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22 July 2014

Mr Peter Harris AO
Chairman
Productivity Commission
Access to Justice Arrangements
LB2 Collins Street East
Melbourne Vic 8003

By email: access.justice@pc.gov.au

Dear Mr Harris

Re: Productivity Commission Draft Report: Access to Justice Arrangements, April 2014

Introduction

1. The Bar Association of Queensland ("BAQ") thanks the Productivity Commission for its draft report and the opportunity to make a submission to the Commission on the matters set out therein.
2. BAQ considers that there are a number of potentially significant proposals set out in the draft report to assist with the important issue of access to justice. There are also a number of other ideas in their infancy which the Commission's draft report should helpfully provoke discussion about.
3. With those positive comments in mind, BAQ turns its attention to some proposals which it considers worthy of adverse comment with a view to discouraging the ultimate commitment of resources to those proposals, to the detriment of the positive initiatives that have otherwise been identified.

Actions brought by regulatory bodies

4. The first matter is to highlight what appears to be an omission.
5. By reference to the summary of the Commission's main proposals set out from page 38 of the draft report, BAQ notes the absence of any reference to the important role of regulatory bodies in pursuing legal remedies on behalf of persons who would have substantial difficulty litigating on their own behalf.

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6. ASIC and the ACCC are examples of such bodies.
7. BAQ considers that a comprehensive review of the issues canvassed in the draft report ought not overlook a close examination of the roles of bodies such as these, including a consideration of initiatives that may be taken to improve access to justice on behalf of affected individuals, though them.
8. For convenience, the remaining observations draw from the summary commencing at page 38 of the draft report.

Judging quality

9. On page 39 there is a reference to the current problem *"quality is hard to judge"*.
10. Proposed reform is identified. BAQ submits that the proposed reform has no bearing at all upon the problem that is identified in the corresponding column. None of the reforms identified in the proposal could be thought to have any relationship at all to the question of whether or not one off consumers of legal services could more effectively judge quality of the legal services provided to them. Advertising could not ever be thought to be of assistance in this regard.

Complaints

11. The next *"problem"* identified on page 39 concerns the powers of complaints handling bodies and a supposed need for them to be strengthened to ensure protection of consumers of legal services from wrongdoing.
12. The proposed reform is to homogenise investigatory powers across the jurisdictions and provide for additional disciplinary powers in relation to consumer matters.
13. It is very difficult to conceive what relationship to the access to justice issues this problem and the corresponding reform have. Whatever merit there is in the suggestion of the reform and in the identification of the problem, they do not bear upon the question of access to justice.
14. Any suggestion that it does have something to do with *"access to justice"* because it concerns disciplinary action regarding overcharging supposes that the problems concerning access to justice that the report aims to deal with are effected by *"overcharging"*. It is submitted that the constraints on access to justice exist regardless of whether the legal services are charged for at appropriate rates or at excessive rates. The clients involved could rarely afford either.

Alternative dispute resolution

15. A further problem identified on page 39 is said to be that *"more legal problems could be resolved through alternative dispute resolution processes"*. The corresponding proposed reform is that *"Courts should continue to incorporate the use of appropriate alternative dispute resolution in their processes and provide clear guidance to parties about alternative dispute resolution options..."*.
16. Firstly, a reform that advocates that something should *"continue"* is not a reform at all.
17. Secondly, BAQ does not consider that there is any basis for supposing that litigants in the court system are not already well aware of alternative dispute resolution processes. The fact that far more cases in the court system in Queensland are resolved through alternative dispute resolution than by any other means, including trial, is testament to that.
18. BAQ considers that this proposal is likely to be entirely ineffective.

Practice in Tribunals

19. On page 40, under the title *"Tribunals have been accused of 'creeping legalism'"* it is urged that restrictions on legal representation in tribunals should be more rigorously applied.
20. BAQ understands that a common observation made by Tribunal members presiding in Queensland is that the presence of legal representation very often provides for a more effective timely resolution of disputes than where parties are not legally represented. BAQ submits that the Commission should revisit this recommendation. If it is to be made at all it should be refined so as to make it perfectly clear that it applies only in those circumstances where legal representation is not in fact advantageous to the system, such as small debt cases.

Costs for self-represented litigants

21. On page 40 there are proposed reforms suggesting scales of cost in courts in different tiers should be introduced and that self-represented litigants should be eligible to seek an award for costs.
22. As a general proposition self-represented litigants are of course entitled to seek orders for costs however the costs that they might expect to recover would usually be substantially less than for a represented party.

