

## MAPPING CHANGES IN THE ACCESS TO CIVIL JUSTICE OF AVERAGE AUSTRALIANS: AN ANALYSIS AND EMPIRICAL SURVEY

### ABSTRACT

The phrase ‘access to justice’ is growing more common in contemporary debates about the Australian civil justice system. This article examines the concept of access to civil justice, why it is important, and the obstacles to achieving it, before reporting the results of an empirical survey on changes in access to civil justice for average Australians. It reports on significant areas of legal problems, their impact, the most popular legal services sought and perceptions of changes in access. This article includes an analysis of perceptions of changes in access including a discussion of effects of innovations such as no-win-no-charge, class actions and third-party litigation funding. This article also reports findings on the public desire to be informed of legal rights of action, differences in problems in inner-city, suburban and rural settings as well as the production of index numbers for levels of access in particular legal areas.

### I INTRODUCTION

In recent years in Australia, discussion and debate in relation to our justice system has frequently made reference to the importance of ‘access to justice’.<sup>1</sup> This is particularly so in civil justice and the recent debate over the merits of class actions

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<sup>1</sup> This extends to judicial references to such access, such as those in recent decisions of the High Court: see *BMW Australia Ltd v Brewster* (2019) 374 ALR 627, 647 [82]–[83], 649 [93] (Kiefel CJ, Bell and Keane JJ), 650 [97], 653 [110] (Gageler J), 669 [177], 676 [199], 677 [202], 678 [205] (Edelman J) (*‘Brewster’*); *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, 106 [60], 116 [90], 118 [91]

and third-party litigation funding, which have seen no less than two government law reform commission reports and a Parliamentary Joint Committee report in the last three years.<sup>2</sup> All of these have made extensive reference to the notion of access to justice.

Though the concept of access to justice defies precise definition,<sup>3</sup> the relevant debates have generally acknowledged the merits of such a concept.<sup>4</sup> Yet there is an absence of analysis of where access to civil justice — and in particular the concepts of no-win-no-charge, class actions and litigation funding — is located in the wider concept of access to justice and legal needs, despite there being considerable literature and empirical studies on that broader concept.<sup>5</sup> There is also somewhat limited Australian empirical analysis of this relationship.<sup>6</sup>

In this article the authors seek to address a number of issues in the context of the contemporary Australian public debate, including by: (1) interrogating the importance of access to civil justice to citizens with legal problems and to society generally; (2) identifying some of the barriers to such access; and (3) reporting findings of our own empirical survey on these questions and on the accessibility of civil justice to average Australians. The latter section will summarise key aspects of our full empirical survey conducted in 2018–19,<sup>7</sup> which sought to assess whether access to

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(Heydon J); *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, 336 [10], 336 [12] (Gummow J), 411 [288] (Heydon J); *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 425 [65] (Gummow, Hayne and Crennan JJ), 444 [125], 451 [145] (Kirby J), 482–3 [256], 489–90 [271]–[272] (Callinan and Heydon JJ) (*Fostif*); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 424 [297] (Kirby J), 465 [431] (Callinan J).

<sup>2</sup> Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Report, March 2018); Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No 134, December 2018); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, 21 December 2020) 125 [9.124].

<sup>3</sup> See, eg, OECD and Open Society Foundations, *Legal Needs Surveys and Access to Justice* (Report, 31 May 2019) 15, 41 n 3.

<sup>4</sup> Though there is debate on how this is achieved and whether an increase in the amount of litigation necessarily correlates with an increase in access to justice.

<sup>5</sup> See below Part III(A).

<sup>6</sup> Though a number of Commonwealth government reports have certainly noted the importance of representative actions (class actions) and litigation funding, and their potential to increase access to justice: see, eg, Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009) 114–17; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 17 February 2000) 527–52 [7.87]–[7.128].

<sup>7</sup> Ethics approval was received from the Monash University Human Research Ethics Committee on 25 June 2018.

civil justice of average Australians has reduced, been static or increased over the past two decades. The empirical survey also identified: (a) areas where average Australians have the most legal problems; (b) legal problems with the highest impact on life; (c) services most popularly sought and satisfaction with these and the legal process; (d) citizens' attitude to their potential civil claims; (e) the extent to which different innovations — no-win-no-charge, pro bono, third-party litigation funding, and class actions — have assisted access to civil justice overall and in different areas of the law; and (f) any salient differences in access to justice in inner and outer urban and regional settings. Lastly, the authors produce access to justice index numbers showing access levels from a list of 26 types of legal problems.

## II ACCESS TO JUSTICE

### A *What Is Access to Civil Justice?*

The expression 'access to justice' is widely used but not so often defined. In some cases, the use of the phrase has focused on the issue of *equality of access* to the legal system and to the courts.<sup>8</sup> This expression is related to the phrase 'equal justice under law'.<sup>9</sup> In Australia, access to justice has been noted as referring to:

- the ability of people to access legal representation;
- the adequacy of legal aid;
- the cost of delivering justice;
- measures to reduce the length and complexity of litigation and improve efficiency;
- alternative means of delivering justice;
- the adequacy of funding and resource arrangements for community legal centres; and
- the ability of Indigenous people to access justice.<sup>10</sup>

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<sup>8</sup> Access to Justice Advisory Committee, Parliament of Australia, *Access to Justice: An Action Plan* (Report, 1994) xxx.

<sup>9</sup> As inscribed on the United States Supreme Court building and reflecting the Fourteenth Amendment to the *United States Constitution*, which provides that no state shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws': see at amend XIV. This focus is on equal *protection* of citizens which might imply a focus on equality of application of laws that protect criminal or civil *defendants*. Yet other laws that protect from harm may require enforcement of remedies by those who suffer harm from others whereby citizens may arguably need equal protection as *plaintiffs*: see below Part II(B).

<sup>10</sup> See generally Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (Report, December 2009).

This article focuses on access to *civil* justice, but the civil landscape is itself very broad. While we will focus to a degree on access to the courts and to legal advice through lawyers, access to civil justice clearly also encompasses alternative means of obtaining civil justice. These extend to using dispute resolution bodies (such as the Australian Financial Complaints Authority), administrative remedies through (less formal) tribunals, ombudsmen, assistance from regulators and community legal centres, legal aid, non-government organisations such as the Consumer Action Law Centre and the Arts Law Centre of Australia, advisory services such as the Family Relationship Advice Line, as well as mandatory dispute resolution services offered by the Small Business Commissioner and other bodies.<sup>11</sup> Indeed, such a variety of possible avenues makes it important for services to explain and guide legal consumers in the best direction.<sup>12</sup>

In a narrower sense, the access to justice phrase is often used in the area of civil litigation, particularly in recent debates over the merits of class action procedural mechanisms,<sup>13</sup> and third-party litigation funding.<sup>14</sup> The academic literature has noted that the term has evolved from only access to lawyers and redress through the courts to encompass enhanced public legal information and education, enhanced use of Alternative Dispute Resolution ('ADR'), and public participation in law reform.<sup>15</sup>

The definition of access to civil justice that we will use in this article and which was used in the survey is a person's 'ability to obtain a just or fair outcome in an area of civil justice' including their 'ability to use and access the court system and the legal system to obtain a just or fair outcome'. The questions in the survey (which are contained in the Appendix to this article) also focus on access to legal advice and representation as well as to court action, given that the three may interrelate in

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<sup>11</sup> See generally Access to Justice Taskforce (n 6) 32–5.

<sup>12</sup> Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 1, 155–9.

<sup>13</sup> See, eg, Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399; Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13.

<sup>14</sup> See, eg, Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Consultation Paper, July 2017). See also US Chamber Institute for Legal Reform, *Third-Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy* (Report, October 2013) 14 <[http://institutelegalreform.org/uploads/sites/1/TPLF\\_in\\_Australia\\_page\\_web.pdf](http://institutelegalreform.org/uploads/sites/1/TPLF_in_Australia_page_web.pdf)>.

<sup>15</sup> Roderick A Macdonald, 'Access to Justice in Canada Today: Scope, Scale, Ambitions' in Julia Bass, WA Bogart and Frederick H Zemans (eds), *Access to Justice for a New Century: The Way Forward* (Law Society of Upper Canada, 2005) 19, cited in Christine Coumarelos, Zhigang Wei and Albert Z Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Report, March 2006) 201–2 <[http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/\\$file/Justice\\_Made\\_to\\_Measure.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/$file/Justice_Made_to_Measure.pdf)>.

practice (advice and representation often precede litigation, and may raise the possibility or threat of litigation, which will eventuate in some cases).

This article also seeks to reconcile alternative meanings of access to justice, on the one hand as referring to procedural justice, but also in the broader sense to the obtaining of a just result or outcome overall.<sup>16</sup> Our definition also accords closely with the definition given in the Organisation for Economic Co-Operation and Development's ('OECD') Report *Legal Needs Surveys and Access to Justice*.<sup>17</sup> The OECD definition refers to 'the ability of people to obtain just resolution of justiciable problems ... [being] a problem that raises legal issues'.<sup>18</sup> As discussed below, a subjective assessment (by legal consumers) as to whether this has been achieved was favoured in the survey over any attempt to determine this objectively.

The definition of access to justice adopted in this article is also wide enough to encompass defending and prosecuting proceedings.<sup>19</sup> It is also wider than only access to 'suing', and encompasses general access to legal advice about a person's rights or legal position and letters of demand or defence, arbitration and mediation, and drawing of agreements which are often the 'springboard' to preventing a dispute or negotiating an outcome.

## B *The Importance of Access to Civil Justice*

### 1 *The Rule of Law*

A reasonable level of access to the justice system and the courts appears to be concomitant with, or a component of, the rule of law.<sup>20</sup> Equality before the law and access to justice are fundamental to the rule of law.<sup>21</sup> The notion of rule of law

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<sup>16</sup> Deborah L Rhode, 'Access to Justice' (2001) 69(5) *Fordham Law Review* 1785, 1786–7.

<sup>17</sup> OECD and Open Society Foundations (n 3).

<sup>18</sup> *Ibid* 11.

<sup>19</sup> While finding that in three quarters of 'serious dispute[s]' members of the public were potential plaintiffs, Hazel Genn's landmark 1999 survey also revealed that, in one quarter of such serious disputes, members of the public were potential defendants: see Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart, 1999) 8.

<sup>20</sup> Access to Justice Taskforce (n 6) 1.

<sup>21</sup> See generally Law Council of Australia, *The Justice Project* (Final Report, August 2018) 2 <[https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20\\_%20Final%20Report%20in%20full.pdf](https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf)>. In a 2007 work, Daniel Zolo theorises a 'conceptual identity' of the rule of law as including: (1) equal membership of the political and legal community; (2) legal equality; (3) certainty of law; (4) constitutional acknowledgment of individual rights; (5) delimitation of the scope of political power and law enforcement; (6) separation of legislative and administrative institutions; (7) primacy of legislative power, the principle of legality and reserve of legislation; (8) obligation of legislative power to

remains potent in the modern world and is often invoked in connection with the modern development of human rights law.<sup>22</sup>

## 2 *The Rule of Law and the Question of Access to Legal Representation in Australia*

A similar normative rationale for access to justice and the rule of law is that deriving from liberal ideas of equal freedom and dignity of individuals.<sup>23</sup> The liberal ideal of individual autonomy is represented in the common law adversarial system which allows each party to represent their own cause and present their case.<sup>24</sup>

The rule of law was famously described in the United States as ‘government of laws and not of men’.<sup>25</sup> This involved courts, vested with judicial power independent of executive and legislative power, playing a crucial role in constraining state power and protecting rights.<sup>26</sup> Further, due process and equal protection under the Fourteenth Amendment to the *United States Constitution* have raised questions of equality of legal representation in the enforcement and defence of rights.<sup>27</sup>

Considering these issues in the Australian context, it must of course be noted that the *Australian Constitution* does not include a Bill of Rights, within which a right to counsel might otherwise be located.<sup>28</sup> While the Australian right to ‘due process’ appears to extend to the right to be tried under recognised procedures in common law courts,<sup>29</sup> the High Court has noted that it does not extend to the right to be provided with counsel at public expense.<sup>30</sup> Yet in that same judgment, *Dietrich v The Queen* (‘*Dietrich*’),<sup>31</sup> the High Court did note that courts have the power to stay or adjourn

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respect individual rights; and (9) independence of the judiciary: see Danilo Zolo, ‘The Rule of Law: A Critical Reappraisal’ in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer, 2007) 3, 18–29.

<sup>22</sup> Zolo (n 21) 4.

<sup>23</sup> Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008) 236.

<sup>24</sup> And in doing so a liberal state may also be concerned to ensure that each party has access to roughly equal legal representation: see generally Ronald J Daniels and Michael J Trebilcock, *Rethinking the Welfare State: The Prospects for Government by Voucher* (Routledge, 2005).

<sup>25</sup> Letter from John Adams to the Inhabitants of the Colony of Massachusetts-Bay, 6 March 1775, 314 <<http://www.masshist.org/publications/adams-papers/index.php/view/PJA02d096>>.

<sup>26</sup> *Ibid.* See also *Massachusetts Constitution* pt 1 art XXX.

<sup>27</sup> See generally *Douglas v California*, 372 US 353 (1963).

<sup>28</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J), 342–3, 350 (Dawson J) (‘*Dietrich*’).

<sup>29</sup> *Ibid* 307 (Mason CJ and McHugh J), 347 (Dawson J) and 359 (Toohey J).

<sup>30</sup> *Ibid* 309–11 (Mason CJ and McHugh J), 317–21 (Brennan J).

