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# The economist and the lawyer went to lunch ... some reflections on the Productivity Commission's Access to Civil Justice Inquiry\*

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I would like to start by paying my respects to the elders past and present of all the peoples of the Kulin nation on whose traditional lands we meet today and to the elders past and present of all the Indigenous nations that have occupied and cared for this continent for over 40,000 years.

Before turning to my remarks I would like to make some public thank yous. It is easy for projects such as the one I am going to talk about today to be associated with the person who gets up and talks about them the most. So I want to pay tribute to the men and women, including one who didn't have an economics degree, who worked tirelessly for over fifteen months to produce this report. I particularly want to thank Dominique Lowe who led the research team and my fellow Commissioner Angela MacRae who had to manage a very tough piece of work and a very serious injury at the same time, not to mention my bad temper on occasions.

## **Now down to business**

The Commission's inaugural and long serving chair Professor Gary Banks once observed:

The Commission's remit has evolved considerably over the years, expanding beyond the traditional industry assistance domain of its predecessors, to encompass not only a wide range of other economic issues, but also key areas of social and environmental policy and regulation. If we have been able to make a useful contribution in these areas,

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this can be attributed, in large part, to what we have learned from business and community groups along the way<sup>1</sup>.

It was with this background that we came to the Inquiry into Access to Civil Justice in June 2013. The Commission did not embark on this work of its own accord but rather at the request of the then Assistant Treasurer. There can be no doubt that the terms of reference were developed in full consultation with the Attorney-General's Department and the then Attorney, an eminent member of the Melbourne Bar.

During the course of the Inquiry, and since its tabling, there has been significant commentary about our recommendations. Much of that commentary has been positive. For example, the Law Council of Australia described the report as “the most comprehensive review of access to justice arrangements in Australia ever attempted”<sup>2</sup>.

But some might say the Law Council has a vested interest in some of the recommendations we made, such as opening up parts of their industry to competition and increasing protections for consumers of legal services. But I digress.

Our recommendations stand for themselves and I don't intend to go through them all today. Rather, I would like to discuss why bringing the Commission's method to the analysis of the civil justice system is not only institutionally appropriate and intellectually valid, but also desirable.

Some have said that the report is just what you would expect from economists; even though four members of the team hold LLBs and one was seconded from the Commonwealth Attorney-General's Department. I am not quite sure what one should expect from economists inquiring into access to civil justice – remember the old joke about putting five economists in a room and getting seven opinions. But if your expectations involve recommendations like increased legal aid funding, support of funding of community assistance providers to undertake law reform advocacy, and reforms to family law to help reduce and mitigate family violence, then you won't have been disappointed.

My colleagues and I, and by the application of revealed preference theory Dreyfus QC, are not alone in our views about bringing economic techniques to the analysis

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<sup>1</sup> (2011) “Industry Assistance in a Patchwork Economy” Speech to Australia Chamber of Commerce and Industry, 23 November.

<sup>2</sup> (2014) “Law Council welcomes release of Productivity Commission Report into access to justice”, Media Report, MS#1416, 4 December

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of legal policy. An article published in the *Journal of Legal Studies*<sup>3</sup> indicated that Richard Posner was the most cited legal scholar of the twentieth century. Those familiar with Posner's seminal work *Economic Analysis of the Law* will also know that in addition to his scholarly pursuits at the Chicago Law School, he is a judge of the U.S. Court of Appeals for the Seventh Circuit – one could perhaps even say a lawyer's lawyer. In the foreword to the eighth edition of his book he said of the study of law and economics

It is the foremost interdisciplinary field of legal studies. The former dean of the Yale Law School, a critic of the law and economics movement, nevertheless called it “an enormous enlivening force in American legal thought” and says that it “continues and remains the single most influential jurisprudential school in this country”. More recently we read that “there is no dispute that law and economics has long been, and continues to be, the dominant theoretical paradigm for understanding and assessing law and policy”<sup>4</sup>

For me this is not surprising. Microeconomics, the most relevant economic sub-discipline for the analysis of legal policy, has at its kernel an understanding of property rights, incentives and contracts. This is well borne out in Ronald Coase's “The Problem of Social Cost”<sup>5</sup>, an article seminal to both law and economics.

