Judicial Conference of Australia

SUBMISSION TO THE PRODUCTIVITY COMMISSION FROM THE JUDICIAL CONFERENCE OF AUSTRALIA ON THE DRAFT REPORT, *ACCESS TO JUSTICE ARRANGEMENTS*

May 2014

The Judicial Conference of Australia

The Judicial Conference of Australia (JCA) is the professional association of judges and magistrates in Australia, with a membership of almost 700 drawn from every court in Australia.

The objects of the JCA include:

- In the public interest to ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia.
- To promote, foster and develop within the executive and legislative arms of government, and within the general community, an understanding and appreciation that a strong and independent judiciary is indispensable to the rule of law and to the continuation of a democratic society in Australia.
- To maintain, promote and improve the quality of the judicial system, as an instrument of the rule in law, in Australia and internationally.
- To seek to ensure that access to the courts is open to all members of the community.

The overall submission of the Judicial Conference of Australia

The JCA is fully supportive of the desire to constrain costs and promote access to justice and equality before the law in Australia's system of civil dispute resolution. The JCA believes that in Australia there is a well-functioning justice system providing timely and independent justice. It also wishes to see that the public can afford to bring disputes that cannot be resolved to the courts to be heard and determined. The JCA recognises and accepts that the justice system is not perfect and welcomes constructive criticism of it.

The JCA endorses the observation of the Hon Michael Black, AC, QC that courts must daily deal with a tension, which he describes as between the competing pulls of cost, speed, perfection and fairness, and that they need

to find the "elusive point of equilibrium".[1] This tension lies at the core of the submissions which the JCA makes in regard to the draft Report, *Access to Justice Arrangements*.

Although the draft report raises a number of matters of interest and relevance to the JCA, we confine our submissions to recommendations in regard to the civil court system and make the following more specific submissions.

The importance of maintaining the constitutional principle that the executive arm of government should not prescribe how courts exercise the judicial function of government

We note that the Productivity Commission has focused on those problems that impact significantly on the civil justice system which it believes "without government intervention, are likely to go unresolved".[2]

We emphasise that, whilst the courts benefit significantly from, and should respond appropriately, to observations and proposals, such as those in the draft Report, it is essential, in order to protect and maintain an independent justice system, that the courts have ultimate responsibility for the management of their processes.

Draft Recommendation 8.1

The JCA is supportive of the use of alternative dispute resolution mechanisms where they can effectively improve the resolution of disputes. However, we emphasise that it is for the courts themselves to implement any reforms of court processes, including whether it is appropriate to make mediation compulsory in certain types of cases. The making of mediation compulsory is a barrier to the right of all persons to apply to the court as an independent arm of government to resolve disputes. Parties with limited resources may not be able to afford both a failed mediation and subsequent litigation against a well resourced opponent. The courts are in the best position to determine whether and when persons should be ordered to mediation.

Draft Recommendation 11.1

Similarly, we are concerned that Draft Recommendation 11.1 implies that the proposed changes, in particular the abolition of formal pleadings, should be imposed on courts rather than be recommended for consideration by particular courts, each of which has its own

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1 M. Black, 'The Relationship Between the Courts and Alternative Dispute Resolution', *The Future of Dispute Resolution*, Lexis Nexis Butterworths, Australia, pp. 87–95. Quoted in the Draft Report at p 16.

2 Draft Report, p 8.

circumstances, which could, in some cases, require a more subtly tailored approach for that court.

Draft Recommendation 11.2

We are supportive of greater empirical analysis and evaluation of the different case management approaches and techniques, and of courts collaborating to better identify cases in which more or less intensive case management would be justified. The International Framework on Court Excellence is a tool that has been developed by, among others, Australian, United States, European and Singaporean courts and courts administrators to assist courts to evaluate and improve their functioning.

Draft Recommendations 11.4 to 11.10, 12.1, 13.1

We are concerned at the implication in these recommendations that the proposed approaches could appear to be starting to encroach on the constitutional independence of the courts. In particular, we express some concern that the recommendations are so worded, in particular by the use of the word "should", as to require:

- an imposition on a particular court of the individual docket system for civil matters unless the court can establish reasons to the contrary;
- jurisdictions to implement the proposed reforms in regard to discovery (the value of which we do not necessarily question);
- courts to have practice guidelines and checklists in regard to information technology
- early exchange of critical documents;
- certain rules in regard to expert evidence and experts;
- strong judicial oversight of compliance with pre-action requirements;
- courts to take into account settlement offers when awarding costs.

We do not express a view on these particular approaches, and in particular do not wish to imply that we are opposed to the courts being given the power to implement some or all of these recommendations. However, we restate our fundamental submission that, to preserve the independence of the courts within our system of government under the rule of law, it is important that there be no imposition on the courts of how they exercise their function.

In making these submissions we emphasise that courts across all jurisdictions are continuing to improve their own procedures in ways that will necessarily vary between them for differing circumstances, such as the nature of their work and their available resources. Our fundamental submission is that the Productivity Commission should make recommendations which are consistent with the constitutional independence of courts.

The recovery of the cost of delivery of justice in civil cases from the litigants

> "We will sell to no man, we will not deny or defer [i.e. delay] to any man either justice or right."[3] [Magna Carta]

The JCA reminds the Productivity Commission that this fundamental principle, that justice is not for sale, has underpinned our system of government for just on 800 years. We are particularly concerned that Draft Recommendations 16.1 to 16.3 appear to suggest as a general rule, that courts should recover from the litigants the direct and indirect costs of delivering justice in civil cases. Every one is entitled to equal access to the courts without discrimination.[4]

The essential flaw in this approach is that it says that justice is for sale. That is unconstitutional. Access to justice is a fundamental human right. Courts exist to decide disputes. Parties can choose alternative dispute resolution processes for which they can pay. The community's taxes pay for essential governmental functions including the three key elements, Parliament, the Executive Government and the Judiciary. Courts are not business units.

The Commission's draft recommendation defies and undermines the benefit that the community derives from the availability of legal redress through the courts. The knowledge that courts will enforce contractual and statutory rights underpins the stability of our society, both personally and commercially. It is therefore in the interests of society generally, not just the parties to particular litigation, that courts are accessible: otherwise rights become meaningless or of marginal value. This leads to social and commercial chaos.

It can hardly be said that there is access to justice, which is the focus of the Productivity Commission's report, if that access is only available to those who are able to pay, or qualify for limited exemptions from paying, the full and inevitably high cost of obtaining the court's adjudication of the matter. That would be especially so if court fees were to include a share of indirect and capital costs, as proposed in draft Recommendation 16.2. Moreover, very often the Executive Government is a party to litigation. It would be an affront to justice for it to propose charging citizens for what the Commission erroneously appears to think is some sort of privilege in challenging or defending against governmental action or inaction.

It is incorrect to typify the function of the courts as providing a "service" in return for a fee, as is done in Recommendation 16.1. This misconstrues

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3 Chapter 29 of Magna Carta, where King John made this promise 799 years ago.

4 Article 7 of the Universal Declaration of Human Rights. "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

the function of the judicial arm of government in our society. The courts are much more than service providers. Their constitutional function in all matters, including civil matters, is to resolve disputes in order to ensure justice is done. This, in turn, provides the essential foundation for a safe, fair and peaceful society. This is so important to the well-being of our society, that its cost should not be borne solely by those coming to the courts. Rather, the right of everyone to equal access to the courts should essentially be seen as a core aspect of government, and thus funded out of general revenue.