INSURANCE COUNCIL OF AUSTRALIA

Mr Warren Mundy
Presiding Commissioner
Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
Melbourne Vic 8003

By email: access.justice@pc.gov.au

21 May 2014

Dear Mr Mundy

PRODUCTIVITY COMMISSION 2014, *ACCESS TO JUSTICE ARRANGEMENTS,* DRAFT REPORT

I refer to the release of the Productivity Commission's Draft Report, *Access to Justice Arrangements* in April 2014 (Draft Report). The Insurance Council of Australia[1] (ICA) represents members of the general insurance industry including those who are underwriters or scheme agents for CTP and motor accident schemes; underwriters or scheme agents for workers compensation schemes; and underwriters for public liability, professional indemnity and product liability insurance.

As a significant stakeholder in matters concerning the adjudication of civil liability claims, the ICA supports dispute resolution processes which reduce dispute duration and cost for the benefit of all parties involved in a claim. In the area of personal injury claims, we support measures which enhance the claimant's timely return to health and work. We submit that the early resolution of claims not only benefits the claimant but also controls costs as a whole.

The ICA supports many of the draft recommendations in the Draft Report. Attached to this letter is a table of particular recommendations together with our members' feedback. Our members may also wish to provide you directly with further detail in relation to the Draft Report's recommendations.

The ICA and our members are happy to continue to work with the Productivity Commission and provide their assistance on the range of issues raised in the Draft Report. If you have any questions or comments in relation to the above please do not hesitate to contact Vicki Mullen on (02) 9253 5120 or vmullen@insurancecouncil.com.au .

Yours sincerely

Robert Whelan
Executive Director & CEO

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[1] The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. December 2013 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of $40.9 billion per annum and has total assets of $112.8 billion. The industry employs approximately 60,000 people and on average pays out about $107.9 million in claims each working day.
Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

Productivity Commission Inquiry into Access to Justice Arrangements
Draft Report - Draft Recommendations and Information Requests

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	Chapter 5: Understanding and navigating the system	
DR 5.1	**All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.** **Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.**	Supported. The ICA supports measures which enhance the litigant's understanding of legal issues.
	Chapter 6: Information and redress for consumers	
DR 6.1	**In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.**	Supported.
DR 6.2	**Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.**	Supported.
DR 6.3	**State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.** **• This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly**	The ICA supports this draft recommendation and any recommendations which improve the transparency of legal costs to all stakeholders.

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	reported through this resource. **• The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.**	
IR 6.2	How would central online resources with information about legal fees be implemented? What level of aggregation is required to avoid any confidentiality issues? On what measures should information be available (means, medians, hourly rates, total bills)? Are the prices charged by all providers relevant — for example, should a minimum threshold of number of cases of each type per year be required before cost data is submitted, should very small and very large firms be included?	The ICA suggests that law firms should be required through regulation to provide samples of de-identified cost agreements together with the final bill every 12 months. We suggest that the following information could be captured to allow for appropriate comparison: • hourly rates and case estimates, • legal fees exclusive of disbursements, • disbursements, separately identifying expert fees and counsel fees, • whether the lawyer is an accredited specialist in the area of law, • whether the retainer is on the basis of no-win-no fee, and • where the legal fees will be recovered from (ie from settlement monies or separately from the other parties). On this basis we submit that any firm undertaking a particular quantity of cases per year in a specific area of law should be included.
IR 6.3	The Commission is seeking views on the appropriate 'hosts' for central online resources with information about legal fees — should they be hosted by each jurisdiction's Attorney-General's department, legal services commissioner (or equivalent) or legal aid commission? Could this resource exist alongside a 'directory' listing of firms who are willing to advertise their prices through, say, a law society website? How could information on quality of service elements best be gathered and	The ICA suggests that such a resource could be maintained by the Law Society in each state jurisdiction so that it can work alongside any existing directory of firms.

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	reported? Are there international examples that would be applicable in Australia? Where should such ratings be reported — should they be 'hosted' by governments, professional associations or independent providers?	
DR 6.4	**In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).** **• Lawyers should be required to provide access to this information within five days of the request.** **• The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.** **• Any initial conclusions drawn from the cost information can contribute to an own motion investigation if the complaints body deems that one is warranted.**	Supported.
DR 6.5	**Cost assessment decisions should be published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of cost amounts or broad dispute type).** **• Cost Assessment Rules Committees (and their equivalents) should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in cost assessments.**	Supported.
DR 6.6	**Other state and territory governments should align their legislation with New South Wales and Victoria to allow disciplinary actions for consumer matters (those matters relating to service cost or quality, but which do not involve a breach of professional conduct rules).** **• This should include the ability for complaints bodies to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.** **• Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.**	Supported.