<sup>31</sup> *Dietrich* (n 28).

criminal proceedings that will result in an unfair trial.<sup>32</sup> Thus, where a person is charged with a serious criminal offence and through no fault of their own was unable to obtain legal representation, the court, in the absence of exceptional circumstances, should generally adjourn or stay the trial until representation is available.<sup>33</sup>

These principles enunciated in *Dietrich* are however generally limited to criminal law, rather than having anything direct to say about fairness and representation in civil matters. While the concept of due process is similarly directed at protection of those subject to criminal proceedings, it is sometimes said to include representation where people face civil loss of property.<sup>34</sup> Nevertheless, the discretion to adjourn in civil courts must be exercised reasonably, and while it will likely be reasonable to adjourn to afford a defendant an opportunity to present their defence,<sup>35</sup> this will be balanced against the plaintiff's right to proceed.<sup>36</sup>

In relation to the inverse position in civil courts — lack of legal representation leading to a plaintiff's likely inability to properly *prosecute* a civil claim — the High Court has quite recently touched upon the proper role of the courts in making orders that might facilitate legal representation to prosecute a claim. In *BMW Australia Ltd v Brewster*<sup>37</sup> there was a question as to the court's power to make a common fund order authorising deduction of litigation funders' fees from damages of litigants with whom the funders did not have a contract (the recovery of the funders' fees enabling, inter alia, the payment by the funder of the plaintiffs' legal fees). The question was whether such a power existed pursuant to general powers to make orders 'appropriate or necessary to ensure that justice is done in the proceeding'.<sup>38</sup> The plurality (Kiefel CJ, Bell and Keane JJ) found that such an order did not assist in determining any issue in dispute and found no intention of the legislature that maintaining litigation was itself doing justice to the parties.<sup>39</sup>

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<sup>32</sup> Ibid 298, 315 (Mason CJ and McHugh J), 357 (Toohey J). Further, Deane J and Gaudron J did suggest that a right to representation in some circumstances is founded in ch III of the *Constitution*, which requires that judicial process and fairness be observed: *Dietrich* (n 28) 326 (Deane J), 362–5 (Gaudron J).

<sup>33</sup> As to later applications of *Dietrich* (n 28) including application in (civil) family law cases, see Frances Gibbon, 'A Decade after Dietrich' (2003) 41(4) *NSW Law Society Journal* May 2003, 52.

<sup>34</sup> See generally Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31(3) *Sydney Law Review* 411. See also Gibbon (n 33) 54–6.

<sup>35</sup> See Deane J's comments in *Sullivan v Department of Transport (Cth)* (1978) 20 ALR 323: at 343. See also Australian Law Reform Commission, *The Unrepresented Party* (Background Paper No 4, December 1996).

<sup>36</sup> The High Court has noted that unnecessary delay may itself be a form of unfair prejudice: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 182 [5] (French CJ) ('*Aon Risk*').

<sup>37</sup> *Brewster* (n 1).

<sup>38</sup> *Federal Court of Australia Act 1976* (Cth) s 33ZF ('*Federal Court of Australia Act*').

<sup>39</sup> *Brewster* (n 1) 639–40 [51]–[53]. The plurality were joined by Gordon J and Nettle J in the result. Justice Gageler and Edelman J dissented from this view finding that such a common fund order could be made: at 655–6 [117] (Gageler J), 685 [232] (Edelman J).

### 3 *Rule of Law and Economic Wellbeing*

There is some evidence of a correlation between the rule of law (partly facilitated by access to justice, as discussed above) and a higher standard of living. The United Nations Development Programme has stated:

There are strong links between establishing democratic governance, reducing poverty and securing access to justice. Democratic governance is undermined where access to justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent.<sup>40</sup>

In the economic paradigm, there is evidence of a significant correlation between a country's achievement of rule of law criteria and its economic wealth or GDP. Researchers have identified high correlations between good institutions (encompassing the rule of law), high levels of trade and rapid economic growth over the very long run.<sup>41</sup> It has also been noted that differences in capital accumulation, productivity, and therefore output per worker are partially driven by differences in institutions and government policies, or 'social infrastructure'.<sup>42</sup> The World Justice Project's Report *Rule of Law Index* came to similar conclusions,<sup>43</sup> identifying nine factors of the rule of law of which the seventh was civil justice.<sup>44</sup> Civil justice was said to encompass the following principles:

- People can access and afford civil justice;
- Civil justice is free of discrimination;
- Civil justice is free of corruption;
- Civil justice is free of improper government influence;
- Civil justice is not subject to unreasonable delay;
- Civil justice is effectively enforced; and
- Alternative dispute resolution mechanisms are accessible and impartial.<sup>45</sup>

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<sup>40</sup> United Nations Development Programme, *Access to Justice: Practice Note* (Report, 3 September 2004) 3 ('*Access to Justice*').

<sup>41</sup> See generally David Dollar and Aart Kraay, 'Institutions, Trade and Growth' (2003) 50(1) *Journal of Monetary Economics* 133.

<sup>42</sup> Robert E Hall and Charles I Jones, 'Why Do Some Countries Produce So Much More Output Per Worker Than Others?' (1999) 114(1) *Quarterly Journal of Economics* 83.

<sup>43</sup> World Justice Project, *Rule of Law Index* (Report, 2020) 9 <[https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf)>.

<sup>44</sup> *Ibid* 10. The factors are: (1) Constraints on Government Powers; (2) Absence of Corruption; (3) Open Government; (4) Fundamental Rights; (5) Order & Security; (6) Regulatory Enforcement; (7) Civil Justice; (8) Criminal Justice; and (9) Informal Justice.

<sup>45</sup> *Ibid* 11.



Variable one — that people can access and afford justice — measured the accessibility and affordability of civil courts, including whether people were aware of available remedies, and could access and afford legal advice and representation and the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers.<sup>46</sup>

David Dyzenhaus argues that a government has an obligation under the rule of law to provide resources so that people can not only know the law but gain access to it.<sup>47</sup> This might include not only legal aid or public information services but also policy settings that encourage private providers. The latter might include self funding mechanisms for lawyers such as ‘no-win-no-charge’ or other contingent fee arrangements or external third-party litigation funding (for making claims) and insurance (for defending them). These measures, in the Australian context, were considered in the survey, as discussed below.

#### 4 *Economic Effects of Access to Civil Compensatory Remedies*

A significant aspect of the access to justice literature — particularly in Australia — is the importance of access to ‘redress’ or civil remedies, which are often of a compensatory nature.<sup>48</sup> This section focuses on economic effects or benefits of civil compensatory remedies which are facilitated through better access to justice.

The argument for compensation used in tort law and other areas of civil law derives from the concept of corrective justice whereby damages ‘correct’ the ‘injustice’.<sup>49</sup> George P Fletcher, writing in 1972, developed this idea to focus on the concept of ‘reciprocity’ as a source of tort law.<sup>50</sup> Another school of tort philosophy that developed in the 1970s was the analysis of tort and civil remedies in economic terms, associated most notably with Richard Posner. In simple terms, the economic view in a negligence case was that there were three important things to be measured: (a) the magnitude of loss if an accident occurs; (b) the probability of the accident occurring; and (c) the burden of taking precautions that would avert the accident.<sup>51</sup> If the product of (a) and (b) exceeded (c) then the failure to take precautions was said

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<sup>46</sup> Ibid 14.

<sup>47</sup> David Dyzenhaus, ‘Normative Justifications for the Provision of Legal Aid’ in John D McCamus et al (eds), *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Report, 1997) 477.

<sup>48</sup> See, eg, Murphy and Cameron (n 13).

<sup>49</sup> See, eg, Richard A Posner, ‘The Concept of Corrective Justice in Recent Theories of Tort Law’ (1981) 10(1) *Journal of Legal Studies* 187.

<sup>50</sup> George P Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85(3) *Harvard Law Review* 537, 540–2.

<sup>51</sup> Richard A Posner, ‘A Theory of Negligence’ (1972) 1(1) *Journal of Legal Studies* 29, 32 (‘A Theory of Negligence’).

to be negligent.<sup>52</sup> Findings of negligence by courts may, therefore, through the effect of deterrence and/or rational risk management, lead actors to take more precautions to avoid accidents and liability. Posner's view was that liability rules seem to have been broadly designed to bring about a low 'efficient' level of accidents and safety, 'an approximation thereto',<sup>53</sup> or an 'efficient allocation of resources to safety and care'.<sup>54</sup>

### 5 Access to Civil Justice Leading to Enforcement of the Law (Including Regulatory Actions)

Greater access to civil justice is also a driver of actions that may have a potential regulatory nature and/or supplement public regulatory enforcement. These might include securities law and investment class actions,<sup>55</sup> competition law class actions,<sup>56</sup> and consumer protection, financial services and environmental actions.<sup>57</sup> Though the philosophy of limiting civil litigation, exemplified by the maxim *interest rei publicae ut sit finis litium* ('it is in the public interest that litigation come to an end'), tends to apply to civil disputes, there is generally less complaint about 'too much' regulatory law enforcement against wrongdoers in the public interest.<sup>58</sup> (Indeed, there is often complaint that regulators have insufficient resources to bring cases that should be brought.) While private suits tend not to achieve all the objectives of public enforcement, they certainly have an important role.<sup>59</sup> Access to civil justice, then, might encourage actions that enforce the law and achieve public regulatory goals and deterrence of illegal conduct. Thus, an award of damages that is higher in magnitude than the cost of taking precautions is thought to tend to cause a party to

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<sup>52</sup> Ibid, invoking the famous formulation of the negligence standard set out by Judge Learned Hand in *United States v Carroll Towing Co*, 159 F 2d 169 (2<sup>nd</sup> Cir, 1947) and *Conway v O'Brien*, 111 F 2d 611 (2<sup>nd</sup> Cir, 1940).

<sup>53</sup> Posner, 'A Theory of Negligence' (n 51) 73.

<sup>54</sup> William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) 8.

<sup>55</sup> Michael Duffy, 'Australian Private Securities Class Actions and Public Interest: Assessing the "Private Attorney-General" by Reference to the Rationales of Public Enforcement' (2017) 32(2) *Australian Journal of Corporate Law* 162 ('Australian Private Securities Class Actions').

<sup>56</sup> Murphy and Morabito (n 13) 25.

<sup>57</sup> Ibid 25–6. As to environmental litigation, see Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41(2) *Melbourne University Law Review* 793.

<sup>58</sup> For instance, in the Royal Commission into Banking, Superannuation and Financial Services, Commissioner Hayne criticized ASIC as having an alleged starting point of resolving misconduct by agreement and suggested that it should rather ask whether it could make a case of breach and why it would not be in the public interest to bring proceedings to penalise the breach. See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018) vol 1, 277.

<sup>59</sup> Duffy, 'Australian Private Securities Class Actions' (n 55) 192.

take those precautions to avoid that award of damages.<sup>60</sup> In this way, deterrence is the mechanism by which *ex post* compensation can lead to *ex ante* prevention.

### C *Barriers to Access to Civil Justice*

There are a number of obstacles to achieving access to civil justice in the courts. Though identified as key problems more than 100 years ago, the evils of cost, delay and complexity<sup>61</sup> appear to remain problematic.

#### 1 *Cost*

In contemporary Australia it has been observed that the justice system is most open to the very rich who can afford representation, and the very poor who can access legal aid,<sup>62</sup> leaving a large group of ‘ordinary Australians’ in the middle without good access.<sup>63</sup> The reasons for the high costs of legal services and representation include:

- the labour intensity of legal work,<sup>64</sup> in that, to advise a client correctly, lawyers need to be across the facts and evidence which can be detailed and often in dispute;
- duplication of work arising from the need for multiple persons (such as barristers, partners and junior solicitors) to be familiar with the same facts and to read the same documents;<sup>65</sup>
- the unpredictability of litigation,<sup>66</sup> which can arise from the complexity and uncertainty of both facts and law, and leads to the inability to estimate costs accurately in advance;
- time costing which can create an incentive to do more legal work and to involve more legal personnel to generate higher fees;<sup>67</sup>

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<sup>60</sup> Posner, ‘A Theory of Negligence’ (n 51) 73.

<sup>61</sup> See Roscoe Pound, ‘The Causes of Popular Dissatisfaction with the Administration of Justice’ (Speech, Annual Convention of the American Bar Association, 29 August 1906).

<sup>62</sup> Chief Justice Wayne Martin, ‘Access to Justice’ (2014) 16(1) *University of Notre Dame Australia Law Review* 1, 3. See also Centre for Innovative Justice, RMIT University, *Affordable Justice: A Pragmatic Path to Greater Flexibility and Access in the Private Legal Services Market* (Report, October 2013).

<sup>63</sup> Martin (n 62) 3.

<sup>64</sup> *Ibid* 5.

<sup>65</sup> *Ibid* 6.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid*. See also Michael Duffy, ‘Two’s Company, Three’s a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory’ (2016) 39(1) *University of New South Wales Law Journal* 165 (‘Regulating Third-Party Litigation Funding’).

- high charge out rates<sup>68</sup> (which may signal higher quality representation but, given asymmetric information and the unique nature of legal work, particularly in litigation, may not always actually do so);<sup>69</sup>
- market regulation<sup>70</sup> limiting supply of lawyers (though this may also be justified as a means of quality control);
- the asymmetry of information, in that legal consumers lack knowledge and understanding of the nature and quality of the legal services which impedes their ability to negotiate on supply and price;<sup>71</sup> and
- high overheads due to the need for counsel, office space, information technology, support staff and forensic support services.<sup>72</sup>

Solutions to the problems of expense will not be explored in detail in this article but suggestions in response include no-win-no-charge/conditional fee arrangements (conditional on a successful outcome<sup>73</sup>), percentage contingency fees, fixed fee arrangements,<sup>74</sup> and third-party litigation funding.<sup>75</sup> Other suggestions have included means tested litigation loans from trusts run by professional associations<sup>76</sup> or government,<sup>77</sup> and public litigation funding of meritorious public interest litigation.<sup>78</sup> Pro bono assistance generally, or for discrete tasks, has been encouraged,<sup>79</sup> as has subsidised pro bono work in commercial law firms or law firms actually owned and run by charities.<sup>80</sup> Supply-side suggestions to reduce cost include reducing overheads by running legal practices on a leaner basis, sometimes involving an

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<sup>68</sup> Martin (n 62) 8.

<sup>69</sup> Vicki Waye, 'Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225, 228.

<sup>70</sup> Martin (n 62) 6.

<sup>71</sup> Martin (n 62) 6–7. See also Waye (n 69) 228.

<sup>72</sup> Martin (n 62) 7.

<sup>73</sup> Centre for Innovative Justice (n 62) 16.

<sup>74</sup> *Ibid* 17.

<sup>75</sup> This may not reduce costs but will offer a source of funding of such costs.

<sup>76</sup> Centre for Innovative Justice (n 62) 24.

<sup>77</sup> *Ibid* 25.

<sup>78</sup> See Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) 621 <[https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/VLRC/2008/1.html?context=1;query=civil%20justice%20review%20report%202008;mask\\_path](https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/VLRC/2008/1.html?context=1;query=civil%20justice%20review%20report%202008;mask_path)>.

