SUBMISSION TO THE PRODUCTIVITY COMMISSION ON PATHWAYS TO JUSTICE

The legal industry when charged with conducting an enquiry into any other industry or institution in this country, typically follow the tailor's maxim. Delivering a 'never mind the quality, feel the width' list of recommendations. Never flinching from the opportunity to fundamentally change the operations, functions, and structure of the organization being investigated. However when it comes to their own law industry, the recommendations are much more conservative, generally along the lines of "the system is working well , don't change a thing!" Or a statement that any change brings with it great risks to our freedom and access to justice.

Indeed even if the many glaring shortcomings in the functioning of the legal industry and the access to justice were systematically identified. Most Australian lawyers would probably agree with the mock-Churchillian statement that our legal system is the worst in the world: except for all the others.

While in the current parliaments of this country the legally trained, if not necessarily practicing lawyers, make up approximately a third of elected members. This I would argue, offers the legal industry a high level of protection from scrutiny and change. While the job description of the highest political-legal office in each parliament, the Attorney General, carries an implicit duty to protect the standing of the court system. It could be argued that our horse and cart constitution was predominantly drawn up by lawyers and jurists in the late nineteenth century. Arguably drawn up by lawyers, for the benefit of lawyers. Not surprisingly the role of the courts has the pre-eminent position in our Australian Constitution.

The legal industry calls upon the noble tradition of THE LAW, as if it was given by God in the form of tablets of stone; or whispered in the voice of Charlton Heston from behind a burning bush. Totally failing to recognize the extent that our system of Common Law has evolved from the medieval Canon Law, with all its shortcomings and "leaps of faith". The truth is that Common Law has evolved considerably since it began in England in 1166. Many of those changes blatantly for the benefit of the legal profession, or as the result of political accident or opportunism.

It morphed into an adversarial system in 1460 when judges let lawyers take control of the evidence in civil cases. In the late eighteenth century it virtually became a cartel. Also at that time, new rules of evidence were devised to conceal the truth. The old ideals of truth equalling reality or what really happened, was swept aside in the face of new presumptions, precedences, an court practices. Along with this dilution of fairness and morality in the search for the truth, went the notion that justice is equated with fairness. Today any examination of the pathways to justice, must recognize that our courts are courts of law, not courts of justice.

However a romantic notion of the functioning of the common law system in the past should not be entertained. The law has always been a weapon used by the strong against the weak. Always a codified system whereby resources have been the pathway to the potential for justice. In Australia it is a case of how much justice can you afford? At the individual level, justice is presented as something open to all: in the same way as different classes of air travel. While for governments facing the budgetary constraints of structural and demographic changes, there are huge aggregate costs of a legal system that has paid scant attention to questions of efficiency and productivity. Study any of the legal indicators, such as trial duration, trial costs, consumer satisfaction with the legal industry, the levels of truth in legal outcomes, and the general lack of quality research into the legal system. They all beg the question for government and the Productivity Commission: Is our legal system of justice sustainable? Despite all the positioning of the legal industry painting a picture of the selfless lawyers doing god's work, taking cases without fear or favour, representing the guilty as well as the innocent in what is often described as the

'taxi cab 'principle of legal representation in the very epitome of private enterprise: few industries are as firmly attached to the taxpayer's teat as the law. Few public officials are as self-serving as the judiciary. If one were cynical, one might suspect that the legal industry and its common law tradition might be channeling the famous wills and estate case of Jennens v Jennens which ran for 117 years, finally collapsing in 1915 when legal costs had entirely consumed the estate's reserves of capital. In other words keeping the justice bandwagon going as is, until the money runs out.

Then of course is the question as to whether a small country of 22 million people facing considerable environmental and technological challenges can afford 10 major legal jurisdictions with separate court systems and hierarchies of courts? Or should we be moving progressively towards rationalization, adopting uniform procedural rules and embracing technological change in the administration of justice? There is also questions of supply and demand as 27 Australian universities pump out legal graduates , and the LLB becomes the Arts Degree of the twenty-first century.

Given the tradition, entrenched power, vested interest, high levels of constitutional and political protection, one would not expect significant changes to our legal system in order to achieve greater justice. Such as a move away from our present adversarial substantive justice, towards an inquisitional procedural justice system that typically decides cases in a much shorter time, at lower costs, and with more predictable procedural fairness and transparency. Such an aspiration lies well in to the future, along with an Australian republic, the end to poverty, nuclear disarmament, and the achievement of world peace.

Studies, such as that being undertaken by the Productivity Commission, can catalog the shortcomings of the legal industry, its myths and contradictions, and generally strive to shine light into dark places.