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DR 6.7	**As in New South Wales and the Northern Territory, all complaints bodies should be empowered by statute to suspend or place restrictions on a lawyer's practising certificate, while allegations are investigated, if the complaints body considers this in the public interest.**	Supported.
DR 6.8	**The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.**	Supported.
IR 6.4	The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether: • consumers are aware of complaints avenues and using them • resolution of disputes and investigations is timely and the sanctions imposed proportionate • consumers and lawyers are satisfied with the outcomes of complaints processes?	Our members' experience is that there appears to be a general lack of awareness of legal complaint bodies, and how they operate. We submit that broader advertising by the complaint body and greater education concerning the complaint process is likely to improve this issue.
	Chapter 7: A responsive legal profession	
DR 7.1	**The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:** **• the appropriate role of, and overall balance between, each of the three stages of legal education and training** **• the ongoing need for the 'Priestley 11' core subjects in law degrees** **• the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education** **• the relative merits of increased clinical legal education at the university or practical training stages of education** **• the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.**	Supported. The ICA supports principle based regulations to enhance the legal profession acting in the best interests of society. We suggest that the recommended review should include a consideration of the importance of ethics training.

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DR 7.2	**Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.** **• Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.**	The ICA submits that this recommendation requires further consideration. We support measures which improve the transparency of legal fees paid by claimants – in particular for mandatory accident compensation schemes. We believe that this will require appropriate and robust oversight and enforcement by an independent regulator. We recommend that a detailed actuarial analysis be undertaken - as such measures may impact claims costs and the efficiency of personal injury schemes, in particular in NSW and Queensland.
DR 7.3	**State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.**	Supported.
IR 7.5	In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?	The ICA submits that the potential professional indemnity impact of this suggestion requires further consideration. We submit that a detailed actuarial analysis be undertaken as such measures may impact claims costs over a range claims, including those in the area of personal injuries.
	Chapter 8: Alternative dispute resolution	
DR 8.1	**Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.**	Supported.
IR 8.1	The Commission seeks feedback on whether there is merit in courts and tribunals	The ICA submits that ADR measures such as

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	making mediation compulsory for contested disputes of relatively low value (that is, up to $50 000). What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions? The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.	mediation could be enhanced to reduce unnecessary costs and support the speedy resolution of claims. To improve this we suggest that such measures be undertaken for claims up to a value of $100,000 and should be instituted as an alternative to current early resolution methods rather than in addition to them.
DR 8.2	**All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.**	Supported.
DR 8.3	**Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.**	Supported.
DR 8.4	**Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.**	Supported.
DR 8.5	**Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.** **Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might**	Supported.

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	be resolved.	
DR 8.6	**Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.**	Supported.
	Chapter 10: Tribunals	
DR 10.1	**Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.**	Supported.
DR 10.2	**Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.**	Supported.
IR 10.2	Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.	The ICA supports the increased use of technology such as video conferencing and electronic lodgement of documents to reduce friction costs and improve the speedy resolution of claims.
	Chapter 11: Court processes	
DR 11.1	**Courts should apply the following elements of the Federal Court's Fast Track model more broadly:** **• the abolition of formal pleadings** **• a focus on early identification of the real issues in dispute** **• more tightly controlling the number of pre-trial appearances** **• requiring strict observance of time limits.**	Supported.
DR 11.2	**There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction.**	Supported.

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	The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).	
DR 11.3	**The National Judicial College of Australia and other judicial education bodies should continue to develop and deliver training in effective case management techniques drawing from empirical evaluations to the extent that these are available.**	Supported.
DR 11.4	**Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.**	Supported.
DR 11.5	**Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:** **• court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available** **• courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly** **• court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate** **• courts should be expressly empowered to make targeted cost orders in respect of discovery.**	Supported.
IR 11.3	The Commission seeks feedback on the effectiveness and access to justice implications of the approach to discovery in Practice Note No. SC Eq 11 of the Supreme Court of NSW under which the Court will not make orders for disclosure of documents until the parties to proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.	The ICA's members advise that in their experience this process produces equitable outcomes as it ensures that discovery is not being used to 'fish' for additional evidence.
DR 11.6	**All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more**	Supported.