<sup>79</sup> Centre for Innovative Justice (n 62) 32. See also Martin (n 62) 10.

<sup>80</sup> Centre for Innovative Justice (n 62) 32. Research by Stephen Daniels and Joanne Martin in the United States suggests that pro bono work is of value to some law firms in (a) providing training opportunities to new and junior staff and (b) marketing the firm, promoting a good image and facilitating client relations. They suggest that these motivations may lead to a situation where the services provided do not always coincide

increased use of technology,<sup>81</sup> and increasing competition in the market. Some have questioned whether legal expenses insurance to protect individuals and families from the consequences of incurring legal expenses needs to be examined,<sup>82</sup> as well as greater dissemination of information through the internet.<sup>83</sup> Others have argued for increased use of ADR such as mediation, as well as greater use of law graduates within practices to provide low fee services.<sup>84</sup> Allowing tax deductibility of legal fees for individuals' personal legal expenses in the same manner as business' legal expenses has also been suggested.<sup>85</sup>

## 2 Delay

Delay has long been complained of in the law, with the system in place in the English Court of Chancery in the 19<sup>th</sup> century even described as one of 'exquisitely contrived chicanery which maximises delay and denial of justice'.<sup>86</sup>

In modern times, proactive judicial case management has done much to mitigate delay. Legislative reforms to civil procedure rules<sup>87</sup> have also done much to encourage parties to narrow the issues in dispute. There remains, however, the perennial problem of choosing between refusing or curtailing further time for pleading, submission or evidence in the interests of minimising delay, and allowing same in the interests of maximising fairness.<sup>88</sup> The balance often tends to tip, not surprisingly, to the latter, though the High Court has questioned whether delay is in itself a form of unfairness that cannot always be compensated by costs orders.<sup>89</sup> ADR is another modern solution that has been encouraged and is now embedded in judicial case management through

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with areas of need: see Stephen Daniels and Joanne Martin, 'Legal Services for the Poor: Access, Self-Interest, and Pro-Bono' (2015) 12 *Access to Justice: Sociology of Crime, Law and Deviance* 145.

<sup>81</sup> Centre for Innovative Justice (n 62) 20. See also Martin (n 62) 9.

<sup>82</sup> Centre for Innovative Justice (n 62) 39. It is said that cover may include both 'before the event' household or motor insurance and 'after the event' insurance sold through solicitors usually taken out in conjunction with no-win-no-charge arrangements and usually involving a large premium.

<sup>83</sup> Martin (n 62) 8.

<sup>84</sup> *Ibid* 10.

<sup>85</sup> *Ibid* 11.

<sup>86</sup> Jack IH Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (Sweet & Maxwell, 1982) 207.

<sup>87</sup> See, eg, *Civil Procedure Act 2005* (NSW) s 56 (3) ('NSW Civil Procedure Act'); *Civil Procedure Act 2010* (Vic) s 23; *Uniform Civil Rules 2020* (SA) r 3.1(1)(g).

<sup>88</sup> See, eg, Michael Legg, 'Reconciling the Goals of Minimising Cost and Delay with the Principle of a Fair Trial in the Australian Civil Justice System' (2014) 33(2) *Civil Justice Quarterly* 157.

<sup>89</sup> Thus, the High Court in 2009 came down strongly in favour of a case management approach, which recognises that delay may itself be a form of unfair prejudice: *Aon Risk* (n 36) 182 [5] (French CJ).

the courts' ability to order mediation.<sup>90</sup> As well as saving time and costs, ADR has the benefit that in some cases it enables creative solutions to disputes (such as renegotiation of commercial relationships) that cannot be provided by courts.

### 3 *Complexity*

Complexity encompasses complexity of facts, the substantive law and procedure. This is a problem that is generally increasing as society develops, and the volume of law increases and branches endlessly into areas of greater specialisation. Social change leading to growth in both order and disorder also leads to greater complexity of facts and evidence. The lawyer must become familiar with those facts and that evidence to advise the litigant properly and prepare the case. There is also complexity in procedure — for example, commencing proceedings by both motions and writs and the use of different terminology for originating process in different jurisdictions.

In relation to substantive law, it has been suggested that legislation could be simplified to remove complexity and provide general principles rather than attempting to deal with every conceivable contingency.<sup>91</sup> There is also scope for greater use of plain English.<sup>92</sup> As to procedure, pleadings can sometimes involve semantic and tactical gamesmanship rather than genuine efforts to illuminate the real issues in order to assist the court.<sup>93</sup> This can be controlled by judges to a degree, but given that the pleading stage occurs before evidence comes before the court, judges' ability to sift through to the salient facts can sometimes be constrained.<sup>94</sup>

## III THE EMPIRICAL STUDY

### A *Legal Needs Surveys*

#### 1 *International*

Attempts to measure or assess access to justice inevitably take us into the rich literature of 'legal needs' surveys (though these surveys have at times been distinguished from access to justice assessment surveys).<sup>95</sup> The OECD has identified 56 such legal needs

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<sup>90</sup> See, eg, *Federal Court Rules 2011* (Cth) rr 28.01–28.02.

<sup>91</sup> Martin (n 62) 12–13.

<sup>92</sup> *Ibid.*

<sup>93</sup> Though the court has an interest in the pleadings, the right to draw pleadings in civil matters moved from the state ('enrolling clerks of courts') to the private legal profession (the bar) as far back as the 13<sup>th</sup> and 14<sup>th</sup> centuries: see Theodore Plucknett, *A Concise History of the Common Law* (Butterworth, 4<sup>th</sup> ed, 1948), 381–5.

<sup>94</sup> Though again, as noted above, the High Court took a proactive approach to this issue in *Aon Risk* (n 36).

<sup>95</sup> OECD and Open Society Foundations (n 3) 25. Legal needs surveys are said to identify a range of justiciable problems and focus on responders' experience rather than their perceptions and attitudes.

surveys across 23 countries over the 25 years up to 2017.<sup>96</sup> These include surveys in the United Kingdom, common law jurisdictions throughout the British Commonwealth, the United States, Japan, Taiwan, Hong Kong, various eastern European countries and former Soviet republics, the Netherlands and some South American and African countries.<sup>97</sup> Pascoe Pleasence, Nigel Balmer and Rebecca Sandefur trace the origins of these types of reports to Charles Clark and Emma Corstvet's landmark study, in Connecticut during the 1930s, of 'how the needs of the community for legal service were being met'.<sup>98</sup> In the 1990s there was renewed interest in such studies, including an American Bar Association Study in 1994,<sup>99</sup> and the landmark study by Hazel Genn in the United Kingdom.<sup>100</sup>

## 2 *Australia*

In Australia, Michael Cass and Ronald Sackville's 1975 survey in *Legal Needs of the Poor* was a pioneering work on access to justice.<sup>101</sup> A major survey was also conducted by Christine Coumarelos, Zhigang Wei and Albert Zhou in 2006 for the Law and Justice Foundation of New South Wales.<sup>102</sup> Further surveys at both national<sup>103</sup> and state<sup>104</sup> levels were conducted in 2012. Those surveys were part of the *Legal Australia-Wide Survey* by Coumarelos et al, which is discussed further below.

## 3 *The Genn Survey*

Genn's study in England and Wales focused on the behaviour of the public in dealing with 'non-trivial justiciable civil problems and disputes, as potential plaintiffs or potential defendants'.<sup>105</sup> A 'justiciable event' was defined as

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<sup>96</sup> Ibid 26–7.

<sup>97</sup> Ibid.

<sup>98</sup> Charles E Clark and Emma Corstvet, 'The Lawyer and the Public: An AALS Survey' (1938) 47(8) *Yale Law Journal* 1272, 1272. See Pascoe Pleasence, Nigel J Balmer and Rebecca L Sandefur, *Paths to Justice: A Past, Present and Future Roadmap* (Report, August 2013) 3.

<sup>99</sup> Consortium on Legal Services and the Public, American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans* (Report, 1994).

<sup>100</sup> See Genn (n 19).

<sup>101</sup> Michael Cass and Ronald Sackville, Commission of Inquiry into Poverty, *Legal Needs of the Poor: Research Report* (Report, 1975).

<sup>102</sup> Coumarelos, Wei and Zhou (n 15).

<sup>103</sup> See, eg, Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Report, August 2012) ('*Legal Need in Australia*').

<sup>104</sup> See, eg, Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Victoria* (Report, August 2012) ('*Legal Need in Victoria*').

<sup>105</sup> Genn (n 19) 12.

[a] matter experienced by a respondent [to the survey] which raised legal issues, whether or not it was recognised by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.<sup>106</sup>

Events were regarded as trivial if the respondent had taken no action because they considered the problem unimportant.<sup>107</sup> Further, the survey applied only to private individuals and not businesses.<sup>108</sup>

Genn’s objectives included obtaining information on the incidence of justiciable problems, how members of the public responded to them, perceived barriers to accessing justice, motivations for using or not using court processes, outcomes of the different strategies adopted and public experiences and perceptions of the legal process.<sup>109</sup> The survey involved replies of a random sample of 4,125 adults. Genn identified thirteen problem types. For analytical purposes, she later regrouped these into nine problem types,<sup>110</sup> being:

- Problems with neighbours;
- Divorce and separation;
- Employment problems;
- Consumer problems;
- Accidental injury and work-related ill health;
- Problems over money;
- Freehold problems;
- Problems with landlords; and
- Tribunal matters.

#### 4 *The 2012 Legal Australia-Wide Survey*

The Law and Justice Foundation of New South Wales began its Access to Justice and Legal Needs (‘A2JLN’) research program in 2002 to examine the ability of disadvantaged people to: (a) ‘obtain legal assistance’; (b) ‘participate effectively in the legal

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<sup>106</sup> Ibid.

<sup>107</sup> Though Genn did not apply this exception to divorce or situations where defence or commencement of proceedings were contemplated: *ibid* 13.

<sup>108</sup> *Ibid* 14.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* 55–6.



system’; (c) ‘obtain assistance from non-legal advocacy and support’; and (d) ‘participate effectively in law reform processes’.<sup>111</sup> In doing so, the A2JLN sought in its conception of ‘legal need’ and ‘access to justice’ to go somewhat beyond the approach of ‘access to a lawyer’ or ‘access to a lawyer in a court’.<sup>112</sup>

As part of the A2JLN, the Legal Australia-Wide Survey (‘LAW Survey’) was a nationwide survey<sup>113</sup> administered between January and November 2008 involving 20,716 randomised telephone interviews nationwide (noted to be the largest sample undertaken anywhere in the world<sup>114</sup>) with residents aged 15 years or over. Responders were asked about their experience of a total of 129 specific types of ‘legal’ problems, defined as ‘problems that have the potential for legal resolution’.<sup>115</sup> These legal problems were categorised into 12 broad problem groups with 27 subgroups.<sup>116</sup> The LAW Survey sought to assess the prevalence, nature, finalisation and outcome of legal problems, as well as the strategies used in response to legal problems and the advice received for legal problems.

## 5 *Our Survey*

The OECD has suggested that access to justice surveys may be distinct from legal needs surveys,<sup>117</sup> and our survey focused particularly on the effects of class actions, litigation funding and no-win-no-charge funding. The OECD also suggests that, despite all legal needs surveys being part of the same tradition, their scale, design and methodology can vary significantly.<sup>118</sup> Every country and every survey is different such that there can be no ‘one size fits all’ approach. This survey thus had some small but important differences with existing surveys, as discussed below. These differences were intended to provide a further contribution to and/or fill gaps in surveys to date. They are as follows.

First, our survey included two categories which gave specific recognition to the online world as a discrete new area of potential legal problems. Secondly, we did not adopt Genn’s specific exclusion of problems related to work activities of individuals who are in business on their ‘own account’.<sup>119</sup> Whilst, as discussed below, our focus was on average Australians rather than large corporations or organisations, we considered that there was nevertheless likely to be overlap between, for example, the legal problems and difficulties of an employee and the legal problems of an

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<sup>111</sup> Coumarelos et al, *Legal Need in Australia* (n 103) iii.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid. The LAW Survey led to eight other reports focusing on each state and territory.

<sup>114</sup> Ibid 2.

<sup>115</sup> Ibid xiii.

<sup>116</sup> Ibid 48.

<sup>117</sup> OECD and Open Society Foundations (n 3) 25.

<sup>118</sup> Ibid 18, 40.

<sup>119</sup> Genn (n 19) 14. The LAW Survey’s focus on ‘individuals’ may also arguably exclude small businesses: Coumarelos et al, *Legal Need in Australia* (n 103) 16.

independent contractor who is in business on their own account (including those contracting in the ‘gig’ economy, for instance). The legal problems of small and micro businesspeople are therefore not specifically excluded, though this may be an area ripe for further specific research.<sup>120</sup> As noted below, the focus on average Australians was established both by generally mainstream legal problem choice and by pitching the survey universally and therefore favouring the problems of the majority rather than any specific grouping.

Thirdly, as an Australian survey, ours had a different context to overseas surveys. Context in that regard includes, for instance, that all working Australians hold compulsory superannuation and are subject to the legal issues and problems of same, and also benefit from workers’ compensation schemes and healthcare, which differentiate some insurance and medical legal problems from, for example, the United States.

Fourthly, our survey dealt with areas in which Australian class action law (there being a lack of such general machinery in the United Kingdom,<sup>121</sup> for instance) has made possible small claims that would not have been pursued in the past, such as retail shareholder nondisclosure claims,<sup>122</sup> and claims for individual consumer loss from cartel activity.

Finally, our survey also benefitted from the ‘supply side’ perspective or insight of the authors based on their own experience of city, suburban and rural private legal practice, including areas of law that many average private law firms spend considerable time servicing. These include probate and to a lesser degree elder law and guardianship, the effects of personal and corporate insolvency, small-scale defamation and debt recovery (less specifically referred to in some of the other surveys).

### B *Legal Problems of Average Australians*

It is necessary to canvass the most common legal problems and needs, as this inquiry informed the scope of our survey.

#### 1 *Common Legal Problems and Needs*

The question of which civil justice legal needs of average citizens are not being adequately addressed is an area of debate. Much of the population states that they have one or more legal problems,<sup>123</sup> and the areas of ‘unmet need’ that have been

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<sup>120</sup> The Commonwealth Productivity Commission has noted the relatively few sources of information around the legal needs of such businesses: Productivity Commission (n 12) 93.

