Inquiry into Access to Justice Arrangements

Australian Government - Productivity Commission

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To the Presiding Commissioner
Productivity Commission
Dr Warren Mundy

cc: Senator the Hon George Brandis QC
Mr Roger Wilkins AO

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Dear Sir

Submission and Comment to the Draft Report Access to Justice Arrangements by the Productivity Commission

These recommendations I provide in my capacity as adjunct professor of law of Bond University, on behalf of which I have held a seminar series titled "Common and Civil Law Dialogue" for a number of years. I am also the Vice-Chairman of the International Law Section of the Law Council of Australia and former Chairman of the German-Australian Chamber of Industry and Commerce. Admitted in New South Wales, England & Wales and Germany I have participated first hand in many civil trials in Germany and in New South Wales. For over 15 years I have advised governments in other countries on behalf of international donors in legal reforms, mainly in aspects of constitutional and company law.

Introductory remarks

I welcome the fact that review of the Access to Justice Arrangements have moved from the Justice sector to the Productivity Commission. In my opinion the problems deriving from the litigation system extend well beyond the Justice sector. The sheer fear of litigation and its material and opportunity costs drive many organizations into litigation avoidance strategies. These avoidance strategies are visible in the augmented use of prohibitions, waivers, liability exclusions and extra layers of compliance across many industries and government organisations.

The current deficit in our litigation system does not only limit access to justice but compromises both civil liberties of the individual and the productivity of the economy.

The draft report issued by the Commission elaborates primarily on the different avenues on which disputes can be resolved, which is needed and highly welcomed. In my opinion however, the deficit in the civil justice system cannot be cured by (only) strengthening pathways beyond the core court system. As the commission rightly points out on page 5 of its draft report, a well-functioning civil justice system is for many reasons of fundamental importance for the nation.

It will therefore not be possible to fix and restore credibility in the civil justice system, unless the court system itself is cured. Hence changes must address the method of how a dispute is resolved, not merely the forum where a dispute is being resolved. All other attempts will fail and increase the

problem over time. The litigation system is at the brink of collapse not only in our country but across many common law jurisdictions.

In this context I am pleased to submit **four recommendations** for consideration by the productivity commission and others. The first two of the recommendations are based on recommendations already foreseen in the draft report (11.4 and 11.5) which are supported and further qualified. Recommendations number three and four are new.
I believe that the implementation of these suggestions would over time significantly contribute to the aim of our litigation system becoming "just, quick and cheap". The four recommendations address the main cost, volume and time components of the current system, which are discovery, affidavit and the hearing. All recommendations are easy to implement and come at almost no cost.

Background

As the commission will be aware, our Australian litigation system derives from a system based on a jury trial. For a jury trial it is absolutely essential, that all evidence is presented to the jury members afresh during the course of the trial. In other words, the hearing is conducted as if the decision making persons in the room have never heard anything about the dispute before. In fact in many countries it is a prerequisite that the members of a jury are uninformed about the dispute.

Australia however has long abolished a jury trial in civil proceedings. Instead well trained judges decide disputes based on the way that the parties choose to present those disputes to them. Therefore it is only logical that elements of a jury trial which are no longer necessary are abandoned with a vision however, to maintain the nature and tradition of our adversarial system.

Recommendation 1

A Judge[1] should deal with a dispute from start to finish.

The Federal Court of Australia has already adopted this approach by assigning docket judges. In recommendation 11.4 the Commission has endorsed this concept, however it is suggested that the exceptions to the rule should be kept to a minimum.

The implementation of this recommendation will allow a hearing to commence with an informed decision maker and will allow the Judge to be already familiar with all aspects addressed in the pre-hearing phase of the trial.

Recommendation 2

During a directions hearing or after having received any substantial documentation by either party, a Judge can provide comments of what he or she considers important legal or factual questions.

In recommendation 11.5 the Commission has already proposed a "strong judicial case management" to limit the general discovery. It is suggested that the above recommendation will further strengthen this endeavour and will give the Judge the authorisation to direct the parties not only formally, but also tailor the discovery to the underlying factual and legal issues of the respective case. This

[1] For simplicity I refer to the person making a decision as a "Judge", even though this person could also be a Magistrate, Ombudsman or Tribunal member.

practice is widely implemented in civil jurisdictions. It will allow the parties to focus its discovery and neglect oblivious discovery which is of little interest to the Judge and of minor importance to the outcome of the hearing. Once a Judge is involved from the beginning it will be easy to provide such comments.
It will allow the parties to understand early in the proceedings, what the Judge considers important in the case. I suggest that comments are made only to legal and factual issues of the case.[2]

Example: Judge forwards the defence to the Claimant and writes: "The Claimant might wish to shed light on the question of misleading conduct during the negotiations between the parties that the Defendant raises."

Recommendation 3

Until evidence in chief is exchanged, a solicitor can submit further evidence on behalf of his/her clients simply by including a reference to the evidence in his/her writ to the courts and the source of that evidence, however without having to introduce this new evidence by way of an affidavit.

This recommendation will substantially reduce the costs of the preparation of affidavits. During the hearing the witness will need to deliver on the evidence provided in the writ. The party has the liberty to introduce an affidavit regardless.
This procedure is common practice in almost all civil law countries, but to my knowledge not well studied.

Example: Solicitor writes in his defence

"My clients had always informed the customer about the defective good. In particular the CEO of the Defendant spoke to the customer at length on 24 May 2012 on the shortcomings of the technical specifications.
Evidence: Mr John Smith, CEO of the Defendant"

Recommendation 4

A Judge can reject the invitation to hear evidence presented in his/her own discretion, if the Judge believes that the evidence offered has no major impact on the outcome of the hearing.

This policy is already commonly practiced in tribunals in Australia.

It will substantially reduce the volume of the litigation.

Section 135 of the Uniform Evidence Act 1995 excludes evidence if its admission would result in "undue waste of time". Whilst applications to exclude evidence under this section are made frequently the scope needs to be widened from "undue waste of time" to "having no major impact". Contrary to section 135, the Judge himself should have the discretion to reject evidence.

[2] In contrast to comments to the credibility of witnesses, see the discussion at [65] – [78] under http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2014/98.html

I conclude in noting that since a substantial industry is based on the current system, all changes should be introduced gradually. Apart from the legal profession this also includes forensic accountants, litigation funders, cost assessors, IT litigation specialist organisations and documentation providers. These stakeholders must be given time to adjust.

I am available to the Commission for further questions.

Yours faithfully,

Wolfgang Babeck

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