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Responses submitted by:
Name: Colin Loveday
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Location: Sydney, New South Wales, Australia

1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Australia has a common law system.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

Civil litigation in Australia is conducted on an adversarial basis. The parties present their case to the court. The judge makes findings of fact and law after consideration of the evidence that has been presented and submissions by the parties on the law.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

While jury trials are utilised in some courts, the majority of civil matters in Australia are determined by a judge.
The judiciary in Australia are appointed by the Government of the day from the ranks of senior lawyers and usually from advocates (barristers). Almost without exception, judges will have had extensive experience as trial lawyers before their appointment to the bench.

Jurors are selected from registered voters over the age of 18. Certain categories of people may be excused or exempt from jury service.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

The general course of litigation and the procedural rules in the superior courts in Australia are broadly the same. However, some specialised tribunals have separate rules of procedure. For example, the commercial divisions of some state Supreme Courts have modified procedures concerning pleadings and pre-trial directions. In addition, there are specialised tribunals for the adjudication of environmental and planning matters and for asbestos related claims with modified procedural rules.

5. Is arbitration an option and when? If so, what rules are typically used?

Commercial arbitration is governed by both State and Federal legislation. The *International Arbitration Act* 1974 (Cth)

governs international arbitrations, while domestic arbitrations are governed by legislation enacted in each State. Arbitration is commonly utilised in commercial disputes in Australia.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Australian courts will, where appropriate, enforce binding arbitration clauses. An Australian court will stay litigation proceedings in favour of arbitration if the arbitration agreement is valid and where the dispute falls within the terms of the agreement and is capable of arbitration.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

Generally speaking, Australian courts are supportive of the different methods of alternative dispute resolution. In the Commercial List of the Supreme Court of New South Wales it is common for the Court to order that the parties mediate before the matter is set down for trial.

8. What is the process for pre-hearing fact discovery (if any)?

Depositions of the parties and witnesses are not taken before trial. However, the Australian legal system is more onerous in terms of the obligations imposed on parties to give discovery of documents.

A party is obliged to discover − that is to identify and allow the other parties to access − all documents in its possession, custody or power which are relevant to a matter in issue in the proceedings. Discovery occurs at the pre-trial stage so that all documents relevant to the case are disclosed by the parties before the hearing commences.

The obligation to give discovery extends to documents which are no longer in the party's possession, custody or power, but which were previously. This may occur where a relevant document has been lost, destroyed or provided to someone else. In such a case, a description of the document must be provided to the other parties.

Documents that are relevant to a case include those documents on which the party relies, documents that adversely affect the party's own case, documents that adversely affect another party's case, documents that support another party's case, and documents that the party is required by a relevant practice direction to disclose.

All discovered documents must be listed, and the parties' lists verified and exchanged. Parties are entitled to inspect each other's' documents and if desired, copy them, save for those in relation to which a claim for privilege has been advanced.

Preliminary discovery before the substantive proceedings assists parties in identifying prospective defendants, to determine whether or not they have a claim or to gain information from third parties where any party to a proceeding reasonably believes that a particular party holds a document which relates to any question in the proceeding.

The obligation to discover all relevant documents continues throughout the proceedings. This means that any document created or found after providing initial discovery must also be discovered.

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(a) Are there provisions for mandatory document disclosures?

See above.

In most courts an order for discovery needs to be sought. In the Federal Court, the *Federal Court Rules 2011* (Cth) provide that a party must not apply for an order for discovery unless it will facilitate the just resolution of the proceedings as quickly, inexpensively and efficiently as possible. Orders for discovery in complex litigation are common.

(b) Is there provision for oral examinations of the parties or others?

Not for pre-hearing fact discovery. Depositions are generally not available in Australia.

(c) Are there limits on the length of oral examinations?

Not applicable.

(d) Are witness statements or summaries to be provided before the hearing?

Yes, in most superior courts. Further, witness statements or summaries of expert evidence are almost universally required.

9. What is the process for pre-hearing expert disclosure (if any)?

Evidence is admissible if it is relevant and not otherwise excluded either by the common law or the relevant *Evidence Act* in the State/Territory or Federal jurisdiction. For example, hearsay is generally inadmissible.