<sup>121</sup> Though certain consumer class actions are now available under the *Consumer Rights Act 2015* (UK): at sch 8 pt 1 cl 5.

<sup>122</sup> See generally Michael J Duffy, ‘Shareholder Representative Proceedings: Remedies for the Mums and Dads’ (2001) 75(5) *Law Institute Journal* 54.

<sup>123</sup> Department of Justice and Regulation (Vic), *Access to Justice Review* (Report, August 2016) vol 1, 55, citing Coumarelos et al, *Legal Need in Victoria* (n 104) 57.

identified by expert reports include family law, employment law, migration law, personal injury, consumer rights, welfare law and housing and tenancy law.<sup>124</sup> Australia's 2012 LAW Survey found that 'consumer, crime, housing and government problem groups' (in that order) were most prevalent.<sup>125</sup> Another 2012 survey, by the Australia Institute, found that 'being treated unfairly by a business', such as a bank, phone company, tradesperson or retail outlet, was the most common category of legal complaint (12% reporting such a problem).<sup>126</sup> The next most common was a dispute with a landlord or tenant, real estate agent or neighbour (8% reporting this).<sup>127</sup>

Overseas, Genn's 1999 United Kingdom survey found problems with '[f]aulty goods and services' as the most frequently experienced problem followed by '[m]oney problems', '[o]wning residential property' problems and '[i]njury/work related health problem[s]' (in that order),<sup>128</sup>

In US surveys the area of 'consumer rights' has also been seen as one of the most significant areas, as well as 'personal finances'<sup>129</sup> and 'problems with creditors'.<sup>130</sup> Michael Trebilcock and Ronald Daniels also note that, in the US, while access to justice in criminal law, social security law, immigration law and family law are important, there are private disputes between parties in which those with fewer legal resources are often at a great disadvantage. Disputes relating to contract, property, consumer protection or landlord/tenant law may have important repercussions yet, for low income people, be relatively difficult to prosecute or pursue vindication of rights.<sup>131</sup> Indeed, socio-economically disadvantaged groups appear to be particularly vulnerable to legal problems and less able to resolve those problems.<sup>132</sup> In this sense, a lack of access to opportunities also results in a lack of access to justice.<sup>133</sup> Genn found in the UK that low levels of income were similarly associated with a propensity not to seek advice when faced with legal problems.<sup>134</sup> Yet it can be argued that legal need is not the same as social disadvantage and that, though there is overlap

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<sup>124</sup> Martin (n 62) 4–5.

<sup>125</sup> Coumarelos et al, *Legal Need in Australia* (n 103) xv.

<sup>126</sup> Richard Denniss, Josh Fear and Emily Millane, *Justice for All: Giving Australians Greater Access to the Legal System* (Institute Paper No 8, Australia Institute, March 2012) 17. This is reflected in Productivity Commission (n 12): see at 88.

<sup>127</sup> Denniss, Fear and Millane (n 126) 17.

<sup>128</sup> Genn (n 19) 23–4.

<sup>129</sup> Thirty-three percent (33%) of those reporting at least one problem cited this problem type. This involved a survey of over 8,000 responders as to experience with legal issues: Ipsos MORI Social Research Institute, *Online Survey of Individuals' Handling of Legal Issues in England and Wales 2015* (Report, May 2016) 1, 3.

<sup>130</sup> Consortium on Legal Services and the Public (n 99) app B.

<sup>131</sup> Trebilcock and Daniels (n 23) 239–40.

<sup>132</sup> Coumarelos et al, *Legal Need in Australia* (n 103) 1.

<sup>133</sup> *Ibid.*

<sup>134</sup> Genn (n 19) 142.

between social disadvantage and lack of access to justice, they are not the same issue and may not always affect the same people.

## 2 *Average Australians*

Our survey endeavoured to focus on ‘access to civil justice of average Australians’ which is not a precise term. The term ‘average’ has been defined as ‘the arithmetical mean’ or the ‘ordinary, normal or typical’.<sup>135</sup> This would mean that, in income terms for instance, it seeks to focus on neither the top nor the bottom income levels (so that, unlike some surveys, the focus is not specifically on the disadvantaged). Less intuitively, but following this theme and the demographic data below, ‘average Australians’ may be more likely to come from populous areas and to have middle level education. Whether the survey succeeded in focusing on ‘average or typical’ Australians is partly answered by asking whether the distribution of responders was also ‘typical’ in being broadly comparable with the Australian population in general and on a number of key demographics. That question is investigated below.

The legal problems of average Australians might be expected to include areas that are ubiquitous in city, suburban and rural legal practice, such as deceased estates, personal injury and family law. It does not follow however that legal problems will always include those areas. Some areas of law will be characterised by small numbers of clients (such as high net worth individuals and corporations) paying high fees for large and difficult legal services, as opposed to large client bases paying smaller fees for more common matters. The former areas generally fell outside this survey and might include preparation of prospectuses, corporate mergers, acquisitions and restructures, commercial property development and landlord advice, banking and finance, construction contracts and disputes, liquor licensing, corporate taxation, advising government, franchisor advice, financial services provider advice, intellectual property protection and disputes and so on. Similarly, some areas of public law, such as constitutional law, were not surveyed, due to a lack of direct daily relevance to average Australians.

The survey thus set out some 26 types of civil legal problems likely to be encountered by average Australians. (These are set out in the Appendix at Question 13.) The list drew substantially on various sources as well as the practical experience of two of the authors over a number of years as legal practitioners within private law firms in the city and suburbs and regionally. The authors also drew from their experience in commercial, general and plaintiff-focused practice, as well as government work. The areas of criminal law, immigration law and taxation law were excluded from the survey which we will now discuss briefly.<sup>136</sup>

Criminal law is a discrete and specialised area of the law, involving action by the state against persons for distinct purposes — punishment, rehabilitation, deterrence,

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<sup>135</sup> *Macquarie Dictionary* (online at 5 June 2021) ‘average’ (defs 1, 3).

<sup>136</sup> Which is consistent with the usual the focus of ‘legal needs’ surveys: OECD and Open Society Foundations (n 3) 25.

denunciation and incapacitation (among others).<sup>137</sup> By contrast, the civil sphere focuses on compensation to victims and resolving disputes.<sup>138</sup>

It might also be commented that ‘access to justice’ in the criminal sphere revolves heavily around arguments as to appropriate levels of government funded legal aid and, to a lesser extent, pro bono representation. Class actions, litigation funding and no-win-no-charge/contingent fee agreements have little or no role in the criminal jurisdiction.

As well as criminal law, the list also excludes the area of immigration law. The rationale for this exclusion is that the experience of the legal process in this area is somewhat unique; it often involves non-citizens seeking citizenship or an entry visa. Our survey being focused on Australian citizens, it was appropriate to exclude immigration law.

Taxation law was excluded as being a discrete and specialised area. Further, it may be that most average Australians will tend to consult their tax accountant, at least initially, in relation to tax matters rather than a lawyer.<sup>139</sup> Taxation may thus fit in more with those areas that are important for larger commercial legal practices but which may have less daily domestic relevance to the bulk of average Australians.

The list of legal problems included in the survey was otherwise considered to be fairly comprehensive. Civil justice may of course go beyond pure private law and involve the state in the area of administrative law. Questions about problems in the area of government law — such as planning issues and dealings with state and federal government bodies — were included in the survey as part of access to civil justice and, notwithstanding the exclusion of areas such as constitutional law, imported some aspects of public law into the survey.

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<sup>137</sup> See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2010) 17–33.

<sup>138</sup> See, eg, Stephen Colbran et al, *Civil Procedure: Commentary and Materials* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2019) 816–19. See also Tania Sourdin, *Alternative Dispute Resolution* (Lawbook, 6<sup>th</sup> ed, 2020) 5–9. The desirability of reducing dispute and conflict is often not contended for in detail as it seems to be frequently assumed or treated as self-evident.

<sup>139</sup> According to the Law Society of New South Wales’ National Profile, as at October 2020, there were 83,643 practising solicitors in Australia: Law Society of New South Wales, *2020 National Profile of Solicitors* (Final Report, 1 July 2021) 6 <<https://www.lawsociety.com.au/sites/default/files/2021-07/2020%20National%20Profile%20of%20Solicitors%20-%20Final%20-%201%20July%202021.pdf>>. It is reasonable to assume generally and from anecdotal evidence that only a percentage of these specialised in giving tax advice. On the other hand, it is said that there were in 2019 some 43,000 registered tax agents, 20,000 registered tax financial planners and 15,000 registered Business Activity Statement agents in Australia: Treasury (Cth), ‘Independent Review of the Tax Practitioners Board’ (Final Report, 31 October 2019) 16 [1.1].

## C Methodology

### 1 Justice: Objective and Subjective Evaluations

Whether an outcome is ‘just’ can be evaluated both objectively and subjectively. The former evaluation is more complicated and is likely to require an extensive enquiry into the outcome, process, law and relevant facts. Objective evaluation may then require ‘second guessing’ the processes that led to that outcome which is likely to be fraught with problems, difficulties, biases and flaws. The subjective evaluation is arguably much simpler in that it merely requires an enquiry into the level of satisfaction with the outcome of the complainant or ‘legal consumer’.<sup>140</sup> On this view, a person who subjectively believes they have had access to ‘civil justice’ — for example, they believe that they have achieved an outcome through the legal system that was basically ‘just’ or ‘fair’ — has, by virtue of that belief, clearly had such access to civil ‘justice’, subjectively evaluated. There is much to be said for the subjective conception in civil law and it is partly the philosophical basis for the facilitation and general approval by courts of negotiated settlement of disputes (for example, if the parties are subjectively satisfied, the court need not intervene or upset their bargain<sup>141</sup>). Thus, our survey adopted the subjective evaluation.

### 2 Sample Size

There were 575 responders, the target group being Australian adults (18 years or over).<sup>142</sup> Some statistical approaches note that, for populations of 100,000 or more, a sample size of 400 should deliver a confidence level of plus or minus 5%.<sup>143</sup> It is also said that a sample of 384 is reasonable for populations of a million or more and will deliver a similar confidence level.<sup>144</sup> Another approach to confidence intervals is to apply the following formula:

$$z \times \frac{\sigma}{\sqrt{n}}$$

<sup>140</sup> The term ‘legal consumer’ has some utility, though may also trivialise somewhat the relationship between the individual and the legal system (the economic analysis that reduces the legal system to a production process designed to satisfy legal ‘wants’ is necessarily a simplification of a more complex and subtle process and interrelationship).

<sup>141</sup> The requirement of court approval of class action settlements being an exception to this precept.

<sup>142</sup> A group with a population of roughly 20 million individuals. See ‘Australia 2019’, *Population Pyramids of the World from 1950 to 2100* (Web Page, December 2019) <<https://www.populationpyramid.net/australia/2019/>>.

<sup>143</sup> See, eg, Glenn D Israel, University of Florida Institute of Food and Agricultural Science Cooperative Extension, *Determining Sample Size* (Document No PEOD6, April 2009) 3.

<sup>144</sup> See, eg, Robert V Krejcie and Daryle W Morgan, ‘Determining Sample Size for Research Activities’ (1970) 30(3) *Educational and Psychological Measurement* 607, 607–10.

(where  $z$  is the ‘critical value’,  $\sigma$  is the standard deviation from the mean in the population samples and  $n$  is the sample size).

At the 95% confidence level, which is often used in statistical studies, the corresponding value of  $z$  is 1.96. The survey data showed standard deviations on the Likert questions<sup>145</sup> ranging from 0.7 to 2.6, but most are in the area of about 1.5. Using 1.5 as a typical standard deviation, the confidence interval would be calculated as follows:

$$1.96 \times \frac{1.5}{\sqrt{575}} = 0.12$$

With this information, it can be said that 95% of the time the true statistics among the Australian population will lie within 0.12 of the statistics collected from the survey (ie, a range of 2.88 to 3.12 for a sample mean of 3) thus supporting the reliability of the data. It should be noted however that findings within particular areas of law are based upon smaller sample sizes and are therefore less reliable as are the results noted for particular regions. It must also be noted that confidence levels are affected (reduced) by this being a nonprobability sample.

### 3 *Online Panel and Methodological Issues (Including Limitations)*

The survey was conducted through the use of online panels. The panels were independently arranged by Qualtrics International Inc (‘Qualtrics’).

An online panel is a form of access panel defined as ‘a sample database of potential responders who declare that they will cooperate for future data collection if selected’.<sup>146</sup> Such panels can include very large numbers of people who are said to be ‘sampled on numerous occasions and asked to complete a questionnaire for a myriad of generally unrelated studies’.<sup>147</sup> In recent years, online panels have become a popular way to collect survey data and have been used in a number of fields including market research, social research, psychological research, electoral studies and medical research.<sup>148</sup> Online panels offer substantial advantages in terms

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<sup>145</sup> A Likert scale being (in this case) a five point scale with choices ranging through Strongly Agree, Agree, Neither Agree nor Disagree, Disagree and Strongly Disagree. The idea is to get a holistic view of opinions. See generally Rensis Likert, ‘A Technique for the Measurement of Attitudes’ (1932) 22(140) *Archives of Psychology* 5, 42–3.

<sup>146</sup> International Organization for Standardization, *Market, Opinion and Social Research: Vocabulary and Service Requirements* (Standard No 20252, June 2012) 1, quoted in Mario Callegaro et al, ‘Online Panel Research: History, Concepts, Applications and a Look at The Future’ in Mario Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (Wiley, 2014) 1, 2–3.

<sup>147</sup> Callegaro et al (n 146) 3.

<sup>148</sup> *Ibid* 1. The European Society for Opinion and Market Research estimates that global expenditure on online research as a percentage of total expenditure on quantitative and qualitative research was 27% in 2018 (of which 25% was quantitative and 2% qualitative). See European Society for Opinion and Market Research, *Global Market Research 2018: An ESOMAR Industry Report* (Online Report, 2018) 138–9

of reduced costs and time required to conduct research. Panel-based online survey research has grown steadily in the 21<sup>st</sup> century.<sup>149</sup>

Samuel Gosling et al have found that samples gathered using internet methods are at least as diverse as many of the samples already used in psychological research and are not unusually maladjusted.<sup>150</sup> Tangible indication of increased acceptance and reliability of internet surveys is their increasing use and acceptance by court, the forum where probity of evidence is most stringently tested. One example is their use by experts in trademark litigation where they are now said to ‘enjoy cautious acceptance by the courts’.<sup>151</sup> The literature suggests that online surveys can ‘readily capture a demographically representative sample by design, obtain better response rates than telephone surveys, and reach across a much broader geography than mall samples’.<sup>152</sup>

Nevertheless, it must be noted that while the online panel process can produce a sample that is comparable to the population on the key demographics that we have discussed, it is partly self-selected so is a ‘nonprobability’ survey. This means that not every individual has a known probability of being selected, being exposed to the invitation and accepting the invitation.<sup>153</sup> Whilst the last element is true of all surveys (whether randomly selected or not) the first two are not, which limits confidence as to representativeness.