23. BAQ urges the Commission to avoid a recommendation that might suggest that self-represented litigants ought to be able to recover the same costs as represented litigants. Self-represented litigants ought not be able to recover the equivalent for any allowance for professional fees. If they were to do so they would commonly be recovering monies when corresponding outlays have not been incurred. There is a real risk that this will adversely incentivise self-represented litigants, either encouraging them to commence claims or discouraging them from settling claims until costs that have not in fact been incurred are paid. If self-represented litigants are to be compensated for their time in the conduct of the case, what about the parties who paid for lawyers but still invested substantial time of their own?

Assistance from judges for self-represented litigants

24. On page 41 there is a reference to providing for additional assistance by judges and court staff to self-represented litigants whilst allowing the judges and the courts to remain impartial. With respect, the notion overlooks that the provision of assistance means that the person or body ceases to be seen as impartial.

Roles for non-lawyers

25. In the same proposed reform it is suggested that clearer rules on when assistance can be sought from non-lawyers are also required. Further reference to the report might allow an interpretation of this that it is proposed that increased reliance on assistance from non-lawyers should be allowed in lieu of assistance from legal practitioners.
26. The provision of assistance by non-lawyers in the conduct of litigation is inimical to enhancing access to justice.
27. The point is illustrated by an earlier reform proposed in the draft report, at the top of page 39, that suggests that improved training of legal practitioners would enhance access to justice. Reliance on unqualified persons contradicts that.
28. If instead of relying on better legally qualified persons, litigants are encouraged to rely upon non-qualified persons, it is obvious that valuable resources will be wasted on the pointless or misdirected pursuit of litigation. That wastage of resources will result in the denial of access of justice to the litigant and to others.

Court and Tribunal fees

29. At the foot of page 41 there is a recommendation for a reform to increase court and tribunal fees to a level whereby there is a relatively high proportion of the court's (and tribunal's) costs recovered.

30. In the body of the report, with respect to this issue, it is noted that as little as 10% is currently being recovered, whereas a target of 80%, if not 100%, ought be considered.

31. It is difficult to imagine how increasing costs imposed upon litigants can be said to be a reform aimed at improving access to justice. In the right hand column, headed *"Main benefits of change"*, the draft report suggests that it will do so because it will provide parties with an incentive to resolve disputes informally, because of increased costs.

32. It is noted the draft report does not suggest that access to justice could be improved by encouraging lawyers to charge their clients more for their services. That too would provide parties with an incentive to resolve disputes informally. Increasing costs for litigants is not improving access to justice.

33. A further suggested main benefit of the change is that it would increase the fiscal sustainability of courts and tribunals and that extra fee revenues have the potential to improve court and tribunal services. It is noted that the recommendation does not seek to tie the increased fees to any such improvement in court or tribunal services. In any case it is a nonsense because if the aim is 80% or 100% cost recovery, whenever more money is spent, court fees will increase.

34. Litigants in courts and tribunals are not customers nor even clients of the courts. It would be disastrous for the system of justice if such a culture was to be encouraged. The notion that the full cost or anything like the full cost of the provision of the *"service"* of the courts was being paid by the litigants themselves would essentially impact on the relationship between the courts and tribunals on the one part and parties on the other part.

35. Courts, and in their respective places, tribunals, are, it should not be forgotten, part of the system of government of this country. They are bodies which impose decisions upon the parties who come before them, in dispute. They are not *"service providers"*. Parties should not pay to have decisions imposed on them, particularly adverse ones.

36. The proposal is as meritorious as suggesting that constituents seeking assistance from their local Member of Parliament should pay on a per service basis.

37. The authors of the draft report have misled themselves on the issue by the reference to the supposed private benefit involved. Courts do not confer private benefits. The discharge of their functions is solely a public benefit regardless of whether any binding precedent is established. The determination of the legal rights of parties by courts of law and tribunals is a critical part of the maintenance of our civilisation. These are not purely matters of economics, which this proposal seems to assume.

38. The Association reiterates that there is no logical connection between the topic of *"access to justice"* and this issue of court fees. On an initial reading of the report it might have been thought that proponents of this initiative were concerned with cost recovery for the operation of the courts. With the benefit of attendance at the recent public sittings of the Commission it may be that some if not all of the proponents to the Commission of this reform consider that the payment of court fees may indirectly improve access to justice either by discouraging some litigants from proceeding to have their disputes determined in public courts and tribunals (such as in private arbitration) or by providing a bigger funding base for the courts and tribunals to draw upon.

