and that is obviously something that does need to be dealt with and properly dealt with. I think the concern has been around people who genuinely -

who are suitable - who are in career breaks or they have retired who are willing and able to do the work, essentially, getting around. Now it may well be for some that it is sufficient to get around even if they or the CLC had to pull on the insurance cost.

**MS EVERETT (LSNSW):** Yes.

**DR MUNDY:** The additional cost of the practising certificate may be at the margin the thing that discourages them doing the pro bono work. Now there may well be others for whom the - if they had to privately fund the insurance that might be the trigger, so that is essentially - we are not suggesting that they should be exempt from those things.

**MS EVERETT (LSNSW):** No. No, well, we think the coverage is absolutely necessary because, obviously, you can't have people practising uncovered.

**DR MUNDY:** Oh, no, we would not suggest otherwise.

**MS EVERETT (LSNSW):** My other concern is, you know, we have solicitors who have retired. Now, if they're recently retired that probably is acceptable, but if we have someone who is out of practice for five years and not doing ongoing legal education, they can very easily get out of touch. Now, I don't think the users of pro bono services in community legal centres are well served by having people who aren't up to date and who aren't providing proper legal services, so I don't think we would be really helping them by not keeping the level - - -

**DR MUNDY:** I don't know if that's what was suggested.

**MS EVERETT (LSNSW):** No, probably not.

**DR MUNDY:** I mean, they could be provided with a limited form of practising certificate which to hold that practising certificate they had to meet the normal CPD requirement. Again that would come at a cost to them, but we're not suggesting that - or there may well be charitable firms who wish to set up a fund to set up CPD funding for people in that position.

**MS EVERETT (LSNSW):** Yes. I don't know. There's obviously lots of ways that it can be dealt with but obviously acknowledge that we really need to keep our services up to date, obviously. If that's acknowledged and recognised and there's some way to provide that then certainly that would be a good thing.

**MR TIDBALL (LSNSW):** Commissioners, if I may just comment briefly on insurance. The Lawcover board, several years ago determined to develop a pro bono product which is offered, and I'm not sure whether you've learned about this from

elsewhere but I'm happy to forward you the details of it, but it's a loss leader. It's a very low-priced policy to make sure that lack of insurance is never the reason for a solicitor to not be under-funded to be able to undertake pro bono work and it's offered through the National Pro Bono Resource Centre.

**DR MUNDY:** Okay. We've had other examples, particularly where people are on career breaks, typically, whose firms will say, "If you want to do pro bono work, that's fine. We'll keep you under policy" - but the cost of paying for their practices doesn't get - there's a range of circumstances. We're not trying to create a second class of solicitor.

**MS EVERETT (LSNSW):** Of course, thank you.

**MS MacRAE:** One of the things that we've recommended - because we're somewhat concerned about the information that's available for consumers and how easy it is for them to shop around, given the nature of legal services - is to have an online resource that would report on ranges of legal fees for particular matters. I'm wondering if you have a view about whether you would resource that and support it, do you think it's a reasonable proposition and do you think it would help to have a better informed consumer market in terms of choice and range of legal services that might be available?

**MS EVERETT (LSNSW):** The Internet is a powerful tool and I know, certainly, consumers do ring around in the conveyancing market which is very competitive. People ring my firm - and I'm just quoting from my experience, of course, which is the best way to do it. We have phone calls daily from people wanting to know what it's going to cost for a sale or a purchase or a conveyancing matter. It is very, very difficult to predict what sort of fees are going to be applicable to, say, a litigation matter where someone will come in, they have a litigation matter they want to pursue, and it is very difficult to say, "Okay, it is going to cost you X amount of dollars," because you don't know whether it's going to be a couple of letters backwards and forwards to the other person, whether it is going to be litigated, whether it's going to settle or go through an alternative dispute resolution - a mediation, conciliation point - or whether it's going to go to a full hearing, which could take a day in the court or it could take two weeks or two months.

So it's incredibly hard to give an estimate, especially when you haven't taken instructions, it would be impossible. If someone rang up and said, "Well, my car has been damaged in an accident and I'd like you to act for me. How much is that going to cost me?" Well, it would be impossible to say how much that would cost. But on the other side of the coin, in the Family Court we are required to serve on the other party an estimate of our fees, and we could do that event based. "If it goes to this point, if it settles at the first mediation conference, our estimate fees will be this

amount.. If it settles before hearing it would be this amount." We're required to provide the court with an estimate of our fees, and also the other parties'. That does turn our minds to it but in that sort of environment it is probably less difficult to do, because we all know what the requirements of the court are, we know what we have to do to get to that point and we know what evidence we have to gather.

Even though it's not an exact science we can give an estimate, but with some other matters it can be very difficult to be able to give an estimate of what our fees would be. The only way would be, I suppose, if a potential client asked what the hourly fee is, we could tell them that, and certainly our cost disclosures are very stringent and the Legal Profession Act, of course, we have to give a very lengthy cost disclosure which runs to some 10 pages and that is a very powerful document that we go through with our client and even though we can estimate what it's going to cost them you can't be very precise because you just don't know what the future holds.

**MS MacRAE:** I guess just taking that a little further, if you were able to take a type of cost and if you were able to say, if it reached this stage - as you do with Family matters - that it makes sense for other civil matters to be able to give a range - because, really, I think Joe Blow off the street, if you asked them how much would a lawyer cost, most of them - they've never dealt with one. They generally say, "I'm sure they would be very expensive." You'd say, "But how much do you think?" "I don't know, probably more than I could afford." That would be as broad an answer as you would get. We're just trying to find a way of getting the market a little bit more informed than that and trying to make it a bit easier than having to ring around 10 different people and then finding that maybe you're explaining all your circumstances to everybody to try and get an estimate and then you're not really quite sure at the end of the day whether that's helped you or not.