In addition, however, microeconomics is also particularly concerned with scarcity and the allocation of resources between competing uses. Notions of scarcity will for some sit oddly, even uncomfortably, with more absolute notions of justice and liberty. However the importance of scarcity considerations to the study of law was recognised late in the nineteenth century by no less than Oliver Wendell Holmes Jr (the third most cited legal scholar of the twentieth century according to that article I mentioned earlier) when he said:

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics ... We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.<sup>6</sup>

Scarcity is central to understanding Australia's civil justice system – the one thing participants could all agree with is that not one part of the system is flushed with cash!

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<sup>3</sup> Shapiro, Fred R. (2000). "The Most-Cited Legal Scholars". *Journal of Legal Studies* 29 (1): 409–426.

<sup>4</sup> Posner, Richard A. (2011) *Economic Analysis of Law*, 8<sup>th</sup> ed, xxi.

<sup>5</sup> (1960) *Journal of Law and Economics*, 3.

<sup>6</sup> (1897) “The Path to the Law” *Harvard Law Review*, Vol 10, 457.

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## The Commission's method

So how did we go about our work? Well, section 8 of the *Productivity Commission Act 1998* (Cth) sets out general policy guidelines which the Commission must have regard to. Most relevant to this inquiry were

- (a) to improve the overall economic performance of the economy through higher productivity in the public and private sectors in order to achieve higher living standards for all members of the Australian community; and
- (b) to reduce regulation of industry (including regulation by the States, Territories and local government) where this is consistent with the social and economic goals of the Commonwealth Government

James Farrell, CEO of the Queensland Association of Independent Legal Services, identified pretty well in some post-release commentary the expression of our approach to this task in a way consistent with our Act

The ability of individuals to enforce their rights can have profound impacts on a person's well-being and quality of life ... a well-functioning civil justice system services more than just private interests – it promotes social order, and communicates and reinforces civic values and norms ... There can also be fiscal benefits.

Prompt, affordable and well understood dispute resolution arrangements can help avoid issues escalating into more serious problems that can place burdens on health, child protection and other community welfare services.<sup>7</sup>

As Gary Banks alluded to, what provides strength to the Commission's work is what we learn along the way. Prior to issuing the draft report we met one-on-one with over 70 individuals and organisations (including over a dozen presiding court and tribunal officers), 60 participants (including judicial officers and senior court administrators) attended three "Chatham House" roundtable sessions, and we received 154 submissions – there was some overlap in these three groups. After the draft report we had the benefit of a further 180 submissions and oral evidence from 98 organisations and individuals at public hearings in every capital city in the country over thirteen days. We also had the benefit of public observations from a range of learned observers, including the Chief Justice of Western Australia who made some robust observations to Commissioner MacRae and I in this very room ... but more of His Honour's wisdom later.

Despite these extensive consultations, and what we thought were pretty clear statements in both the draft and final reports, it has been suggested by some that the Commission does not understand, or perhaps does not respect, the division of

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<sup>7</sup> (2014) "Extra funding for legal assistance services should only be the start". *The Conversation*, December 8, <<https://theconversation.com/extra-funding-for-legal-assistance-services-should-only-be-a-start-34843>>, accessed 1 February 2015.

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powers between the three branches of government provided for in Australia's constitutional arrangements. Very little could be further from the truth.

In our Issues Paper we made clear that

The Commission is not an appropriate body to revisit the outcomes of legal disputes. The Commission is not a court or tribunal for rehearing a particular matter and has no power to amend or revoke the decisions of these institutions. The Commission cannot resolve unresolved disputes.

Why did we say this – because it is abundantly clear that such matters are the sole province of the judicial arm of government. An examination of the draft and final report, and of 13 days of transcript evidence show that not only did we not open up any decision made by any Commonwealth, State or Territory judicial officer, in fact we shut witnesses down who attempted to do so. We applied the same level of respect to administrative civil dispute resolution processes conducted by ombudsmen and tribunal members.

