ACCESS TO JUSTICE: RESPONSE TO DRAFT REPORT

'Disappointment' is a reaction which I never expected to have about a report of the Productivity Commission. Frankly, I do not expect this report to make much difference.

Reacting that way is, probably, more indicative of the intractability of policy issues around 'justice' than any shortcomings at the Commission – whatever, it is also likely that the intellectual and cultural gulf between 'lawyers' and 'economists' (and anyone else) makes it difficult for outsiders to intrude views to successfully reform of the legal profession.

Sadness on that score is all the more so given a legal profession determined to not change.

One stark reality about the legal profession and justice, is a widespread and ever-ready sense of community disappointment bordering on incredulity that 'justice' is so apparently, so often, so elusive.

Powerful interests seen to be using 'justice' as a weapon and a shield is widely disturbing.

Alas, whatever the shortcomings, the major beneficiaries of them are legal practitioners.

The general community has had enough.

-- so, what else can one say

I cannot pretend to have a sufficiently competent comprehension of the task the Commission faces to be specifically critical of the draft report – except that it does not contemplate a revolution.

My unwavering inclination is to reiterate my submitted preference for a 'revolutionary' initiative based on golden-rule principles. Disputes, especially consumer complaints and other personal claims, would be tested and settled against the question of whether what was done was consistent with the precept that who did it would be happy to be treated the same way. Most people can answer that question correctly pretty quickly.

What sounds a bit 'Christian' to Christians has, on reflection, counterpart prescriptions in all similar schemes seeking to voluntarily regulate behaviour in ways that find favour with general communities -- that aside I will not labour the in-principle case put in the first submission.

I am similarly persuaded that it would be entirely practical to institutionalize a low-cost arrangement to resolve disputes largely governed by a 'jury' of independent minded people – most people instinctively know if something done was fair or not and especially so if the parties to a deal were comparably competent or not.

In many ways ombudsman schemes are intended to work in this way and most do – the major shortcoming seems to be a constraint on the general application of an ombudsman's decision to a class of complaints.

Unfortunately, however, many other ADR schemes have been taken over by legal practitioners and are now so formal as to be little different to a court of summary jurisdiction bound by formal legal precedents that do not admit a leavening sense of fairness.

More generally it is disturbing that much of what passes for the 'system of justice' is more correctly assessed as a system of injustice.

In an increasingly complex world, ordinary people are unfairly deemed competent to make binding deals with professionals bent on exploiting them without fear of the deal being set aside for the reason that it was manifestly unfair. Professionals intent on behaving unfairly can resort to defences of 'full prior disclosure' confident in the knowledge that the documentation is beyond the comprehension of ordinary people.

It was especially concerning to see, this week, that a court would not countenance a claim that a bank's behaviour was contrary to a 'code of practice' for the reason that the obligation implied in the code lacked precision:

A summary of the decision said:

Citing a number of recent cases in other Australian courts, the court said this application should be determined on the law "as it stands". In so doing the court said the law of contract, as it applies to the guarantor of a loan, was "clear" and overrides any provisions in the Code of Banking Practice (specifically, clause 3.2) which seek to impose a duty on banks to act "fairly and reasonably". The Code "… is a vague obligation and an uncertain base for a defence on these facts", the judge observed

End piece

Given the precedent of 'failure' for all well-intentioned, prior proposals to reform the legal system -- to bring 'access to justice' more fairly in reach of ordinary people -- it may be too much to expect the Productivity Commission to be more successful. I did expect better.

When I talk to ordinary people about 'justice' issues it is disturbing to hear how despondent they are about the present system. Conversely, the idea that personal and consumer disputes might be decided by the application of a 'golden rule' has immediate appeal -- I put to the Commission that it would be a sensible short next step to propose a practical institutionalization of such an arrangement, perhaps in a limited pilot scheme to start with.

One test of the commonsense of this would entail canvassing various professional bodies to see if they would be party to such an arrangement – please put the question to professional bodies representing 'financial advisers', 'lawyers', 'journalists' et al et al. The basis of refusals would be instructive reading.

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