Evidence of an opinion is not admissible to prove the existence of a fact about which the opinion is expressed, unless that opinion is given by a person with specialised knowledge based on that person's training, study or experience. There are several conditions for expert evidence to be admissible, namely that:

- there must be a field of specialised knowledge;
- there must be an identified aspect of that field in which the witness demonstrates that he/she has become an expert; and
- the opinion proffered must be wholly or substantially based on the witness's expert knowledge.

Generally in Australia, witnesses provide written statements of their evidence, in the form of affidavits, statutory declarations or witness statements before the hearing. These documents are usually signed under oath or affirmed. These documents are then "read" onto the record in court, and serve as evidence-in-chief for that witness.

Witnesses are then usually cross-examined and re-examined in court. With the leave of the court, a hostile or unfavourable witness may be questioned by the party who called the witness as though they were cross-examining the witness. In re-examination, the witness may only be questioned about matters arising out of the cross-examination, and leading the witness is not permissible.

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There are two possible expert reports that may be admitted in proceedings - a joint report, arising out of a conference of experts; and an individual expert's report. While specific requirements differ between jurisdictions, generally an expert's report must include:

- the expert's qualification on the subject of the report;
- the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instruction may be annexed);
- the expert's reasons for each opinion expressed;
- any literature or materials utilised in support of the opinions;
- any examinations, tests or investigations on which the expert has relied; and
- the qualifications of persons who conducted such examinations/tests/investigations

Unless otherwise ordered, an expert's evidence in chief must be given by the tender of one or more expert's reports.

The expert's paramount duty is to the court, not the engaging party. An expert is not an advocate for a party, but has an overriding duty to provide impartial assistance to the court on matters within the expert's area of expertise. Generally, unless the court orders otherwise, an expert will not be permitted to give oral evidence unless the court is satisfied that the expert has acknowledged that they have read the appropriate guidelines or code of conduct which pertains to experts, and agree to be bound by it.

The parties themselves decide which evidence they will rely upon to prove their case. However, Australian courts retain the discretion to make orders regarding the admissibility of certain evidence. Courts also have the discretion to exclude or limit evidence if its probative value is substantially outweighed by the prejudice it may cause to a party.

(a) Are expert reports or written summaries required to be exchanged?

Yes, usually pursuant to directions made by the court. See above.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

No.

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

In some courts, concurrent evidence (known colloquially as hot tubs) is mandated and in others, encouraged. As a result, concurrent expert evidence is becoming increasingly common. The procedure will be prescribed by the court for each case but usually involves experts with the same areas of specialized knowledge meeting in advance of the hearing, preparing a joint report outlining areas of agreement and disagreement and then giving their evidence (including cross examination) concurrently.

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10. Are there other notable discovery rules?

Documents obtained on discovery are not able to be used for any purpose other than the proceedings in which they were disclosed. The *Harman v Home Office* undertaking is the implied undertaking given to the court by any party obtaining documents on discovery (or by virtue of some other compulsory process) that it will not use such documents for any collateral purpose.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

Prehearing conferences or directions hearings are common in Australian courts. They are usually conducted by a judicial officer (either the docket judge or court registrar). Both the timing and content of these directions hearings are at the discretion of the court and do vary from court to court.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

Interlocutory procedures exist for parties to move to strike out the whole or any part of a pleading (including causes of action, claims and defences), where the court determines that the pleading discloses no reasonable cause of action or defence, has a tendency to cause prejudice, embarrassment or delay or is otherwise an abuse of court process.

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

Rules of procedure permit a party to bring an interlocutory application to contest the admissibility of expert testimony. Such applications are usually the subject of specific directions by the court and may be heard before trial or at the beginning of the trial.

14. What is the standard for admissibility of expert evidence?

Expert (opinion) evidence is inadmissible unless the witness has "specialised knowledge", that specialised knowledge is based on the person's training, study or experience, and the opinion is "wholly or substantially" based on that specialised knowledge.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Courts in several Australian jurisdictions may appoint a "court expert" to inquire into and report on a question of fact arising in a matter before the court, or an "expert assistant" to assist the court on any issue of fact or opinion (other than an issue involving a question of law) identified by the court in the proceeding, should the need arise. In some courts, the

expert's report will only be binding on a party to the extent that that party agrees to be bound by it. In other courts, the report is deemed to have been admitted into evidence unless the court orders otherwise.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

In Australia at common law, legal privilege is known as "legal professional privilege" although with the introduction of uniform *Evidence Acts* in some jurisdictions it has been renamed "client legal privilege". At common law there are three elements necessary to establish privilege over communications passing between a legal adviser and client:

- the communication must pass between the client and the client's legal adviser;
- the communication must be made for the dominant purpose of enabling the client to obtain legal advice, or for the purpose of actual or contemplated litigation; and
- the communication must be confidential.