#### 4 *Qualtrics*

The research team engaged Qualtrics to conduct the online survey. Qualtrics applies various techniques to address the above sampling and quality issues, which are described in its Panel Services Information, and in Qualtrics’ Response<sup>154</sup> to the European Society for Opinion and Market Research’s *28 Questions to Help Buyers of*

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<<https://www.dx2025.com/wp-content/uploads/2019/11/global-market-research-industry-report-2018-encrypted.pdf>>.

<sup>149</sup> Mario Callegaro et al, ‘A Critical Review of Studies Investigating the Quality of Data Obtained with Online Panels Based on Probability and Nonprobability Samples’ in Mario Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (Wiley, 2014) 23, 23–4.

<sup>150</sup> Samuel D Gosling et al, ‘Should We Trust Web-Based Studies? A Comparative Analysis of Six Preconceptions about Internet Questionnaires’ (2004) 59(2) *American Psychologist* 93, 102.

<sup>151</sup> Himanshu Mishra and Ruth M Corbin, ‘Internet Surveys in Intellectual Property Litigation: *Doveryai, No Proveryai*’ (2017) 107(5) *Trademark Reporter* 1097, 1121. *Doveryai, No Proveryai* is a Russian proverb that means ‘trust but verify’: at 1097 n 1.

<sup>152</sup> *Ibid* 1121.

<sup>153</sup> Stephanie Steinmetz et al, ‘Improving Web Survey Quality: Potentials and Constraints of Propensity Score Adjustments’ in Mario Callegaro et al (eds), *Online Panel Research: A Data Quality Perspective* (Wiley, 2014) 273, 274.

<sup>154</sup> Qualtrics, *ESOMAR 28: 28 Questions to Help Buyers of Online Sample* (Online Report, 30 April 2019) <<https://www.iup.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=274179&libID=274203>>.



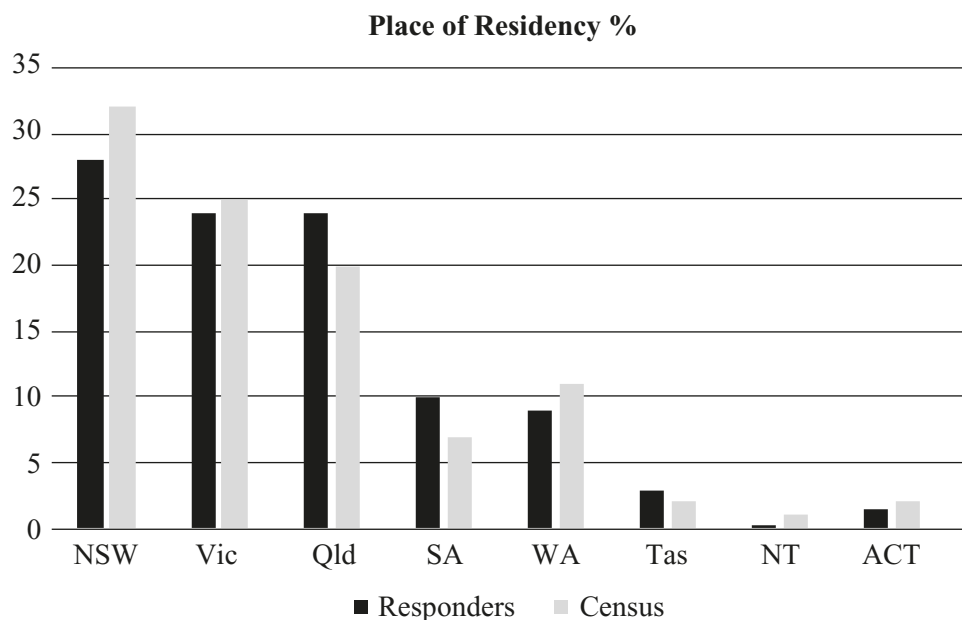
*Online Samples* (‘ESOMAR 28’).<sup>155</sup> Qualtrics’ techniques include multiple panels, quality checks to exclude duplication and ensure validity and precautionary steps to make sure the best data is being collected via the panel providers.

*D Representativeness of Survey Responders/Interviewees and Effect of Demographic Attributes*

A comparison of the demographics of the 575 responders with Australian Bureau of Statistics (‘ABS’) data indicates broad similarity with the Australian population on a number of key demographics.

*1 Place of Residency*

Figure 1 compares the state or territory of responders with the state or territory of responders to the 2016 Census (‘Census’)<sup>156</sup> compiled by the ABS and suggests that the responders correspond reasonably with the state and territory distribution of the Australian population.



**Figure 1: Comparison of responders’ locations with Australian population locations from the 2016 Census (responders n = 574)**

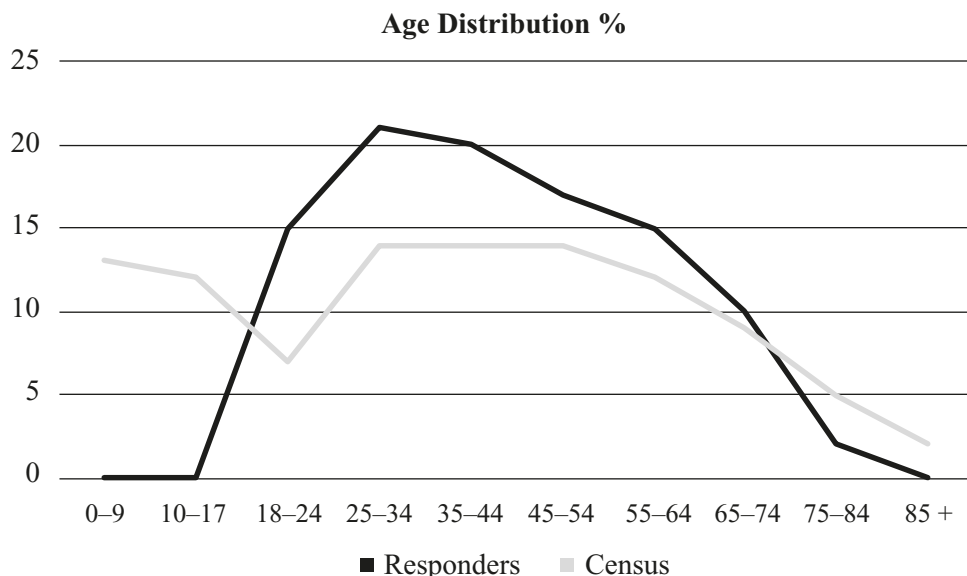
<sup>155</sup> European Society for Opinion and Market Research, *28 Questions to Help Buyers of Online Samples* (Guide, 15 June 2012) <<https://www.esomar.org/uploads/public/knowledge-and-standards/documents/ESOMAR-28-Questions-to-Help-Buyers-of-Online-Samples-September-2012.pdf>>.

<sup>156</sup> See generally ‘Census’, *Australian Bureau of Statistics* (Web Page) <<https://www.abs.gov.au/Census>>.

## 2 Age Distribution

The survey excluded minors due to their lack of legal capacity. Apart from this factor, Figure 2 suggests that the age distribution of responders resembles the national average, save for a slight bias toward the young and away from the old. Insofar as computer literacy and online access might be somewhat related to age, this bias may reflect the fact that this is an online survey.

The bulk of the responders are in the following three age brackets: 25–34 (21%), 35–44 (19%) and 44–55 (17%). This could indicate that these age groups have more legal problems or may be better informed of their legal rights than those aged 18–24 or over 55. As discussed below, findings in relation to changes in access to justice over the previous 20 years should be treated with considerably more caution for those in the 18–24 and 25–34 age groups.



**Figure 2: Comparison of responders' ages with Australian population ages from the 2016 Census (responders n = 574)**

## 3 Education Levels

The survey group appears to have a somewhat higher percentage of those whose highest education level is Year 12 or above (some 62%), compared to the general population where some 42% hold education equivalent to Year 12 or above as their highest level of education.<sup>157</sup> Insofar as computer literacy and online access might be

<sup>157</sup> Australian Bureau of Statistics, *Microdata: Education and Work, Australia* (Catalogue No 6227.0.30.001, 11 November 2020).

argued to be somewhat related to education level, then the slightly higher educational levels of responders may also be a reflection of the online nature of the survey.

The survey group of responders appears to have a somewhat higher percentage of those with a postgraduate or master's degree than the general population (13% compared to approximately 10% respectively),<sup>158</sup> and conversely a somewhat lower percentage of those with a bachelor's degree (25% compared to approximately 32% respectively).<sup>159</sup> The percentage of the survey group with a diploma is 20% compared to approximately 23% in the general population.<sup>160</sup> Despite these limitations, the group appears to be still reasonably representative of the general population in relation to education.

#### 4 *Income Levels*

Income levels of the responders seem to be fairly representative of the Australian population. The largest annual income group of the responders is in the \$20,000–50,000 range at 31%, compared to approximately 24% in the general population.<sup>161</sup> The second largest income group is in the \$50,000–80,000 range at 21%, compared to approximately 15% in the general population.<sup>162</sup> With 49% of the population earning less than \$50,000 annually,<sup>163</sup> income is likely to be an issue in accessing the legal system due to high legal fees. This raises the possible importance of pro bono, no-win-no-charge, third-party litigation funding, legal aid and so on.

#### E *Access to Justice Index Numbers*

Eighteen of the 50 questions in the survey tested overall access to civil justice. These test any general increase (or reduction) in access to civil justice over the past 20 years. They also tested access to justice for particular types of legal problems. This was a partly 'leximetric' analysis involving comparative quantitative analysis of legal phenomena relating to access to civil justice — in this case, allocating positive values to attributes to seek to measure an overall phenomenon.<sup>164</sup> This form of analysis has been employed in various areas of law.<sup>165</sup>

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2015–16* (Catalogue No 6523.0, 13 September 2017).

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Robert Cooter and Thomas Ginsburg, Illinois Law and Economics Working Papers Series, *Leximetrics: Why the Same Laws are Longer in Some Countries than Others* (Working Paper No LE03-012, June 2003) 2.

<sup>165</sup> For example, it has been applied to measure the effectiveness of laws for shareholder protection: see Rafael La Porta et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113, 1115–17; Priya P Lele and Mathias M Siems, 'Shareholder Protection: A Leximetric Approach' (2007) 7(1) *Journal of Corporate Law Studies* 17, 22–30.

The authors selected various criteria in constructing the leximetric index numbers. The implicit contention is that subjective evaluation by responders that their access to various services has increased over the previous 20 years indicates that their access to civil justice has increased over that time (and that disagreement indicates that such access has not increased over that period). The services tested include legal advice/information from government bodies, advice from legal aid and private lawyers, no-win-no-charge arrangements with private lawyers, and class action proceedings.

Surveying these different types of providers and legal services also offers some data on why or how access to civil justice may have improved (if indeed it has). In relation to particular legal problems, the implicit contention is that the responders' subjective evaluations of achievement of the following factors indicate a higher overall level of access to civil justice (and that a negative evaluation indicates a lack of overall access to civil justice). These factors include ability to obtain legal assistance, satisfaction with legal assistance, satisfaction with the litigation process and outcome, awareness of how to become part of any relevant class action proceedings, and availability of third-party litigation funding.

#### IV SOME OVERALL FINDINGS OF THE EMPIRICAL STUDY

##### *A Most Common Legal Problems*

The most frequently cited area of legal problems for average Australians was employment law. The second highest was family law. Of the 575 responders, 181 had had an employment law problem in the last 20 years. In that same period, 114 had a family law problem, 105 a debt problem, 100 a personal injury legal problem, 91 a discrimination problem and 90 a housing or tenancy problem.<sup>166</sup> The raw numbers of responders with particular problems are set out in Table 1 below. Percentage numbers are marked out of total responders (575) and also out of total legal problems reported (1325).

**Table 1: Responders' Legal Problems as a Percentage of Problems Reported and Total Responders (responders n = 574)**

No.	Legal Problem	% of Responders Reporting	% of Problems Reported
1.	Employment law (181)	31.5%	13.7%
2.	Family law (114)	19.8%	8.6%
3.	Money, debt or insolvency problems (105)	18.3%	7.9%
4.	Personal injury law (100)	17.4%	7.6%
5.	Discrimination law (91)	15.8%	6.9%

<sup>166</sup> Note that responders could nominate more than one legal problem.

No.	Legal Problem	% of Responders Reporting	% of Problems Reported
6.	Housing and tenancy law (90)	15.7%	6.8%
7.	Damage to property (72)	12.5%	5.4%
8.	Consumer rights (62)	10.8%	4.7%
9.	Wills or estates (50)	8.7%	3.8%
10.	Medical negligence (40)	7.0%	3.0%
11.	Insurance (39)	6.8%	2.9%
12.	Online commerce (38)	6.6%	2.9%
13.	Investment including shares (35)	6.1%	2.6%
14.	Other legal problem (33)	5.7%	2.6%
15.	Contracts (32)	5.6%	2.4%
16.	Dealings with government (27)	4.7%	2.0%
17.	Total or permanent disablement (26)	4.5%	2.0%
18.	Disability law (25)	4.4%	1.9%
19.	Other online issues (Social media, etc) (22)	3.8%	1.7%
19.	Trade practices including misleading conduct (22)	3.8%	1.7%
21.	Banking law (21)	3.7%	1.6%
21.	Law relating to the elderly (21)	3.7%	1.6%
21.	Defamation (21)	3.7%	1.6%
24.	Class Actions (20)	3.5%	1.5%
25.	Superannuation (19)	3.3%	1.4%
25.	Competition law (19)	3.3%	1.4%

As can be seen, employment law was easily the most reported legal problem and, together, the first three largely domestic issues of employment, family law and debt affected over 69% of responders.