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	efficiently. **All jurisdictions should ensure that, at a minimum, these checklists cover:** **• scope of discovery and what constitutes a reasonable search of electronic documents** **• a strategy for the identification, collection, processing, analysis and review of electronic documents** **• the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data)** **• a timetable and estimated costs for discovery of electronic documents** **• an appropriate document management protocol.**	
DR 11.7	**Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.**	Supported.
DR 11.8	**Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:** **• a requirement on parties to seek directions before adducing expert evidence** **• broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.**	Supported.
DR 11.9	**Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether:** **• a single joint expert or court appointed expert would be appropriate in a particular case** **• to use concurrent evidence, and if so, how the procedure is to be conducted.**	Supported.
DR 11.10	**All courts should:** **• explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia** **• facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.**	The ICA makes no submission.
	Chapter 12: Duties on parties	
DR 12.1	**Jurisdictions should further explore the use of targeted pre-action protocols**	Supported.

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	for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.	The ICA submits that the imposition of appropriate costs orders is likely to further facilitate this, particularly in personal injury claims.
DR 12.2	**Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.**	Supported.
	Chapter 13: Costs awards	
DR 13.1	**Australian courts and tribunals should continue to take settlement offers into account when awarding costs. Court rules should require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis.**	Supported.
DR 13.2	**In the Federal Circuit, Magistrates, District and County courts, costs awarded between parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to:** **• the stage reached in the trial process** **• the amount that is in dispute.** **For plaintiffs awarded costs, the relevant amount in dispute should be the judgment sum awarded. For defendants awarded costs, the amount in dispute should be the amount claimed by the plaintiff.** **Fixed scales of costs should reflect the typical market cost of resolving a dispute of a given value and length. Data collection and analysis should be undertaken to periodically update these amounts and categories.**	Supported.
DR 13.3	**Superior courts in Australia that award costs, such as supreme courts and the Federal court, should introduce processes for costs management, based on the model from English and Welsh courts. Parties would be required to submit, and encouraged to agree on, costs budgets at the outset of litigation. Where parties do not reach agreement, the court may make an order to cap the amount of costs that can be awarded.**	Supported.
DR 13.4	**Parties represented on a pro bono basis should be entitled to seek an award**	The ICA makes no submission.

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	for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.	
DR 13.5	**Unrepresented litigants should be able to recover costs from the opposing party, subject to the costs rules of the relevant court.**	The ICA submits that this recommendation requires further consideration. We believe that only amounts actually incurred by the litigant as disbursements such as the cost of expert reports should be recoverable in these circumstances. We are concerned that any further amounts will be difficult to quantify and may encourage unmeritorious claims.
DR 13.6	**Courts should grant protective costs orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.**	The ICA makes no submission.
DR 13.7	**Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.** **These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.**	The ICA makes no submission.
	Chapter 14: Self-represented litigants	
DR 14.1	**Courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case.** **• All court and tribunal forms should be written in plain language with no unnecessary legal jargon.** **• Court and tribunal staff should assist self-represented litigants to understand all time-critical events in their case. Courts and tribunals should examine the potential benefits of technologies such as personalised computer-generated timelines.**	Supported.

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	• Courts and tribunals should examine their case management practices to improve outcomes where self-represented litigants are involved.	
DR 14.2	**Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.** **Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.**	Supported.
DR 14.3	**Governments, courts and tribunals should work together to implement consistent rules and guidelines on lay assistance for self-represented litigants.**	Supported.
	Chapter 15: Tax deductibility	
DR 15.1	**The Commission recommends that no change be made to existing tax deductibility of legal expenses.**	Supported.
	Chapter 16: Court and tribunal fees	
DR 16.1	**The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:** **• in cases concerning personal safety or the protection of children** **• for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.** **Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.**	The ICA submits that this recommendation requires further consideration. We recommend that a detailed actuarial analysis be undertaken as such measures may impact costs over a range of personal injury schemes across Australia. The ICA notes that the matter of court fee relief is a matter for Courts and Tribunals to determine.
DR 16.2	**Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.** **The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors**	As above DR 16.1.