Legal professional privilege and litigation (or work product) privilege, as those terms are commonly used, exist in Australia both at common law and under statute. The "dominant purpose" rule is applied.

A further form of privilege protects bona fide without prejudice confidential communications which are aimed at resolving disputes.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

Not applicable.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

A Court.

19. Briefly describe the trial process?

(a) Are there opening submissions, in what form and of what length?

In most jurisdictions opening submissions are expected and they usually involve written submissions filed and served in advance of the hearing which are then supplemented by oral submissions at the beginning of the trial. There is no

prescription as to length or time (except in some tribunals) and such matters are at the court's discretion.

(b) What is the order of presentation of witnesses?

The plaintiffs usually present all their witnesses both fact and expert followed by the defendants.

(c) Who conducts examination and in what order?

Examination in chief is conducted by the lawyer calling the particular witness, followed by cross examination followed by re-examination.

(d) What is the process for closing submissions?

Usually the defendant will go first, followed by the plaintiff and sometimes the defendant will have a right of reply.

20. Please identify any other notable trial procedures.

Recently, Australian courts have been utilizing concurrent expert evidence procedures known colloquially as hot tubs. The procedure will be prescribed by the court for each case but usually involves experts with the same areas of specialized knowledge meeting in advance of the hearing, preparing a joint report outlining areas of agreement and disagreement and then giving their evidence (including cross examination) concurrently.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

In general terms, the plaintiff bears the onus of proof in respect of each element of the claim and in civil matters the relevant standard is the balance of probabilities.

It is also relevant to note that in Australia there are important statutory consumer guarantees and defective product causes of action under consumer protection statutes that are referred to as "strict liability" provisions. For actions for breach of a consumer guarantee, a claimant need not prove fault, but nonetheless must establish, on balance that, for example, the subject goods are not fit for purpose or are not of acceptable quality in the circumstances. For a defective goods action, a claimant needs to prove that the subject goods have a safety defect, i.e. are not as safe as persons are generally entitled to expect (having regard to all relevant circumstances).

At common law, in contract and in other actions based on the consumer protection provisions, the claimant must establish:

- that loss or damage has been suffered;
- that the relevant conduct is either in breach of a common law duty, in breach of the contract or contravenes one of the consumer protection provisions; and

- that the loss or damage was caused by the defendant's conduct.

The test for causation depends upon the cause of action relied upon.

Prior to reforms to the law of negligence which occurred in 2002 (the Tort Reform Process), the position at common law was that causation was a question of fact to be decided according to evidence before the court. Australian courts applied a "common sense" test to determine the question of causation.

Following the Tort Reform Process, while the test varies between jurisdictions, there are basically two requirements for causation in negligence:

- first, that the negligence was a necessary condition of the occurrence of the harm (referred to as "factual causation"); and;
- second, that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (referred to as "the scope of liability").

There is, however, an allowance for determining in an "exceptional" case, whether negligence that cannot be established as a necessary condition of the occurrence of harm should nonetheless be accepted as establishing factual causation.

Defective goods actions under the consumer protections regime may arise where a person has suffered loss or damage because of a safety defect. A person may be able to recover damages for loss or damage suffered where it is reasonably foreseeable that the consumer would suffer such loss or damage as a result of the failure to comply with a consumer guarantee.

Australian courts have not embraced the view that a plaintiff proves causation or reverses the onus of proof in relation to causation by demonstrating that the exposure they were subject to simply increased the probability of their injury occurring.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

At common law, compensatory damages are available. General damages may be awarded for pain and suffering, loss of amenities and loss of expectation of life, special damages for loss of wages (both past and future), economic loss and causally related expenses.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Exemplary, punitive or aggravated damages can be awarded by the courts, although not in relation to claims brought under Federal legislation and in some jurisdictions for personal injury claims. Awards for exemplary damages are relatively unusual and are not of the magnitude that is often seen in the US.

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24. Are there time limits for bringing claims? Responding to claims? Please describe.