There was some variation in the most common legal problems between urban and rural settings. Employment law was the most common legal problem in all areas except for the outer suburbs, where they were the second most common, ranking behind personal injury problems. Family law was the second most common in all areas except for the outer suburbs where they were the third most common, ranking behind personal injury and employment law.

Other areas of regional difference included discrimination, which was the second most common problem in farm settings and the third most common problem in inner cities, yet was less of an issue in middle and outer suburban locales where it was only the seventh most common problem. The inverse was the case with personal injury which was the most common legal problem in the outer suburbs, but ranked as only the seventh most common legal problem in inner urban areas. Housing and tenancy were the fifth most common problems for inner and middle urban dwellers

but the sixth most common for regional areas and only tenth most common for farmers.

**Table 2: Area of Legal Problem By Region**

<b>ALL AREAS</b>	Employment 13.7%	Family 8.6%	Money, Debt or Insolvency 7.9%	Personal injury 7.6%	Discrimination 6.9%
<b>Inner urban</b>	Employment 12.5%	Family 9.0%	Discrimination 7.9%	Money, Debt or Insolvency 7.9%	Housing & Tenancy 7.1%
<b>Middle urban</b>	Employment 16.0%	Family 9.4%	Money, Debt or Insolvency 8.2%	Personal injury 7.2%	Housing & Tenancy 6.9%
<b>Outer urban</b>	Personal injury 11.1%	Employment 10.7%	Family 8.7%	Money, Debt or Insolvency 8.7%	Property Damage 8.3%
<b>Regional</b>	Employment 14.3%	Family 7.9%	Discrimination 7.7%	Money, Debt or Insolvency 7.3%	Personal Injury 7.3%
<b>Farm</b>	Employment 9.8%	Discrimination 8.7%	Money, Debt or Insolvency 8.7%	Family 7.6%	Insurance/ Personal Injury 6.5%

### *B Highest Impact Problems*

The legal problems that had the most impact on a person's life were problems relating to total or permanent disablement (76%). Despite being the most frequent area of legal problems, employment law was only eighth in terms of impact. The areas of highest impact represented by the percentages of responders of that area nominating impact on their life as high were as follows:

**Table 3: Percentage of Responders Reporting High Impact  
(responders n = 574)**

No.	Legal Problem	% of Responders Reporting High Impact
1.	Total or permanent disablement	76%
2.	Defamation or slander	66%
3.	Disability	60%
4.	Family law	59%
5.	Medical negligence	57%
6.	Problems with government	53%

No.	Legal Problem	% of Responders Reporting High Impact
6.	Money, debt or insolvency	53%
8.	Employment	51%
9.	Discrimination	50%
10.	Investment including shares	48%
10.	Personal injury	48%
12.	Other legal problems	45%
13.	Laws relating to the elderly	42%
13.	Banking	42%
13.	Wills and estates	42%
16.	Class actions	40%
17.	Housing and tenancy	39%
18.	Property damage	37%
19.	Superannuation	36%
19.	Trade practices	36%
21.	Online issues other online commerce	36%
22.	Consumer rights	30%
23.	Competition law	26%
24.	Insurance	25%
24.	Contracts	25%
26.	Online commerce	15%

### C Most Used Legal Service

The legal service sought most by average Australians by a large margin was advice (33%). A limitation on this finding may be that responders gave varying interpretations to the notion of ‘advice’.<sup>167</sup> Nevertheless, this appears to be access to civil justice at its most essential level — knowledge of a person’s legal position and rights and obligations. Thus, knowing what a court may do can often facilitate an early resolution of a dispute. The most used services were:

<sup>167</sup> The LAW Survey spoke of seeking advice from a lawyer as ‘consulting ... [a lawyer] in a professional or formal capacity to try to resolve the problem’. Consulting the lawyer meant that ‘the respondent, or someone on the respondent’s behalf, had spoken or written directly to the ... [lawyer]’: Coumarelos et al, *Legal Need in Australia* (n 103) 92.

**Table 4: Most Used Legal Services (responders n = 574)**

No.	Legal Service	% Used
1.	Advice	33%
2.	Representation in negotiation	19%
3.	Preparation or drawing of documents	14%
4.	Letter of demand	9%
5.	Commencement of court proceedings	8%
6.	Defence of court proceedings/arbitration	3%

#### D *Desire to be Informed of Civil Claims*

Most average Australians would like to be informed of their rights to make civil claims. Eighty-seven percent (87%) of responders agreed or strongly agreed that they would wish to be informed of potential civil claims they may have for breaches of law by businesses, companies or government. Nine percent (9%) were undecided about whether they wished to be informed and only 3% did not wish to be informed. The question was posed because, in the debate over third-party litigation funding in particular, an argument is sometimes put that litigation funders and some lawyers ‘stir up’ civil disputes that would not otherwise exist. An example of this view is contained in the minority judgment of Callinan and Heydon JJ in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,<sup>168</sup> where their Honours observed:

The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes ... and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits.<sup>169</sup>

The survey thus sought the perception of the users of the legal system as to this view.<sup>170</sup> Perhaps due to responders’ self-interest in imagining themselves having a potential claim, it was considered that a disproportionate number of responders might

<sup>168</sup> *Fostif* (n 1).

<sup>169</sup> *Ibid* 487–8 [266].

<sup>170</sup> The views of potential litigants (legal ‘consumers’) are of course not decisive of this question — wider public policy questions about the function of civil law itself are relevant and there are arguments for and against this; nevertheless, the views of users can also not be entirely ignored.



agree that they should be informed of such claims. As such, ‘control’ questions were added, but these did not change the outcome.<sup>171</sup>

Whether potential defendants are insured for liability or not does not seem to have been an influential factor. Ninety percent (90%) agreed (62% strongly and 28% somewhat) that the existence or otherwise of insurance to indemnify such claims did not bear on whether claimants should be informed of such claims. These results indicate a strong desire of Australians to be informed if they or others have civil claims. It should be noted that this kind of ‘informing of claims’ is already occurring in various types of law firm marketing and entrepreneurial lawyering and in the process of so called ‘book-building’ (where group members with claims are recruited in a class action).<sup>172</sup>

### E *Change in Level of Access to Civil Justice*

A *majority* of Australians believe their access to civil justice has increased over the last 20 years. An important limitation on this result is that exposure to legal problems is likely to begin with (and increase) with adulthood. Some 37% of responders were under the age of 34 years, so that their experience of dealing with legal problems up to 20 years prior is more questionable (any recollections prior to adulthood may be of parents dealing with such problems, for instance). An additional limitation is the concept of access to justice itself. Despite the definition given in the questionnaire preamble, and discussed above, the notion is sufficiently abstract and potentially complex that responders might reasonably be expected to have had different understandings of it. Fifty-nine percent (59%) of responders considered that their overall access to civil justice has increased over the last 20 years. Twenty-seven percent (27%) neither agreed nor disagreed and 12% disagreed (either somewhat or strongly).

Perceptions of whether access to justice has increased over the last 20 years show some variation across the urban/rural divide, with the inner urban group most supportive of the view that access to civil justice has increased in the last 20 years and the outer suburban group least supportive of that view. The mean results (a lower

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<sup>171</sup> Control questions are questions designed for the responses to be compared to responses to other questions. See, eg, Christopher J Patrick and William G Iacono, ‘Validity of the Control Question Polygraph Test: The Problem of Sampling Bias’ (1991) 76(2) *Journal of Applied Psychology* 229, 229. The first control question asked whether others should be informed of potential claims against a company in which the responder held shares. This question sought to remove or minimise such self-interest or at least offset it by raising the counter prospect of potential detriment to responders. A further control question asked about claims by others (not including the responder) against federal or state governments. This assumed that interviewees perceive that civil actions against government may lead ultimately to higher taxes. It is of course possible that not all interviewees perceived this connection.

<sup>172</sup> See, eg, *Brewster* (n 1) 649 [91] (Kiefel CJ, Bell and Keane JJ); *Wigmans v AMP Ltd* [2019] NSWSC 603.

figure on the scale 1 to 5 indicating greater approval with the proposition that access to justice has increased) are as follows:<sup>173</sup>

**Table 5: Mean Agreement with Proposition By Region  
(responders n = 574)**

Location	Mean
Inner urban	1.14
Middle urban	2.26
Outer urban	2.51
Regional	2.41
Farm	2.24

#### F *Effect of No-Win-No-Charge*

The largest of the surveyed factors contributing to the perceived increase in access to civil justice was the introduction of ‘no-win-no-charge’<sup>174</sup> agreements. A significant proportion — 59% of responders — agreed that the introduction of such agreements has increased their access to civil justice. Twenty-seven percent (27%) were undecided about this and only 13% disagreed.

No-win-no-charge agreements first appeared formally in Victoria in July 1994.<sup>175</sup> This concept was explained in the survey instructions as meaning ‘a fee arrangement with a private lawyer where the lawyer charges a fee from the client only if the outcome of the case is successful for the client in recovering money or property (but not if it is unsuccessful)’. No-win-no-charge appears to be popular in personal injury and certain other claims. However, it is unlikely to be an effective billing method for a client who is defending a claim. Though there is the possibility of an award of party/party costs on a successful defence this may not be sufficient to cover the (higher) solicitor/client costs that may be charged. The authors are not aware of firms generally offering no-win-no-charge for defence of claims.

<sup>173</sup> Note that the overall numbers of responders from a farm or regional setting (other than regional towns or cities) were 33 in total which is not a large sample.

<sup>174</sup> Which were also known variously as ‘no-win-no-fee’, ‘no-win-no-pay’, ‘no-win-no-cost’ and so on by various different providers.

<sup>175</sup> Irene Lawson, “No Win: No Fee”: The Management of Medical Negligence Litigation on a Conditional Fee Basis’ (1998) 23(6) *Alternative Law Journal* 280, 280. See also ‘No Win No Fee Lawyers’, *Slater and Gordon Lawyers* (Web Page) <<https://www.slatergordon.com.au/the-firm/legal-costs/no-win-no-fee>>.

No-win-no-charge was found to be most common in personal injury law (46%) and superannuation (41%), and least common in wills<sup>176</sup> (1%) and contracts (0%).

### G *Other Effects on Access*

Other important reasons for the perceived increase in access to civil justice were found to be: (1) the introduction of class action proceedings; and (2) better legal advice or information from government bodies.

Fifty-six percent (56%) of responders believed that the introduction of class action proceedings has increased their access to civil justice. Twenty-nine percent (29%) were undecided on this point while 13% disagreed. ‘Class actions’ is also included as a category of legal problem itself, which 20 responders had experienced.<sup>177</sup> Of these 20 responders, 45% strongly agreed, while 25% agreed, that they were able to obtain legal assistance. Forty percent (40%) strongly agreed, while 20% agreed, that they were satisfied with the legal assistance they received. Some lack of actual experience of class actions is obviously an important caveat on the significance of answers about their effect on access to justice. Likewise, the online survey results are limited as to provision of raw qualitative data on responders’ specific experiences of the phenomena of litigation funding, class actions, government information, pro bono and no-win-no-charge. Responders were not asked specifically to rank these phenomena. Fifty-six percent (56%) considered that their access to legal advice or information from government bodies had increased over the last 20 years. Twenty-eight percent (28%) were undecided whether this was so while 14% disagreed.

#### 1 *Class Actions*

The procedural machinery for class actions was first generally introduced in Australia by amendments to the *Federal Court of Australia Act 1976* (Cth) allowing for a claim on behalf of seven or more persons.<sup>178</sup> The amendments were intended to ‘enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources’.<sup>179</sup> Similar procedural rules for class actions have since been enacted or promulgated in most states.<sup>180</sup>

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<sup>176</sup> Costs in will disputes are often ordered to be paid out of the estate. This is not technically no-win-no-charge as an unsuccessful claimant might still have their costs paid if the action was reasonable. Nevertheless, it might appear similar to no-win-no-charge to the lay person, making this low result somewhat puzzling.

<sup>177</sup> This category obviously overlaps with other categories. ‘Class actions’ (category 25) have been common for shareholders, resulting in potential overlap with category 5, ‘investment including shares’.

<sup>178</sup> *Federal Court of Australia Act* (n 38) s 33C.

<sup>179</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

<sup>180</sup> See, eg, *NSW Civil Procedure Act* (n 87) pt 10; *Uniform Civil Rules 2020* (SA) ch 3 pt 4; *Supreme Court Act 1986* (Vic) pt 4A.

Class actions are of course a procedural mechanism rather than either a substantive area of the law or a specific means of funding proceedings (they are often funded as no-win-no-charge or through a litigation funder). Nevertheless, they have become an area of legal specialisation and so were included in the survey as an area of law in their own right. They also spread funding costs and were generally included as a form of funding assistance/access. Significant numbers of class actions have been brought in the areas of securities and investment, product liability, employment, mass tort, consumer protection and immigration.<sup>181</sup> Class actions appear to have been most available in competition law (2.11 mean) and share investment (2.31 mean).

## 2 *Information from Government*

The survey did not interrogate responders further on the question of how information from government has improved; however, given the vast amount of information nowadays made available by government bodies online, it is clear that the internet has been a key factor in significantly enhancing access to legal advice or information from government bodies. Prior to the advent of the internet, such advice could only be provided in printed form, as well as verbally.<sup>182</sup>

Increasing resources for assistance from government may have influenced these figures. An example in the area that the survey identified as most significant to average Australians — employment law — is the creation of the Fair Work Ombudsman which can provide free advice in certain circumstances. It publicises the results of major investigations and uses media to make the public aware of issues in employment law such as underpayment of wages.<sup>183</sup>

### H *Lesser Influences*

Other lesser factors in the increase in access to civil justice over the last 20 years are increased access to advice from private lawyers, availability of legal aid, third-party litigation funding and lawyers acting on a pro bono basis.

Fifty-one percent (51%) of responders believed they had experienced better access to private lawyers generally over the 20-year period with only 18% disagreeing. Thirty

<sup>181</sup> Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report, July 2017) 27 <[http://global.classactions.stanford.edu/sites/default/files/documents/Morabito\\_Fifth\\_Report.pdf](http://global.classactions.stanford.edu/sites/default/files/documents/Morabito_Fifth_Report.pdf)>.