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	should include: **• whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body** **• the amount in dispute (where relevant)** **• hearing fees based on the number of hearing days undertaken.**	
DR 16.3	**The Commonwealth and state and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2.**	As above DR 16.1.
DR 16.4	**The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.** **Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible party is successful in recovering costs or damages in a case.** **Fee guidelines in courts and tribunals should also grant automatic fee relief to:** **• parties represented by a state or territory legal aid commission** **• clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.** **Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.**	As above DR 16.1.
	Chapter 17: Courts — technology, specialisation and governance	
DR 17.1	**Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate, and examine whether there should be a presumption in favour of**	Supported.

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	telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.	
DR 17.2	**Australian governments and courts should examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, to reduce court administrative costs and to support improved data collection and performance measurement.**	Supported.
DR 17.3	**Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.**	Supported.
	Chapter 18: Private funding for litigation	
DR 18.1	**Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.** **• The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.**	The ICA submits that this recommendation requires further consideration. The ICA believes that more work on this area should be undertaken prior to restrictions on damages based billing being removed. Our members believe as a matter of principle that any legal cost model needs to ensure that lawyers are reasonably compensated for the work they complete which is not to the detriment of the client that they represent. Cost protections for people seeking legal assistance can be built into legal cost models. We submit that any legal cost model should also provide strong incentives for solicitors to resolve claims sooner, without litigation, instead of rewarding lawyers for unnecessarily working on files in order to drive up legal costs. The ICA submits that legal costs be regulated to reflect the following guiding principles: • full transparency to ensure that the claimant

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		receives appropriate recompense without additional solicitor/client legal representation deductions, • legal efficiency should be encouraged and rewarded in the legal cost model, • smaller claims should allow for simple navigation by a claimant to remove the need for unnecessary legal representation which would be reflected in the cost scales,and • penalties apply to prevent unnecessary disputes in claims by all parties and their legal practitioners. Different billing formats may be applicable for different types of legal work. In relation to compensation schemes, we recommend that a working party be formed involving all relevant stakeholders for each compensation class to determine the most appropriate billing method, and for this to be applied across all schemes of a similar nature across Australia (e.g. CTP schemes to have the same billing method across Australia). An actuarial analysis should also be undertaken to ensure the cost of the models proposed by the working parties is viable..
DR 18.2	**Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.** **Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this**	The ICA strongly supports this recommendation. We believe that the protection afforded by an Australian Financial Services Licence (AFSL) as part of a broader regime of appropriate safeguards to potentially vulnerable parties outweighs the compliance burden to Litigation Funding Companies (LFC).

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	recommendation by the Commonwealth Government after consultation with relevant stakeholders.	The ICA submits that consumers require safeguards beyond the protection afforded by the *Competition and Consumer Act 2010* and the *Australian Securities and Investment Commission Act 2001*. We submit that LFCs should meet minimum financial requirements of an AFSL (to guard against collapse), internal and external dispute resolution procedures, conflict of interest rules, and fit and proper person tests for its officers. We submit that this would increase the standing and professionalism of LFCs. It would also place LFCs on an equal footing with insurer litigants who are involved in many of the class actions. In addition the ICA submits that LFCs should be required to: • adequately disclose details of the agreement with an appropriate cooling off period, • have a fiduciary duty to litigants which ensures that the litigants maintain a level of control over the proceedings, and • maintain transparency of its involvement in proceedings. We submit these greater controls will not only protect consumers from inappropriate practices, but also ensure regulators have overview of LFCs' activities without impacting the litigant's access to justice.
	Chapter 19: Bridging the gap	
DR 19.1	**The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all**	Supported. The ICA looks forward to participating in the

NUMBER	DETAIL OF DRAFT RECOMMENDATION	INSURANCE INDUSTRY RESPONSE
	Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address: **• how to define the scope of retainers** **• the liability of legal practitioners** **• inclusion and removal of legal practitioners from the court record** **• disclosure and communication with clients, including obtaining their informed consent to the arrangement.**	development of such rules.
DR 19.2	**The private legal profession should work with referral agencies to publicise the availability of their unbundled services.**	The ICA makes no submission.
	Chapter 24: Data and evidence	
DR 24.1	**All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).** **To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:** **• adopting common definitions, measures and collection protocols** **• linking databases and investing in de-identification of new data sets** **• developing, where practicable, outcomes based data standards as a better measure of service effectiveness.** **Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.**	Supported.
DR 24.2	**As part of draft recommendation 24.1, existing data systems should be overhauled so that providers can track outcomes for intensive users of legal assistance services over time.**	Supported.
DR 24.3	**The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.**	Supported.