There are considerable variations between the limitation periods applicable to common law proceedings in the various Australian states and territories, resulting from a profusion of specialist legislation and court decisions. Although the tort reform process has resulted in a greater degree of uniformity in relation to limitation periods applicable to personal injury actions, it is a very complex area with different limitation periods applying to personal injury actions versus other civil claims and with considerable differences between states and territories.

The time limit within which a defence has to be served is set out in the procedural rules of each court. Typically, the statement of defence must be filed within 28 days after service of the originating process, unless otherwise ordered by the court. It is common for the court to order an extension of time to enable a party to seek further and better particulars of the matters pleaded in the claim.

25. What are the requirements to establish jurisdiction in your court? Can a defendant request that the court decline jurisdiction over a foreign defendant on the basis that there is a more convenient forum?

While it is subject to a considerable body of case law, in Australian courts matters of substantive law are governed by the *lex loci delicti* and matters of procedure are governed by the *lex fori*. The rules of *forum non conveniens* apply, and there is well developed case law on this issue.

When served with originating process, a defendant may in certain circumstances file a form of conditional appearance for the purpose of challenging jurisdiction. In order to challenge jurisdiction, the defendant must establish that the relevant court is "*a clearly inappropriate forum*". This is determined upon an analysis of "*connecting factors*", which include such things as the location of the parties, choice of jurisdiction, available causes of action, convenience and location of witnesses. The existence of a more convenient forum will be relevant, but not determinative.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

A third party may be joined to existing proceedings. The relevant court rules in each jurisdiction set out the circumstances in which a party may be joined to the proceedings. In New South Wales, the *Uniform Civil Procedure Rules 2005* provides that the court may order a person to be joined as a party where it considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings. A third party may also apply to the court to be joined as a party, either as a plaintiff or a defendant.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

It is a loser pays costs system. The unsuccessful party usually pays the costs of the successful party. These costs include

not only court filing fees, copying charges and other out-of-pocket expenses, but also the lawyer's professional fees. In this context, a reference to costs is not a reference to the total or actual costs incurred by the successful party. Recoverable costs are generally calculated by reference to a court scale, which invariably limits the amounts a successful party can claim for disbursement and services performed by their lawyers.

28. Are contingency fees allowed?

Contingency fees are not permitted although in some limited cases an uplift is permitted. These uplift arrangements allow lawyers to enter into an agreement with their client that provides for the normal fee to be increased by a pre-agreed percentage.

29. Is third party funding of claims permitted? Under what circumstances?

Third party funding of claims is permitted in Australia. While lawyers are restrained from entering into contingency agreements, non-lawyers are not. Consequently, litigation funders have emerged to promote and fund class action litigation.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

In Australia, statutory regimes exist for representative proceedings in the Federal Court of Australia, the Supreme Court of Victoria and the New South Wales Supreme Court. The Courts of the other states and territories have more limited provisions for group actions. The Federal Court procedure has been in force for more than twenty years.

In order to commence a "representative proceeding" in Australia, the claims must satisfy three threshold requirements:

(a) at least seven persons must have claims against the same person or persons;
(b) the claims of all these persons must arise out of the same, similar or related circumstances; and
(c) the claims of all these persons must give rise to at least one substantial common issue of law or fact.

Representative proceedings are available in most areas of law where the court has jurisdiction.

Representative proceedings may be commenced whether or not the relief sought is or includes equitable relief, or consists of or includes a claim for damages even if the claim for damages would require individual assessment. Representative proceedings may also be commenced whether or not the proceedings concern separate contracts or transactions between the respondent in the proceedings and individual group members or involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

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31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

The legislative provisions for representative proceedings allow Australian regulators to pursue private enforcement actions on behalf of persons who have suffered, or are likely to suffer, loss or damage by reason of conduct which contravenes certain statutory provisions.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

Time to trial depends on the particular jurisdiction and the nature of the claim. It may take anywhere from six months to several years for a matter to be heard and determined. The more complex the claim, the longer the time period is likely to be as pre-trial steps including documentary discovery are likely to be more voluminous and take more time. There are provisions in all jurisdictions for expedited hearings in appropriate circumstances, including the ill health of a litigant.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

In virtually all jurisdictions there is a right of appeal from the judgment of a trial judge. The procedure varies depending on the jurisdiction in which the original trial was conducted. Leave to appeal is usually necessary when the appeal is from an interlocutory judgment. Even though appeals generally turn on questions of law, it is not uncommon for parts of the evidence used at trial to be reviewed during the course of an appeal. Appeals will be heard by appeal court judges. Most of the state Supreme Courts have separate Courts of Appeal. The Federal Court of Australia adopts a Full Court structure.