The Commission's job is to undertake analysis and make recommendations – in this case under a lawful direction from the relevant Minister under our Act. Whilst the Commission is part of the executive, it has been explicitly established by the Parliament and given certain powers which the Executive at large does not possess, which are rarely threatened and even more rarely used. In the report where we have made recommendations within the province of the judiciary, be it Commonwealth, state or territory, we used the same language as we did, and the Commission does more generally, when making recommendations to the executive. The degree of respect is the same, no more, no less.

### **Do the courts provide services?**

Perhaps these concerns stemmed from a misunderstanding of the Commission's approach in treating the courts as service providers. Some participants suggested that because the courts are an essential service, that it is wrong to approach the analysis of them from a market or economic perspective. I have previously observed that health services, fundamental to the wellbeing of people, do not seem to be excluded from economic analysis.

A more philosophical objection, and perhaps on face a more tractable one, is that justice is something that should not and cannot be bought and that it is simply not right to consider it to be a service. These concerns have been raised particularly in the context of our recommendation to improve court resources by increasing court fees paid by some well-resourced litigants in some types of matters.

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It is important to keep in mind that our interest is in the roles that the courts play in the resolution of civil disputes, and as such as comparing among other things costs, timeliness, processes and incentives of different dispute resolution mechanisms and policies that lead to the avoidance of disputes. It is therefore important for us to have a framework for analysis that would enable us to consider the costs and benefits of different approaches to dispute resolution, as it is clear that in many cases, although not all, that there is scope to substitute court based dispute resolution with other forms – private arbitration, tribunals, ombudsman and so on.

Indeed, we now see countries competing to provide court services in relation to major commercial disputes. During our early discussions, one jurisdiction told us that they wished to become “the corporate dispute resolution capital of Australia”. It was clear in that discussion that the very senior (non-judicial) official had in mind that that state’s court system would actively seek to attract matters from both other Australian and overseas courts – if this isn’t competition in a market for services, I don’t know what is.

Some will no doubt recall the observations made by the Competition Tribunal in *Re Media Council of Australia*

The choice of market definition ... must depend on the issues for determination. For the Tribunal’s purposes it is the identification of a market or markets that best enables it to evaluate the likely effects of the authorised conduct<sup>8</sup>

Our approach to considering the role of the courts should be considered in the same way, as a device to aid analysis and to assess the effects of our recommendations. No other implication should be drawn, and certainly suggestions that in doing what we did was “playing down” or misunderstanding the role of the courts is simply mischievous, and in some cases self-serving.

That is not to say we are not aware of the wide societal benefits that are derived from civil litigation in strengthening the rule of law and creating predictable norms to guide the resolution of disputes outside a judicial context – economists generally refer to these as “spillovers” and their analysis in proper context is well understood. We also recognise that in fact these are public goods as they are both non-rival (consumption by one does not diminish consumption by another) and they are non-excludable (once produced, consumption of them cannot be prevented).

However whilst the various arms of government, lawyers, and many in the community would undoubtedly see the creation of these public goods as highly

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<sup>8</sup> (1996) ATPR 41-497

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desirable, as we do, their production is unlikely to be part of the consideration of most parties considering civil litigation or responding to it.

The size and distribution of public and private benefits will vary from case to case. However there are some cases of substantial public benefit, I would suggest a small minority, where the private benefits are insufficient, or one or more parties lack the resources, for the matter to proceed. That is why we recommended that, in addition to the current provision of funding of public interest litigation, that courts provide protective costs orders in those cases where, absent such orders, the matter would be unlikely to proceed. Litigation funding and similar arrangements also can play a role in addressing such public good failures and are the subject of significant consideration in the report (chapter 18).

Australian evidence suggests that around ten per cent of litigation costs are associated with courts and related fees. In very large commercial litigations, this will be much lower – we estimate that court fees were of the order of 0.15 per cent of aggregate legal fees in the Bell Resources Case. The bulk of the cost is taken up by payment of solicitors and to a lesser extent barristers and various forms of expert evidence providers – this is why we devote a number of chapters of the report to practices for charging for legal services, including billing structures and costs orders. These are all services provided in markets, albeit imperfect ones, and are consumed when people access the courts. It is possible then to conceive of these as a bundle in joint consumption, the analysis of which is facilitated by considering the activities undertaken by the courts as services.