At least to be able to go somewhere to say, "Well, if I've got a personal injury and you can tell me if it goes to this stage or if I've got some idea in my head about the figure I think it might be, sure I'm not going to be able to come back to anybody and say, 'Well, that misguided me.' It's only an estimate, it's a range but at least I've got something in the ballpark that gives me somewhere to start when I then might want to choose to ring around and see if I can refine those costs a bit better." Is that too wild a proposition to be able to do something of that sort?

**MS EVERETT (LSNSW):** It's extremely difficult because litigation is very complex, as we know, and I frequently see people and I explain to them what the process would be and give them an idea of what are the standard costs within a range and that's something we do and something we are required to do under our costs disclosure, but to have a web site it would be very problematic, I would think, because you have, for example, some solicitors who may be more experienced in an area of law, and what may take them two hours to do could take another solicitor

10 hours to do. When you specialise, obviously - my practice is a general practice but I have solicitors, and myself, who are experienced in different areas.

It would be very problematic to be able to put - in litigation matters - an estimate of fees. Conveyancing would be easier and some areas would be easier, obviously, because you know it pretty well, but with litigation it would be very difficult, I would imagine, to be able to do that but it may be something we could look at and come back.

**MR TIDBALL (LSNSW):** Yes. It's certainly an issue though that we are covering, along with the other law societies and bars in our submission to the Law Council. It's a matter that has been, I believe, covered in that submission and our comments.

**DR MUNDY:** It does seem possible for a range of medical professions in the United States - and surgery, I suggest, is as complex as running litigation - to do this. They even have quality feedback which in a litigious country like the United States where defamation is almost king it's quite interesting. I guess what we're trying to get a sense of is whether it's possible to give people some - we're not seeking to identify individual solicitors, we're trying to give people some sense that if you're in a matter that looks something like this, you're looking down the throat of something in this range. That's what we're trying to get at, in part because people just suffer from sticker shock.

**MS EVERETT (LSNSW):** Yes.

**DR MUNDY:** They have no expectation. There's no experience of this and if the range was even quite wide and the number fell in the range, at least they would have some sense of it. I'm just mindful of the time. I just was wanting to see if you had any reflections in relation to the Legal Profession Reform Law Act or Bill, wherever it's up to. Not so much about its content. I mean, we think it's a good thing. I'm just interested whether you have any reflections on (a) the reason why it hasn't ended up being quite as uniform as we would have liked it to be, and (b) those particular areas where work is needed perhaps where alignment with those jurisdictions that aren't participating might be important from a public policy perspective, that we might be able to say, "Well, okay, you're not going to take on the whole bill, but for heaven's sake line these bits up for us."

**MS EVERETT (LSNSW):** Doctor, we have New South Wales and Victoria on board, which is 70 per cent of the national profession, and we're getting really positive feedback from the other states that they're coming on board.

**DR MUNDY:** Even Western Australia?

**MS EVERETT (LSNSW):** Perhaps not Western Australia, but they're renowned to stand alone. Even with the Family Law Act they stand alone, so they're out of the Commonwealth Act. Every other state and territory is guided by the Commonwealth Act, but Western Australia not. Even so, we have had discussions with Western Australia and we are hopeful. We're talking to them and we think now that we have got the enabling legislation in place, those discussions are continuing, especially in COAG, and the New South Wales Attorney-General has - well, I don't want to misquote him but I know he's keen to speak to his counterpart attorneys-general in other states and - - -

**DR MUNDY:** This is the new one?

**MS EVERETT (LSNSW):** Yes, Mr Hazzard - to promote that, and also the federal Attorney-General we believe is keen to promote it as well. Again I don't want to verbal them but that's my understanding. We're quietly confident that the other states and territories will come on board because the ACT, being surrounded by New South Wales and Victoria, we think it's in their interest and we think they understand that and they will come on board. As I said, I'm quietly confident, but Mr Tidball will probably perhaps add to that.

**MR TIDBALL (LSNSW):** Very quickly, Commissioners. As I understand it, although I am not an expert on it, applied law schemes very often see other jurisdictions come in later in the day and I think as this was always very much an east coast push to have a large market, it stands to all commonsense that Victoria and New South Wales would be there first. It is up to us to expound the benefits of the scheme and that is what we're doing. My view is that as we do that, the others will come in.

I think, Commissioner, the main deal breaker for the smaller jurisdictions is that - and I use the ACT as an example - it has not had a co-regulator. The issues of cost and the issues of cost escalation in terms of infrastructure are always going to be smaller in a small jurisdiction where you have to add a function. Effectively now with the start-up costs covered, which the Law Society of New South Wales has covered, as well as the recurrent costs being covered, there is a very constructive conversation that we can have but we will need to explain the benefits, but I think over time you will see other jurisdictions come in.

**DR MUNDY:** Okay. Thanks very much for your time today.

**MS EVERETT (LSNSW):** Thank you very much for the opportunity.

**DR MUNDY:** We will now have a short break and reconvene at 11 am. Thank

you.

**MR TIDBALL (LSNSW):** Thank you.

**MS EVERETT (LSNSW):** Thank you, Commissioners.

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