ACCESS TO JUSTICE

[My contribution is dedicated to lawyer friends cast more in the mould of Atticus Finch and not warranting the following criticism of colleagues that should be cast aside.]

There can be few issues affronting the Australian community that are as regularly but ineffectively reviewed as the arrangements for access to civil justice.

The observant community remains astounded at both the way lawyers can fleece clients with alacrity and the apparent inability of the relevant professional regulators to proscribe and penalize such misbehavior.

Reviews, protracted and expensive, conducted by lawyers appointed to government sponsored panels and professional legal agencies typically come to naught in the way of meaningful change.

This is not surprising. Senior lawyers, including judges and parliamentarians, asked to reform the profession, very likely benefited in their past from the (mal)practices the community wants stamped out – risking exposure, the objectivity of the reformers is compromised.

The Productivity Commission now has a brief to review these arrangements anew. This is pleasing because the emphasis of the Commission will be on reforming the legal system so it can deliver commonsense concepts of justice efficiently and affordably.

Conceptual benchmarks

There would be less need to worry about access to justice if there were less injustice.

A distinction between 'justice' and 'injustice' reflects the golden-rule – is the complained behavior consistent with what a defender would consider 'fair' if done to them or their friends and families? That is not usually a hard question to answer.

Disrespect for any golden-rule now commonly sees a brutally practical determination of powerful players to do 'anything' considered legal and, more obnoxiously, anything not yet declared illegal.
Big business in particular is routinely characterized as staying one jump ahead of the law -- playing 'hard ball' with customers, suppliers and the wider community: executives are daily doing things that they would not consider 'fair' if done to them or their families.

The business-is-business morality is flawed.

All too often the threat, and conduct, of protracted and expensive legal proceedings makes the law a weapon for the powerful to use to beat the weak.

Regulatory responses

Governments sponsor well-intentioned regulation and administrative oversight to head-off injustice and bring order to business behavior.

Typically, however, golden-rule prescriptions lag well behind the initial wave of irreparable damage and soon give way to new tricks and continuing misbehavior justified with semantic abuses of the letter of the law and.

The game is lost when the appointed regulators can't cope or, worse, are derelict in their duty – and some are. The community is distressed about the apparent injustice coloring many failures of regulatory processes routinely paraded as intended to avoid the problems of a failed legal system.

Good intentions are not enough. The available litany of illustrations is endless.

Ponder, for example, the apparent powerlessness of the corporate regulator, ASIC, for more than a decade, to require financial advisers, taking excessive commission-based fees, to give their clients the 'best advice' as distinct from advice that was more profitable to the adviser. On the scales of 'injustice' and 'dereliction', this was astounding.

Consider also the pricing behavior of a banking system levying, uniformly, fees considered grossly excessive for minor breaches of account-keeping rules – and the snail-pace progress of the class-action challenge through the 'accepted' legal minefield. It is astounding that it happened and more so when the claim for redress is so vigorously, and expensively, defended. There was no preemptive regulatory initiative to deal with a widely known problem.

Next, consider apparent shortcomings of the industry-funded dispute resolution service known as the Financial Ombudsman Service. My perspective is illustrated in a submission to the current senate inquiry into the performance of ASIC (a copy will be available once it is published by the committee)
(Link-http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/asic/submissions.htm. One implication is that, so-called, ADR arrangements, like this one, are better run as government managed agencies and, more generally, would be best overseen by a coordinating government agency, perhaps one akin to the newly established consumer financial protection agency in the US.

Some of these issues will probably surface in any prospective inquiry into the Australian financial system.

Whatever, among the accessible options for protecting justice, effective regulatory institutions are indispensible and it is regrettable that many 'justice' issues are left languishing as the consequence of regulatory negligence, dereliction and incompetence.

One point of these remarks about 'regulation' is to warn against any temptation to promote ADR arrangements not backed up with independent oversight…….and nothing beats a simple application of a golden rule coupled with the power to order redress of clear breaches and to penalize offenders.

A journey through the minefield

Most have a passing familiarity with the real legal system as distinct from stylized portrayals from the broadcast entertainment media.

For this 'most', outstanding features of the real legal system include the excessive cost and the excessive time taken to resolve matters and the number of professionals feeding off clients at their professional mercy. These outcomes are predictable enough in a profession obsessed with 'billable time', lucrative hourly-rates and the apparent absence of any disciplines to contain the time taken.

Make-work schemes take on a new dimension and the dedication of the legal profession to the task is predictably legendary. Make-work tactics generally entail deliberately deceptive advice – not least lawyers advising clients to 'instruct' them to sustain the game while they are still able and willing to pay

My familiarity with the reality is deeper and more extensive than most and was always endured with an eye on the case for reform implicit in the way events unfolded – a thought, incidentally, that does not linger in the mind of practitioners.

This history can be elaborated, what follows is the self-explanatory text of two of my 'regulation-writer' columns published in CFO, a Fairfax business magazine.

[Separately provided to the Commission, as background material, will be a copy of a 2006 submission to a Civil Justice Review conducted by the Victorian Law Reform Commission: *The Rule of Lawyers…. a very dicey prospect for the community* -- and a story *Civil Justice: not civil and not just* -- previously prepared for publication and circulated in the legal profession.]

Lawyers , shape up [Published in CFO magazine November 2009]
http://tools.afr.com/viewer.aspx?EDP://20091101000031762857

Taming the legal eagle [Published in CFO magazine august 2010]
http://www.afr.com/p/business/financial_services/accouting/cfo/taming_the_legal_eagle_4uszqA54n2X59vY6Qvi3DN

End piece

In the event, neither the inquiry in Victoria nor the federal Attorney General's reform initiative made any apparent difference – in particular there is still no national legal ombudsman scheme nor any suggestion that the profession has embraced reform voluntarily.

Reflecting on these and like inquiries and reform initiatives it is very likely that there is a wealth of considered public and professional opinion readily available in submissions now resting in the archives of agencies that invited participation. The Commission may be able to peruse that material – its relevance has hardly been eroded by time.

The continuing problems reflect the deliberate reluctance of the profession, and government, to reform the system – the Commission will also face this resistance.

Looking for something helpful from the left field, the Commission may be interested in an initiative -- *The Banking and Finance Oath* -- being promoted in the banking and finance industry. [http://www.thebfo.org/The-Oath]

So, whatever else might be proposed by the Commission in the way of structural and procedural reforms to protect access to justice, the Commission might also assess the prospects for a similar institutionalizing of ethical standards in the legal profession.

However such professional initiatives may be conceived and marketed, the general approach has much in common with 'golden rule' thinking (and 'name and shame' disciplines) that might better promote respect for the spirit of appropriate professional behavior as distinct from the game playing invited by black-letter law and regulatory proscriptions.

……..after a long career in the business of developing and administering public policy and related regulation, I am persuaded that professionals making a monitored golden-rule commitment to behave ethically, offers the best chance of real reform – and not least in the legal profession managing access to justice elsewhere.

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