<sup>182</sup> Though, conversely, the complete migration of information sources to the internet may be detrimental to those who do not have internet access or have low online skills: see, eg, Catrina Denvir, University College London Centre for Access to Justice, *Assisted Digital Support for Civil Justice System Users: Demand, Design, & Implementation* (Final Research Report, April 2019) <[https://researchmgt.monash.edu/ws/portalfiles/portal/257143565/257090538\\_oa.pdf](https://researchmgt.monash.edu/ws/portalfiles/portal/257143565/257090538_oa.pdf)>.

<sup>183</sup> See, eg, 'Revealed: How 7-Eleven Is Ripping off Its Workers', *The Sydney Morning Herald* (Web Page, 2015) <<https://www.smh.com.au/interactive/2015/7-eleven-revealed/>>; 'Slaving Away', *Four Corners* (Australian Broadcasting Corporation, 2017) <<https://www.abc.net.au/4corners/slaving-away-promo/6437876>>.

percent (30%) neither agreed nor disagreed with this suggestion. Legal aid, third-party litigation funding and lawyers acting pro bono have all assisted in increasing access to civil justice somewhat, with agreement to this suggestion significantly outweighing disagreement, though falling short of majority agreement, and the balance being undecided. Forty-seven percent (47%) of responders agreed that access to legal aid lawyers has increased over the last 20 years. Thirty two percent (32%) were undecided and 19.87% disagreed. Forty-six percent (46%) considered that their access to civil justice has increased due to the availability of third-party litigation funding. However, 40% were undecided while 12% disagreed. Forty-one percent (41%) considered that access to civil justice has increased through increased availability of pro bono legal services. Thirty five percent (35%) were undecided while 22% disagreed. Only 39% agreed they had better access to private lawyers funded by government legal aid — 37% were undecided and 23% disagreed.

### 1 *Access to Private Lawyers*

The relatively strong support for the suggestion that access to private lawyers has increased over the last 20 years might possibly be explained in a number of ways. First, it may be partly accounted for by private lawyers being increasingly funded through no-win-no-charge agreements, legal aid or third-party litigation funding, as well as acting pro bono. Another factor may simply be the increased number of lawyers in Australia caused mainly by more universities offering recognised law courses. In New South Wales, for instance, the number of solicitors is said to have increased by more than 100% between 1988 and 2006.<sup>184</sup> Increased supply would tend to increase availability and possibly even reduce fees somewhat, at least in theory. The most typical form of funding — simply paying the private lawyer<sup>185</sup> — was most common in wills (69%) and family law (58%), and least common in banking (14%) and class actions (6%).

### 2 *Legal Aid*

Nowadays, government-funded legal aid tends to be made available almost exclusively for legal problems in criminal law or family law.<sup>186</sup> As criminal law was excluded from the survey, the responses suggesting better availability of legal aid

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<sup>184</sup> Suzie Forell, Michael Cain and Abigail Gray, *Recruitment and Retention of Lawyers in Regional, Rural and Remote New South Wales* (Report, Law and Justice Foundation of New South Wales, September 2010) 12. See also Erica Cervini, 'Lawyers, Lawyers Everywhere, and Not a Job To Be Found', *The Age* (online, 12 June 2014) <<https://www.theage.com.au/education/lawyers-lawyers-everywhere-and-not-a-job-to-be-found-20140612-zs55y.html>>. The number of solicitors increased during that time from 9,076 to 19,358, while the population only increased by some 25% (from 5.7 million to 6.8 million): see Australian Bureau of Statistics, *Australian Historical Population Statistics, 2006* (Catalogue No 3105.0.65.001, 23 May 2006).

<sup>185</sup> With a 36% All Problems Average ('AP'). AP represents an aggregate from all legal problems surveyed.

<sup>186</sup> See, eg, 'Find Legal Answers', *Victoria Legal Aid* (Web Page, 12 July 2021) <<https://www.legalaid.vic.gov.au/>>.

appear likely to be limited mainly to the area of family law (though the results suggest that certain other areas may be touched on by legal aid such as contract and defamation and slander).

### 3 *Third-Party Litigation Funding*

Third-party litigation funding usually involves a commercial funder advancing funds to a litigant's lawyer to meet the legal costs of pursuing a claim for monetary relief. In return, the funder receives a percentage of any monetary relief/compensation or damages successfully recovered.<sup>187</sup> Initially, third-party litigation funding developed in Australia mainly in the insolvency area where insolvency officers such as company liquidators sought funding to pursue claims against directors. In more recent times, litigation funders have become involved in funding class actions in a number of areas including property damage caused by negligence, and increasingly in general commercial claims including investor class actions (often alleging misleading disclosure to securities markets).<sup>188</sup>

Third-party litigation funders tend to have minimum claim sizes which might be calculated as fixed sums (such as \$500,000<sup>189</sup>) or as a multiple (such as ten times<sup>190</sup>) of the requested funding amount so that funding may not be that likely to be available for many single claims by average Australians. This might change in the future with expansion of, and more competition in, third-party litigation funding.<sup>191</sup> Nevertheless, an apparent rule of thumb adhered to by funders that requires a ratio of 1:4 costs to damages,<sup>192</sup> combined with somewhat inelastic legal costs to advance a case, may mean that small claims are generally unlikely to be assisted greatly by commercial litigation funders. However, the situation is different if a claim raises issues common to a number of possible claimants whose claims can be aggregated together in a class action. Litigation funding will also not be of assistance to average

<sup>187</sup> See, eg, Duffy, 'Regulating Third-Party Litigation Funding' (n 67); Julie-Anne Tarr and AJ George, 'Third-Party Litigation Funding in Australia: More External Regulation and/or Enhanced Judicial Supervision?' (2018) 36(3) *Company and Securities Law Journal* 262.

<sup>188</sup> See, eg, Vicki Waye and Vince Morabito, 'Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions' in Willem H van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, 2016) 155, 156–62.

<sup>189</sup> See, eg, 'About Us', *Litigation Funding Solutions* (Web Page, 2018) <<https://www.litigationfundingsolutions.com.au/>>.

<sup>190</sup> See, eg, 'Commercial Litigation Funding: Criteria', *Omni Bridgeway* (Web Page, 2021) <<https://omnibridgeway.com/litigation-funding/dispute-funding/commercial/>>. Under such criteria, if a claim cost \$100,000 to run, then it would need to be a claim for at least \$1 million.

<sup>191</sup> At least one funder, Augusta Ventures, indicates that claims as low as £200,000 (\$360,000) might be considered: 'For Individuals', *Augusta Ventures* (Web Page) <<https://www.augustaventures.com/what-we-do/for-individuals/>>.

<sup>192</sup> See, eg, *ibid.*

Australians who are defending rather than prosecuting claims, even where they have good defences — as, even if successful, there will be no damages recovered.

In the authors' survey, litigation funding was perceived by responders to be most available in contract law (2.18 mean) and class actions (2.50 mean).

#### 4 *Pro Bono Legal Services*

The availability of pro bono legal assistance has always been and remains somewhat ad hoc. A wide variety of activities might be classified as pro bono, ranging from a formalised and subsidised pro bono section in a law firm through to a variety of activities of solicitors and barristers giving their time to organisations, community legal centres or private individuals. Subsidisation might also extend to public interest or test cases. Less obvious activities that have a pro bono element include law firms cross-subsidising less remunerative areas within firms. These may range from complete financial support through to the common practice of reduced fees (sometimes referred to as 'but say' bills) for lower-income clients. Even 'write-offs' of fees due to the impecuniosity of a client might entail an element of pro bono.

The Australian Pro Bono Centre provides a history of the development of pro bono practice in Australia, which does appear to suggest some increasing focus on the area by the profession as well as community organisations and government.<sup>193</sup> These include the following developments:

- various pro bono clinics, legal centres, co-ordinators and pro bono partners within law firms;
- referral schemes by law societies and charities (such as Justice Connect and the Australian Pro Bono Centre);
- state-based public interest clearing houses;
- pro bono conferences; and
- reports and surveys including the *National Law Firm Pro Bono Survey*.<sup>194</sup>

Nevertheless, according to the *National Law Firm Pro Bono Survey*, pro bono participation rates of lawyers have been somewhat variable in the time that surveys have been conducted (2010–18). In that period, the hours of pro bono legal work per lawyer per year appeared to increase from 2010–16 before dipping in 2018 and increasing again in 2020.<sup>195</sup>

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<sup>193</sup> Australian Pro Bono Centre, *Report on the Seventh National Law Firm Pro Bono Survey* (Report, February 2021) 2–7.

<sup>194</sup> See, eg, *ibid.*

<sup>195</sup> *Ibid.* 22. The figures are: 29 hours (2010); 29.9 hours (2012); 31.7 hours (2014); 34.8 hours (2016); 30.5 hours (2018); and 35.5 hours (2020).

In the authors' survey, pro bono funding was most common in problems with government (41%) and banking (28%) and least common in superannuation law (8%) and trade practices law (7%).

### 5 *Private Lawyers Funded by Legal Aid*

Victorian guidelines for applications for legal aid funding to pay the fees of private lawyers make it clear that '[m]ost grants of legal assistance are for criminal or family law matters. A small number of grants are also provided in some other matters such as guardianship, infringements, migration, social security, mental health and discrimination matters.'<sup>196</sup> This limitation in the scope of legal aid may explain why only 39% of responders agreed they had better access to private lawyers funded by government legal aid over the last 20 years, with 37% undecided and 23% disagreeing.

## V SOME SECTORAL FINDINGS

### *A Problem Areas Where Legal Assistance Is Most Available.*

Responders were most likely to be able obtain legal assistance for problems in wills and least likely for problems with government. The data is as follows in relation to the top three areas of availability and the bottom three areas (where a lower mean indicates higher availability):

**Table 6: Mean Availability Score for Legal Problems (responders n = 574)**

No.	Legal Problem	Mean
1.	Wills and estates	1.88
2.	Total/permanent disablement	2.15
3.	Personal injury	2.20
24.	Contracts	3.03
25.	Other online issues	3.05
26.	Problems with government	3.31

The high ranking for wills and estates may reflect the ubiquity of this service across city, country, and suburban law firms of various sizes.

### *B Dealing with a Legal Problem without Advice*

Responders' perceived inability to deal with a legal problem in the absence of legal advice was most reported in superannuation law where no responders reported dealing with the problem by personal negotiation, 18% used self-help/fixing the

<sup>196</sup> 'Get a Lawyer to Run Your Case', *Victoria Legal Aid* (Web Page, 7 July 2021) <<https://www.legalaid.vic.gov.au/get-legal-services-and-advice/get-lawyer-to-run-your-case>>.



problem themselves and 72% reported the problem as unresolved. Superannuation is undoubtedly a complex area of the law given the layers of statutory regulation imposed over trust law and policy changes made over the years.<sup>197</sup> This level of complexity may have the result that lawyers and other professionals practising in this area are both highly specialised and potentially more costly.<sup>198</sup>

### C *The Largest Source of Legal Advice*

Private lawyers are the largest source of advice overall,<sup>199</sup> with their services being sought most in wills and personal injury matters. Advice was also sought most in relation to wills (64%) and personal injury (62%), and sought least in relation to online commerce (6%) and competition law (5%).<sup>200</sup>

### D *Areas of Most Satisfaction*

The area of most general satisfaction was wills (defined also to include will disputes), where responders were most successful in getting legal assistance (1.88 mean). Responders were most satisfied with the legal assistance they received in contracts (1.55 mean) and wills (2.12 mean) but least satisfied with legal assistance in property damage (3.14 mean) and medical negligence (3.08 mean).

Responders were most of the belief that they obtained the remedy they needed in wills (1.98 mean) and contracts (2.00 mean) and least for problems with government (3.46 mean) and medical negligence (3.10 mean). They were most satisfied with their remedy in wills (2.08 mean) and competition law (2.47 mean) and least satisfied for problems with government (3.46 mean) and defamation and slander (3.29 mean).

Responders were most satisfied with the litigation process in competition law (2.11 mean) and laws relating to the elderly (2.11 mean) and least satisfied for defamation and slander (3.26 mean) and property damage (2.92 mean). They were most satisfied with the litigation outcome in online commerce (2.05 mean) and other online issues (2.05 mean) and least satisfied for problems with government (3.50 mean) and defamation and slander (3.47 mean).

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<sup>197</sup> See, eg, 'Defined Benefit Funds: Notional Taxed Contributions', *Australian Taxation Office* (Web Page, 8 November 2018) <<https://www.ato.gov.au/Super/APRA-regulated-funds/Managing-member-benefits/Defined-benefit-funds---notional-taxed-contributions/>>.

<sup>198</sup> See, eg, Michelle J White, 'Legal Complexity and Lawyer's Benefit from Litigation' (1992) 12(1) *International Review of Law and Economics* 381.

<sup>199</sup> 30% AP average.

<sup>200</sup> Limitations as to possible varying interpretations of the notion of 'advice' are noted above: see Coumarelos et al, *Legal Need in Victoria* (n 104) 92.

*E Most Litigious Area*

Family law might be described as the most litigious area of the law, in that commencement of proceedings was the most popular remedy (25%)<sup>201</sup> compared to an overall average of only 8%.

*F Access to Justice Index Numbers*

Access to justice index numbers were calculated to test both general satisfaction with the outcome of a legal problem and the extent to which there was availability for that problem of any or all of government legal aid, pro bono, no-win-no-charge, class actions or third-party litigation funding. That calculation produced an average index number for all problems of 54% and found the highest index number in competition law (64%) followed by the following areas of law.

**Table 7: Access to Justice Index Numbers**

No.	Legal Problem	Access to Justice Index Number
1.	Laws relating to the elderly	62%
2.	Investment including shares	61%
3.	Online commerce	59%
4.	Superannuation	58%
4.	Wills and estates	58%
6.	Class actions	57%
6.	Money, debt or insolvency	57%
6.	Trade Practices	57%
9.	Employment	56%
9.	Total/permanent disablement	56%
11.	Discrimination	55%
12.	Consumer rights	54%
12.	Housing and tenancy	54%
14.	Banking	53%
14.	Other Online Issues	53%
14.	Personal Injury	53%
17.	Disability	52%
17.	Insurance	52%
19.	Family Law	50%
20.	Medical negligence	49%

<sup>201</sup> Though this may reflect a requirement to make an application to obtain enforceable consent orders.