## **Court fees**

It seems that our recommendations regarding court fees have attracted the most ire. As I have indicated, we see the courts as playing a central role in the civil dispute resolution system, even when disputes are not being resolved in court. But they are part of the process that imposes costs on parties (both monetarily and in time) which effect the decisions of parties as to how disputes are to be resolved, whether those disputes are pursued within courts or parties choose to resolve them otherwise.

It is widely held that Australia's courts are generally under resourced and this leads to delay and costs to parties, and potentially justice being denied. In the civil sphere this is not helped by the significant non-court cost of litigation and the fact that other than *some* family law matters, there is virtually no legal aid available to the vast bulk of people in Australia beside that provided by community legal centres.

At this point I must be frank and say that as much as one can theorise about the separation of the three branches of government, the reality is that when it comes to

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fiscal resources, the Parliament is supreme and in a Westminster style democracy, in most relevant cases, this means the Executive has huge sway over the resourcing outcomes of all arms of governments.

The Law Council of Australia suggested to us that courts should not be left to compete with branches of the bureaucracy for finite resources. This view seems in part based on a view that the courts provide public goods – a proposition that I have already discussed<sup>9</sup>. But there is nothing in economic theory that suggests that public goods must be funded by governments, that people should not pay for the private benefits that they consume jointly with the public good, and that one particularly type of essential public good, to the extent that it is publicly funded, should not be considered in the context of funding all other public goods.

The idea of uncontested resources and free courts for all comers is simply not a practical outcome. Further, there are also questions about what accountability measures would be put in place for such expenditures and it is unclear how peoples' preferences for the use of their scarce tax revenue would be expressed.

Australian courts have charged fees for many years and currently recover between three and fifty per cent of their costs – courts in England and Wales recovered around eighty per cent of their costs in fiscal year 2011 with the aim of full cost recovery by this fiscal year. No evidence was put to use that the existence of fees for some time has raised constitutional issues not that English justice is in terminal decline.

So fees are here and I would suggest here to stay, so the relevant question for policy is how should those fees be structured?

If there was a logical basis for the setting of courts fees at the time they were imposed, the processes that have rolled these forward over time have been such that any relationship to court costs and the benefits that parties receive is entirely coincidental. To be frank, the current level and structure of court fees are largely arbitrary.

Our recommendation 16.1 went to addressing these points. It said (in part):

Irrespective of the overall level of cost recovery that is adopted, fees charged by Australian civil courts and tribunals should be:

- underpinned by costing models to identify where court resources are consumed by parties

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<sup>9</sup> Submission DR266, p7.



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- charged at discrete stages of litigation — and for certain court activities or services — that reflect the direct marginal cost imposed by parties on the court or tribunal
  - charged on a differentiated basis, having regard to the capacity of parties to pay and their willingness to incur litigation costs.

Factors used to charge fees on a differentiated basis should include:

- the amount in dispute (where relevant)
- whether parties are an individual, a not for profit organisation or small business, or a large corporation or government body
- the length of proceedings (for example, by basing hearing fees on the number of hearing days undertaken).

We thought the structural aspects of this recommendation were relatively uncontroversial as similar recommendations, at least in parts, have been made in the past by bodies such as the Australian Law Reform Commission or represent current practice in some courts. The point is about efficiency (providing the right behavioural incentives) and equity (reflecting the capacity of litigants to pay). Only in a naïve world of unconstrained resources can these questions be responsibly ignored.

I mentioned the wisdom of the Chief Justice of Western Australia earlier. We were very grateful that His Honour was able to attend our hearings in Perth – the only judicial officer to do so. He said the following after discussing with us the \$14 million subsidy provided by the taxpayers of Western Australia (his description) to the parties to the Bell Resources litigation:

There are other cases in our court between very substantial [litigants] – sometimes corporate enterprises, big mining companies, fighting each other, big families who have substantial incomes. You can probably guess the people I’m talking about. I struggle to see why the taxpayers of Western Australia should subsidise litigation of that kind at all. So I think there’s a lot to be said for the regime in which there is a capacity to fully cost recover from those sorts of litigants, and I have proposed in the past that there be a discretionary scale on a full costs recovery basis<sup>10</sup>.