39. The Association has difficulty with those propositions.

40. It is noted that on page 472 of the Draft Report it is said *"because formal proceedings in courts and tribunals come at a substantial cost to the taxpayer, governments should encourage disputes to only reach courts and tribunals where necessary (AGD 2009)"*.

41. With respect to the source relied upon there, most cases, and certainly those that involve the use of substantial resources available to the courts, are only before the courts because it is *"necessary"*. It would be an exceptionally rare event for parties to be before the courts expending substantial sums of their own monies (in almost all cases), at great inconvenience to themselves, in circumstances other than where it was *"necessary"*.

42. Of course that depends in a sense upon the point of view from which the necessity is judged. An objective observer may consider that there was another alternative. As was submitted on behalf of the Association at the public hearing, every civil dispute (leaving aside regulatory type proceedings) has open to it an alternative, private means of resolution.

43. Cases only proceed before courts and tribunals where one, some or all parties have not been able to find a way to their own satisfaction, at a subjective level, to resolve the dispute. That is what makes the intervention of the courts necessary. That is the reason for the courts' existence (in the civil jurisdiction).

44. In the Association's view there are several fundamental misconceptions that are reflected in the Draft Report in this respect.

45. At page 469 it is said:

> *"However, as with many other essential public services (for example, the regulation of financial services, pharmaceuticals and air safety), the Commission believes that there is a compelling argument to seek to recover some of the costs from users of the services."*

46. The analogy with the named essential services is inapt.

47. Courts are not *"an essential service"*. Courts are an arm of government that impose decisions upon litigants whether the litigants like the decision or not.

48. The only bodies with which any analogy to the courts can be drawn are parliament and the executive arm of government. To draw any other analogy misconceives the role of courts in our society and leads to error with respect to the underpinning philosophies that should apply with respect to a consideration of the imposition of court fees.

49. Secondly, in the next paragraph on page 469 it is said:

> *"If there was no public benefit associated with a case being heard, the parties involved should bear the full cost of the court or tribunal resources devoted to the case."*

50. There is never no public benefit involved in a civil dispute being heard before a court or a tribunal. As we have earlier submitted, the role of courts is always to provide a public benefit by being the ultimate body, as an arm of government, that resolves disputes between citizens or between citizens and the State when they are unable to do so for themselves.

51. Again, this misconception seems to be an important one in the Commission's deliberations as set out in the Draft Report.

52. At page 477 it is rightly observed that inadequate resources cause rationing of court services resulting in delays and are therefore a barrier to access to justice.

53. Given what has been said above, it can be properly regarded that if there are inadequate resources there has been a failure by government to provide the financial resources necessary for the proper operation of the courts.

54. The imposition of court fees does not solve that problem. The imposition of court fees put simply is merely an opportunity for the governments to relieve themselves further of the obligation to provide the funding for the proper administration of justice in this country. There is no safeguard and no certainty that the raising of one additional dollar by way of court fees will allow for

increased resourcing of courts as opposed to reduced contribution by government to the budgets of the courts.

55. If a criminal trial is to be delayed partially because of the unavailability of a judge hearing a civil dispute between large corporations, leaving the accused incarcerated whilst awaiting trial, then that is a function of inadequate funding by government to which, for the above reasons, the imposition of court fees is not the answer. There simply can be no confidence that it would solve the problem anyway.

56. At the public hearing the Association acknowledged what might be seen politically as an inevitability that there will be court fees. It was no doubt not taken that the Association accepted that that was reasonable. Further, there is in the Association's submission no justification for any increase in court fees across the board of the kind contemplated in the Commission's Draft Report.

Contingency fees

57. The Association notes the submission of the Law Council of Australia and has nothing to add.

Conclusion

58. BAQ reiterates its earlier comment and wishes to place emphasis on the important work that has been done by the Commission in the preparation of the draft report and the identification of a number of important and influential initiatives. The emphasis by BAQ in this submission on some negative features of the draft report is not intended to derogate from the useful contribution that the draft report provides to a difficult problem.

59. BAQ looks forward to the opportunity to address the Commission at its public hearings.

Yours faithfully

Shane Doyle QC
President