No.	Legal Problem	Access to Justice Index Number
21.	Other legal problems	48%
22.	Defamation and Slander	47%
23.	Contracts	45%
23.	Property damage	45%
25.	Problems with government	41%

Note though that the access to justice index numbers do not reflect whether that area of law is one in which legal problems are common. As appears from the earlier Tables, most of the legal problems with high access to justice index numbers are not in areas of occurrence of the most legal problems. The highest, competition law, is the smallest area of legal problems surveyed (26<sup>th</sup>). Its ranking may result from successful settlements in no-win-no-charge cartel class actions, such as that in *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]*.<sup>202</sup> The others are, similarly, not main areas of legal problems, with rankings as follows: laws relating to the elderly (22<sup>nd</sup>); investment including shares (13<sup>th</sup>); online commerce (12<sup>th</sup>); and superannuation (25<sup>th</sup>).

## VI CONCLUSION

Access to civil justice remains an important concern for the justice system and for society overall. The civil justice system has a crucial role in peacefully quelling civil disputation while also protecting and vindicating individual rights according to law. The system is an important component of the rule of law, the strength of which itself has been shown to have an empirical correlation with social and economic wellbeing. Access to that system, including access to legal advice, representation and where necessary, court action, are important in protecting the rights of citizens. Private enforcement of such rights entails further value in its deterrent effect on breaches of the law and in supplementing regulatory enforcement.

Barriers to access to civil justice have been noted and legal needs surveys seek to study these while providing a significant literature which intersects with the notion of access to advice, representation and the court system. Such surveys may also provide information on the incidence of justiciable problems, citizens' responses to them, motivations for using or not using court processes, outcomes of different strategies, and public experience and perception of the legal process. This article includes results of a nationwide online survey of access to civil justice, conducted substantially in the tradition of such surveys but also focusing particularly on average Australians and on the effect of developments in Australia, such as no-win-no-charge legal services, pro bono practice, third-party litigation funding and class action procedural machinery.

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<sup>202</sup> (2006) 236 ALR 322.

Subject to the limitations noted above, some of the more important findings of this article include the following:

1. A majority of Australians subjectively believe that their access to civil justice has increased over the last 20 years. The single largest factor noted as contributing to this perceived increase was the introduction of ‘no-win-no-charge’ fee arrangements;
2. Australians have the most legal problems in the area of employment law, though the area with the greatest impact on their lives was total and permanent disablement. The area in which the second most problems were encountered was family law;
3. Advice is the most popular legal service sought, followed by legal representation in negotiation;
4. Australians most commonly seek a lawyer to defend court proceedings in the area of banking;
5. A majority of Australians surveyed would like to be informed of any rights they have to make civil claims;
6. The area with the most general satisfaction in civil justice was wills and estates;
7. Employment law problems are the most common legal problems in all geographical areas (urban and rural) except for the outer suburbs, where they are the second most common legal problem. Family law problems are the second largest area of problems in all geographical areas except for the outer suburbs, where they are the third most common; and
8. Index numbers calculated to test satisfaction with the outcome of a legal problem and the extent to which there was availability of innovative funding sources produced the highest index number for competition law followed by laws relating to the elderly.

The findings give overall (though not specific) feedback on the success of past access to civil justice initiatives. They are also illuminating in understanding and indicating levels of satisfaction with legal services and with the civil justice system itself in particular legal areas. As such the research provides useful insights for future access to civil justice initiatives.

## VII APPENDIX: THE QUESTIONNAIRE

**Before commencing the survey, please read, and if necessary, make a note of the following which explains the terms used in the questions in this survey.**

### ***EXPLANATION OF TERMS***

Your ‘**access to civil justice**’ means your ability to obtain a just or fair outcome in an area of civil justice, including your ability to use and access the court system and the legal system to obtain a just or fair outcome.

‘**Alternative dispute resolution/mediation**’ is a process for solving legal disputes where parties agree to negotiate an outcome, usually with the assistance of an independent third party who assists all parties equally but does not represent any of them. Parties may or may not be individually represented by lawyers.

‘**Civil justice**’ includes getting a just or fair outcome in areas including laws relating to employment, discrimination, housing and tenancy, money, debt or insolvency (bankruptcy or company receivership/administration/liquidation), investment including shares, personal injury, medical negligence, property damage, consumer rights, competition law or trade practices, family law, contracts, wills, laws relating to the elderly, disability, total or permanent disablement, superannuation, government, insurance, banking, class actions or any other legal problem other than a criminal law matter.

‘**Class action proceedings**’ mean proceedings brought by a person on behalf of you and other victims of unlawful conduct where you are notified of the commencement of the proceeding and can participate in any recovery in the case or, alternately, decide to opt out of the case.

‘**Legal aid lawyer**’ means a lawyer employed and funded by a government funded legal aid body.

‘**Litigation**’ means court proceedings between two or more parties.

‘**Private lawyer**’ means a private or non-government lawyer who acts for you, usually in return for fees.

‘**Private lawyer funded by government legal aid**’ means a private lawyer who acts for you but whose fee is paid by a government funded legal aid body.

‘**Pro bono**’ describes the arrangement where a lawyer acts for you but does not charge you for his/her services.

‘**No win no charge**’ includes ‘no win, no pay’ or ‘no win, no cost’ and means a fee arrangement with a private lawyer where the lawyer charges a fee from you only if the outcome of the case is successful for you in recovering money or property (but not if it is unsuccessful).

‘**Remedy**’ means an outcome or solution to your legal problem which may include a payment of money to you or a court order that someone does something that you want them to do and also includes achieving these outcomes by settlement/agreement of the parties as well as by the court hearing the case and ordering the outcome.

‘**Third-party litigation funding**’ means an arrangement where a third-party litigation funding business funds a claim by you against someone (such as a company, business or government body) in return for a share of the compensation or damage recovered by you in the claim.

### **Q 1**

**Do you commit to providing your thoughtful and honest answers to the questions in this survey?**

- I will provide my best answers
- I will not provide my best answers
- I can’t promise either way

*[Note that responders who did not give the first answer were then eliminated from the survey].*

**Q 2**

**What Australian state or territory do you live in?**

**Q 3**

**What is your age?**

- Under 18
- 18–24
- 25–34
- 35–44
- 45–54
- 55–64
- 65–74
- 75–84
- Over 85

**Q 4**

**What is your birthplace?**

- Australia
- Outside Australia

**Q 5**

**Are you an Australian citizen?**

- Yes
- No

*[Note that responders who answered 'No' were eliminated from the survey]*

**Q 6**

**Is English your first language?**

- Yes
- No

**Q 7**

**What is the highest level of secondary education received?**

- Year 9
- Year 10
- Year 11
- Year 12
- Other

**Q 8**

**What is the highest level of post-secondary education received?**

- Trade certificate
- Diploma
- Bachelor Degree
- Master's Degree or higher
- Other

**Q 9**

**What is your income level? (per annum)**

- Under \$20,000 per annum
- \$20,001–\$50,000
- \$50,001–\$80,000
- \$80,001–\$110,000
- \$110,001–\$140,000
- \$140,001–\$180,000
- \$180,001–\$200,000
- Above \$200,001

**Q 10**

**Which of the following are you? (you may tick more than one box)**

- Full time employee
- Part time/casual employee
- Manager
- Business owner
- Contractor
- Domestic duties/homemaker
- Unemployed
- Student
- Self-funded retiree
- Pensioner
- Other

**Q 11**

**Which sector do you work in? (you may tick more than one box)**

- Private small business
- Private large business
- Retail
- Health
- Education
- Government
- Professional
- Manufacturing
- Primary production
- Other

**Q 12**

**Where do you live?**

- Farm or regional setting
- Regional or rural town or city
- Inner urban
- Middle suburban
- Outer suburban

**Q 13**

**Have you had a legal problem in any of the following areas of civil law in the last 20 years?**

- 1 Employment (eg problems with your employer or unfair dismissal)
- 2 Discrimination (eg less favourable treatment based on gender, race, religion, age, disability or sexual preference)
- 3 Housing and tenancy (eg problems with your landlord)
- 4 Money, debt or insolvency (eg credit card or other debt problems or a person or business owing you money but not paying because they have insufficient money)
- 5 Investment including shares (eg being misled by companies or financial advisers about the safety or value of your investments)
- 6 Personal injury (eg physical injury from road or work)
- 7 Medical negligence (eg misdiagnosis or faulty treatment from doctors)
- 8 Property damage (eg someone damaging your car or home intentionally or accidentally)
- 9 Consumer rights (eg faulty or defective products or services)
- 10 Competition law (eg goods being overpriced due to collusion or agreements between businesses)
- 11 Trade practices (eg businesses misleading you)
- 12 Family law (eg custody of and access to your children, child support, and property division following divorce or break up of a relationship)
- 13 Contracts (eg arrangements with electricity, gas, water suppliers or with telephone companies or others)
- 14 Online commerce (eg problems with online suppliers of goods and services)
- 15 Other online issues (eg problems with social media sites, dating or other websites)
- 16 Defamation and slander (eg problems with people trying to publicly hurt your reputation)
- 17 Wills (eg making a will or being left out of someone's will)
- 18 Laws relating to the elderly (eg aged care agreements)
- 19 Disability (eg disability services)
- 20 Total/permanent disablement (eg making a claim on insurance or getting compensation)
- 21 Superannuation (eg getting access to or information about your superannuation)
- 22 Government (eg local government or planning issues or problems with dealings with state or federal government bodies or departments)
- 23 Insurance (eg making a claim on motor or home insurance)
- 24 Banking (eg unethical or illegal behaviour by banks toward you)
- 25 Class actions (eg being a class member in an action dealing any of the areas of civil justice)
- 26 Any other legal problem other than a criminal law matter

**Q 14**

**There is no question 14.**

**Q 15**

**I would wish to be informed of any potential civil claims I may have (but am not aware of) for compensation against businesses, companies or governments for breaches of law by them.**

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

*[Note that these same five options were used for Questions 16–18 and 20–7]*

**Q 16**

If a company in which I (or my superannuation fund) owned shares had broken a law, I would wish victims of that breach to be informed of any claims for compensation that they may have against my company.

**Q 17**

If a federal or state government body had broken a law affecting other people but not me, I would wish victims of that breach to be informed of any claims for compensation that they may have against the government.

**Q 18**

I and other victims of breaches of law should be informed of any potential civil claims they may have (but are not aware of) against businesses or companies or governments whether or not the businesses, companies or governments are insured to meet such claims.

**Q 19**

Say how strongly you agree or disagree with the following statements generally and with reference to any civil legal problem(s) you have had over the last 20 years.

**Q 20**

I consider that my access to legal advice/information from government bodies has increased over the last 20 years.

**Q 21**

I consider that my access to advice from legal aid lawyers has increased over the last 20 years.

**Q 22**

I consider that my access to advice from private lawyers funded by government legal aid has increased over the last 20 years.

**Q 23**

I consider that my access to advice from private lawyers has increased over the last 20 years.

**Q 24**

I consider that my access to civil justice has been increased over the last 20 years by more private lawyers acting 'pro bono' (for free)?

**Q 25**

I consider that my access to civil justice has been increased over the last 20 years by the introduction of 'no win no charge' arrangements by private lawyers.

**Q 26**

I consider that my access to civil justice has been increased over the last 20 years by the introduction of class action proceedings.

**Q 27**

I consider that my access to civil justice has increased over the last 20 years due to the availability of third-party litigation funding.

**Q 28**

I consider that my access to civil justice generally has increased over the last 20 years.

- Strongly agree
- Agree
- Neutral
- Disagree
- Strongly disagree

**Q 29**

In respect of each legal problem you have identified as having had in the last 20 years answer the following questions separately (for each problem).



**Q 30**

**In what area of civil law [set out in Q 13] was your legal problem?**

**Q 31**

**What year approximately did your legal problem arise?**

- 2014–18
- 2010–14
- 2006–10
- 2002–06
- 1998–2002

**Q 32**

**What was the degree of impact of the legal problem on your life?**

- High
- Medium
- Low

**Q 33**

**Were you able to achieve assistance with your legal problem?**

- Yes
- Maybe
- No

**Q 34**

**If you were unable to achieve assistance, how was your legal problem dealt with?**

- Personal negotiation
- Self-help (taking action to fix the problem yourself)
- Not dealt with
- Other

**Q 35**

**If you were able to achieve assistance for your legal problem, where did you seek advice?**

- Friend or family
- Government
- Legal aid lawyer
- Private lawyer
- Other

**Q 36**

**If you saw a lawyer about your legal problem, what service did you seek?**

- Advice
- Preparation/drawing of document(s)
- Letter of demand
- Representation in negotiation
- Alternative dispute resolution/mediation
- Arbitration
- Commencement of court proceedings
- Defence of court proceedings

**Q 37**

**If you saw a lawyer about your legal problem, what service and/or remedy did you ultimately get?**

- Advice
- Preparation/drawing of document(s)
- Negotiated settlement without court action
- Negotiated settlement after court action commenced
- Settlement from arbitration or mediation
- Court order for damages
- Court orders for other relief such as injunction or declaration
- Court order dismissing a claim against you.

**Q 38**

**If you saw a private lawyer about your legal problem, how was your legal assistance funded?**

- Paid the lawyer from my own money
- Legal Aid paid the lawyer
- Pro bono (ie the lawyer did not charge)
- 'No win no charge' arrangement with lawyer
- Third-party litigation funder paid the lawyer
- Insurance company paid the lawyer

**Q 39**

**Questions for access to justice for each legal problem**

**In relation to your legal problem please say how strongly you agree or disagree with the following statements.**

**Q 40**

**I was able to get legal assistance in relation to my legal problem**

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

*[Note that these same five options were used for Questions 41–50]*

**Q 41**

**I was satisfied with the legal assistance I received in relation to my legal problem.**

**Q 42**

**From the legal assistance I received for my legal problem was able to obtain the remedy I needed.**

**Q 43**

**I was satisfied with the remedy I obtained in relation to my legal problem.**

**Q 44**

**I was satisfied with the litigation process in relation to my legal problem.**

**Q 45**

**I was satisfied with the litigation outcome in relation to my legal problem.**

**Q 46**

**At the time of my legal problem, government legal aid assistance was available to assist me.**

**Q 47**

**At the time of my legal problem, some 'pro bono' (free) legal assistance was available to assist me.**

**Q 48**

**At the time of my legal problem 'no win no fee' legal assistance from some lawyers was available to assist me.**

**Q 49**

**At the time of my legal problem, I could have become part of a relevant class action proceeding to assist me.**

**Q 50**

**At the time of my legal problem, third-party litigation funding was available to assist me.**