Only time will tell what costs taxpayer subsidies will flow from the current Reinhardt and Wright familial disputes.

The approach outlined by His Honour is entirely consistent with that contained in our recommendation 16.1. Further, recommendation 16.2 suggests that fees should not materially increase in minor economic matters or those relating to family violence, child protection and broadly where peoples’ liberty may be at stake. We

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<sup>10</sup> trans p587

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also recommended that additional monies raised should be put to improving court resources and legal aid funding.

Our approach is to align court fees with the costs of courts dealing with matters and the benefits and financial capacity of litigants. Outside the family courts, virtually every court in Australia and many tribunals differentiate fees on at least one of the bases we have suggested. So perhaps what is novel in our approach is just the suggestion that this should be done with a much stronger eye on the financial capacity of litigants.

Moreover, we deliberately did not suggest a target level of recovery for the courts system as a whole, types of courts or individual courts. Rather, we suggested that fees should be reviewed in the light of the principles above and that there is scope to increase fee recovery in some types of matters – a view clearly shared by Chief Justice Martin. We also recommended principles for the reduction or waiving of court fees for less well-resourced litigants and improved administrative autonomy for the courts – something I note occurred recently in this state.

I must say though, that I find the outrage expressed by some about this suggestion quite strange, especially as we say it as a way of increasing court resources. As mentioned above, court fees account for a relatively small proportion of litigation costs and this does seem to be inversely related to the scale and complexity of the matter, as indicated by the Bell Resources case. Moreover, the evidence that increasing fees reduces the use of court services is not compelling. For example data available to us regarding the Federal Circuit Court, where fees increased by one hundred per cent in real terms over the three years to 30 June 2013, suggests that lodgements are not strongly effected by fees.

If the costs of litigation are a barrier to justice then surely we should be focussed on the bulk of the costs, that is, monies paid to lawyers and experts. And this of course we did. We paid particular attention to the ways in which lawyers charge their clients, how the structure of costs awards might affect litigation behaviour, and better ways of adducing expert evidence (many of which have already been introduced across Australia's diverse court landscape).

But for many people, the costs of litigation are just too great and no amount of microeconomic reform is going to increase their access to the justice system. This lack of access must inevitably lead to people suffering wrongs. If people cannot afford legal representation then the level of court fees is irrelevant. This is why we recommended a substantial interim increase in legal assistance funding, for both legal aid commissions and community legal centres, with a framework so that legal

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need, and its funding, can be more robustly assessed in the future – more work for Holmes’ economists and statisticians I fear.

The most substantial change from the draft to final report was the inclusion of an additional chapter on family law matters, reflecting the weight of evidence that we received in hearings that the system simply is not serving some of the most vulnerable people in our community. Whilst we did make some observations about processes and potential inefficiencies in some legal assistance providers and the allocation of funding between them, the simple fact is that there are insufficient resources for legal assistance providers to meet need.

Recent funding reductions have reduced the front line service capacity of legal aid commissions community legal centres and Aboriginal and Torres Strait Islander legal services, including to help vulnerable women and children. Some of these cuts were motivated by a view that governments should not fund law reform and policy advocacy – a view the Commission does not share (recommendation 21.1). However, whatever the motivation of these cuts, the evidence presented to us overwhelmingly demonstrated that these funding reductions have resulted in a significant reduction in front line service delivery. Implementation of our legal assistance funding recommendations would go some way to assisting in addressing this important national economic, social and human rights issue.

## **Concluding comment**

I will leave you with one last thought from Judge Posner

Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.<sup>11</sup>

For us, the success of our work will be the extent to which it influences public policy going forward, and on that front, only time will tell.

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<sup>11</sup> (1989) “Foreword” in *Essays in Law and Economics: Corporations, Accident Prevention and Compensation for Losses*, Michael Faure, Richard A. Posner & Roger van den Bergh eds.