Perhaps the most valuable approach would be to draw attention to the fact that our black letter law legal systems are really black box systems. The term black letter law applies to the technical legal rules to be applied in particular cases. These rules being perceived as being largely established and no longer subject to reasonable doubt. Black box systems are when resource inputs produce a result but how exactly the result is achieved is poorly studied, a mystery largely hidden from view, and definitely not open to high levels of public scrutiny. Perhaps no idea so encompasses the law as a black box system, than the precedent that ignorance of the law is no excuse.

Certainly lawyers ignorance of the law is not punished!

If this Productivity Commission can catalog a list of potholes in the pathway to justice, then well and good. Though it has hindered its own progress along that path by excluding from the terms of reference those Transactional Law areas such as wills, areas of civil law, interaction with solicitors and government, and the exponential rise in the numbers of Apprehended Violence Orders issued in non-domestic (typically neighbourhood) situations.

What might be its most significant achievements to promote the cause of access to justice, would not be recommendations for more law, more legal aid, or for more lawyers and social workers on a string. No what is most needed is to improve detailed information about the law that is accessible on the internet. Particularly procedural information that is currently not provided because that is perceived as being the provence of lawyers. For example the supreme courts will not give detailed instructions as to how to fill out a probate application. For fear of treading on the toes of legal practitioners.

Also anyone issued with a summons receives a very Victorian era document but no instructions about the details of the law they are being charged under, or court procedure. Paradoxically at a time when society is rightly concerned with bullying, our legal system is the biggest bully. Glorifying itself in throwing about the full weight of the law. No where is this better illustrated than in the cattle auction conduct of our local courts.

I also note that a persistent complaint of judges and magistrates is that considerable delays in court procedure result from clients representing themselves. The spiraling cost of legal services makes that inevitable. A much fairer pathway to justice would be to present freely available, detailed information to the public about the procedural steps in the different types of legal hearings. Also to fundamentally streamline and codify court proceedings.

Also in the same way that having more resources can lead to a better class of justice, being the plaintiff in many cases brings advantages of 'possession' over the defendant in controlling the case. Much like the old scrummaging rules of rugby. For example, a person can apply to a chamber magistrate for a summons to be issued against another person on very flimsy, even quite unreasonable grounds. In most cases, even if the chamber magistrate has considerable doubts, a summons will be issued for the local court to decide, a process that may take over six months. No documentation or interview notes will be forwarded to the presiding magistrate. The plaintiff has the discretion and can withdraw the case. While the defendant is strapped in for the ride. A ride through the metaphorical 'dark tunnel" where they are typically 'kept in the dark' about what is going on and what likely to happen next.

Mention has been made of the massive recent growth in all states and territories of AVO's. Numbers of these issued have increased significantly, so have the costs and time associated with defending them. Unsurprisingly many defendants accept the order for the least time without making admissions, because the local court process to hear the matter, with all its costs, worry, and potential publicity; is likely to be only one or two months shorter than that time period. They are surprised however, when the summons is issued stating that the court has heard the case and has found the charges proved.

The example of AVO's also illustrates the ecological nature of the law. A longitudinal study would reveal that the popularity as a legal strategy AVO's 'escaped' from the Family Court into the wider community. In many cases not justified, but a valuable way of shifting power, and putting the other party at a distinct disadvantage. Such a study would also reveal that a minority of lawyers initially brought a disproportionate number of such cases. Also that there was not a level legal playing field as unequal experience in bringing such cases was played out in the court system.

While no other field of human activity, not even the military; exhibits the pragmatic wisdom of 'attack being the best form of defense', as does the law. This is readily seen in the quaint old legal phrase of a Hackett Attack. A Hackett Attack refers to a situation whereby a person is made a victim of crime twice over. Once in suffering the initial criminal attack, and then being falsely accused by the perpetrator of a crime or provocation. For example for a while in the 1980's it was very common for a person charged with assaulting a man, to falsely claim that the other person had propositioned them. Unsurprisingly few of those assault cases actually went to court.

The law and justice are really in a much more ecological struggle. Giving us more the law of the jungle, rather than one handed down by god and the angels. Our system of justice is characterized by a number of inefficiencies, contradictions, and practices that would fail the 'have to explain it to a person from another culture' test. It is not technically corrupt. It is something much more insidious, it is complacent.

At the start of the new years first legal term many jurisdictions have their judges and court officials attend a church service (The Red Mass) and then parade in full regalia back to the Supreme Court. It should become an Australian tradition for members of the public to cry out,in the voices of small children, during that parade: "The Emperor has no clothes!" Because the law has many faults , shortcomings and omissions, but the public is constantly told by lawyers, that "only a fool cannot see" the majesty and richness of the legal fabric.