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Yes for trials but less so in civil appeals.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

The use of technology is becoming increasingly common in court trials in Australia. Complex trials are usually conducted using electronic court-rooms and most courts have specific rules in that regard. The use of graphics, computer animation and the like are sometimes used in oral address and often utilized in expert evidence where the issues involve complex technical or scientific issues. The use of power points is relatively rare - the product of bench versus jury trials.

Appeals will be conducted using electronic court books but the use of graphics, computer animation and power points are rare unless such technology formed part of the evidence at the first instance hearing.

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36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

Australia does have solicitors and barristers. The traditional division of labour between the two arms of the legal profession is becoming less pronounced.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tort-feasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

Under the common law and certain legislation, if the defendant can demonstrate the plaintiff contributed to the damage by failing to take reasonable care, damages will be apportioned by reference to the plaintiff's share in the responsibility for that damage. Similarly, under statute, joint and several tort-feasors may bring cross claims. The regime expressly covers personal injury and loss of life cases.

A state-based statutory system of proportionate liability exists for non-personal injury claims.

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

Australia is a Member of the Hague Conference on Private International Law, and has acceded to the Hague Convention.

The central authority in Australia for receiving requests under the Hague Service Convention is the Federal Attorney-General's Department. Australia has made a number of declarations under the Hague Convention, including that documents must be translated into English unless the person being served voluntarily receives them in a foreign language.

Australia does not object to the use of private process servers, diplomatic channels or local agents, but other service requirements vary between the states and territories.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

Documents obtained on discovery are not able to be used for any purpose other than the proceedings in which they were disclosed. The *Harman v Home Office* undertaking is the implied undertaking given to the court by any party obtaining documents on discovery (or by virtue of some other compulsory process) that it will not use such documents for any collateral purpose.

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40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

There are two matters that are worth referencing. First, many courts in Australia now adopt a procedure which requires the court and the parties to conform with the so-called overriding purpose rule. This rule requires the just, quick and cheap resolution of the real issues in the proceedings. The objects include efficient disposal of the business of the court, the efficient use of available judicial and administrative resources and the timely disposal of the proceedings at a cost affordable by the respective parties. Various techniques and procedures have been adopted by the courts to achieve these objectives and lawyers will be called into account if there has been a failure to comply with the overriding purpose rule.

Second, many courts in Australia have now adopted specific code of conduct rules for expert witness evidence. These codes of conduct mandate that:

(a) an expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise;
(b) an expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness); and
(c) an expert witness is not an advocate for a party.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

There are several features of Australia's representative proceedings (class actions) system that are challenging for defendants. First, the "loser pays" rule applies in representative proceedings - the unsuccessful party is usually ordered to pay the costs of the successful party. However, in representative proceedings the regime restricts a costs order from being made against class members other than those who actually commenced the proceedings.

Second, the Australian procedure has no certification procedure or requirement - that is, there is no threshold requirement that the proceedings be judicially certified as appropriate to be brought as a representative proceeding. Rather, once the action has been commenced, it will continue unless the defendant applies to the court for an order terminating the proceedings. It has proven difficult to satisfy a court that it is in the interests of justice to do so.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

Third party litigation funding is becoming increasingly common in Australia, particularly in shareholder and financial products class actions. Recently the Australian Government made regulations exempting litigation funding schemes from the definition of a managed investment scheme. This was done because the Federal Court of Australia had previously held that funded class actions are managed investment schemes as defined and regulated by the corporations legislation. It is likely that there will be further regulation of third party funding and this is likely to re-open the debate about access to justice issues.

As part of this process, the Australian Government has asked the Productivity Commission (the Government's independent research and advisory body) to undertake an inquiry into Australia's system of civil dispute resolution. While

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it is too early to tell what reforms may occur, it is apposite to note that the Productivity Commission has been expressly asked to consider and report on court practices and procedures. In its draft report published for public comment, the Productivity Commission has called for debate on a range of access to justice issues including private funding for litigation, the introduction of contingency fees, costs awards and the tax deductibility of legal expenses.