IS ACCESS TO JUSTICE A RIGHT OR A SERVICE?

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1. This symposium is timely. This month we have celebrated the 800th anniversary of King John signing *Magna Carta* at Runnymede and its enduring impact on the rule of law.

2. A court system is fundamental to every form of government, from tyranny to representative democracy. The pursuit of justice is a normative concept in the mind of every person who feels that he or she has been done wrong.

3. A system of justice is an institution for the redress of grievances. It can only command the respect of a society's members if they trust that it is an impartial, equal, transparent and principled system that gives effect to the rule of law[1]. These necessary qualities of any system of justice worthy of that name, were reflected in the original c. 40 of *Magna Carta*, that promised:

> To no one will we sell, to no one will we deny or defer [i.e. delay] right or justice[2].

4. These values endure not only in Ch III of the *Constitution*, that vests the judicial power of the Commonwealth in the Courts, but also in Art 10 of the *1948 Universal Declaration of Human Rights* of the United Nations which provides:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him[3].

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1 see too: *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 977 per Lord Diplock

2 It read, in Latin, "Nulli vendemus, nulli negabimus aut deferemus rectum aut justiciam".

3 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org1docid/3ae663712c.html [accessed 24 June 2015]

5. The Productivity Commission's *Report on Access to Justice Arrangements*[4] was released on 3 December 2014. The Judicial Conference of Australia has some observations to make about certain of the Commission's recommendations. A number of those are important and merit further consideration, but others, in particular its proposals to use court fees to recover the cost of providing the courts to resolve a dispute, are simply misguided.

6. I will reflect on this last aspect, before discussing the Commission's recommendations concerning self-represented litigants, the use of McKenzie friends[5], early case management, litigation funding and legal aid.

Court fees

7. The Commission discussed court and tribunal fees together in chapter 16 of its report. It recommended that:

> 16.1 Irrespective of the overall level of cost recovery that is adopted, fees charged by Australian civil courts and tribunals should be
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> - underpinned by costing models to identify where court resources are consumed by parties
> - charged at discrete stages of litigation – and for certain court activities or services – that reflect the direct marginal cost imposed by parties on the court or tribunal
> - charged on a differentiated basis, having regard to the capacity of parties to pay and their willingness to incur litigation costs.
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> …
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> 16.2 The Australian, State and Territory Governments should increase cost recovery in civil courts and tribunals. The additional revenue should be directed towards improvements in court resourcing (recommendations 17.2 and 17.3) and legal assistance funding (recommendation 21.7).
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> In addition to applying the principles outlined in recommendation 16.1, courts and tribunals should recover their full costs in all cases of a substantial financial or economic value, with the court being able to defer or reduce fees only in cases where it would be in the public interest to do so, or to avoid a particular party being denied access to justice.
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> In resetting fees, the impost on parties should not materially increase in:

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4 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014)

5 see *McKenzie v McKenzie* [1971] P. 33. Edelman J recently described the role that a McKenzie friend can play in *Nepal v Minister for Immigration and Border Protection* [2015] FCA 366 at [13]-[17].

- cases concerning family violence, child protection, deprivation of liberty, guardianship, mental health, or claims to seek asylum or protection

- disputes dealt with by tribunals and courts that are of minor economic or financial value.

8. There are several problems with those recommendations and the thinking behind them, that I propose to consider in turn. Those problems are, *first*, that the Commission has assimilated tribunals, which are executive bodies, with courts, and so ignored the very different constitutional roles and functions of each. *Secondly*, the Commission has assimilated the role of courts with alternate dispute resolution (**ADR**) processes. That fundamentally misunderstands that the role of the courts is to quell controversies in a final, binding decision that is immediately enforceable. ADR cannot be a substitute for, or prerequisite to, access to the courts. *Thirdly*, the Commission has failed to appreciate that the differential fees that it advocates cannot achieve fair or just outcomes and will deny, not promote, access to justice. *Fourthly*, the apparent value of what is at stake or the identity of a party in any case is no guide to the public importance of a court decision that authoritatively quells that controversy. And, *last*, the use and setting of court fees by the executive government can deny access to courts including in cases where a person seeks to challenge governmental decisions.

9. In 1994, in the High Court, Mason CJ, Brennan, Gaudron and McHugh JJ held that a person's right to unimpeded access to the courts can only be taken away by express enactment[6].

Courts are not tribunals

10. The Commission's recommendations 16.1 and 16.2 do not appreciate that tribunals are part of the executive arm of government, and perform very different functions than courts. Our *Constitution* recognises that the governmental powers of the Commonwealth are divided into three, namely the legislative[7], executive[8] and judicial powers[9].

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6 *Coco v The Queen* (1994) 179 CLR 427 at 436, applying what Lord Bridge of Harwich had said in *Raymond v Honey* [1983] 1 AC 1 at 14

7 Ch I

8 Ch II

9 Ch III

11. The constitutional place of the courts in our system of government is clear, as Gleeson CJ, Gummow, Hayne and Heydon JJ explained in 2005[10]:

> Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, concerns of the particular parties to the controversy in question, be they private persons, corporations, polities or the community as personified in the Crown or represented by a Director of Public Prosecutions. No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. **But the community at large has a vital interest in the final quelling of that controversy. And, that is why reference to the "judicial branch of government" is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed.** (emphasis added)

12. The mechanisms used to set fees for tribunals can take into account whether the executive body should recover some or all of the costs of dealing with an application before it. I do not wish to say anything about that topic except to highlight its fundamental difference to the considerations applicable to judicial proceedings.

13. Executive bodies, including tribunals, perform the function of creating new rights and obligations, such as when they grant or refuse licences, permissions or visas. They can do so by referring to policy considerations or other matters not specified by the legislature. On the other hand, courts usually find facts and apply the law to them so as to ascertain the existing legal rights and obligations of the parties and so resolve a dispute. Ordinarily, courts do not create new rights or obligations but determine existing ones.

14. The decision of the court will also create a legally authoritative precedent that will be binding on not just the parties, but on other courts and the community generally. And, if a court exercises a power to create new rights or obligations, it can only do so according to legal principles or on the basis of an objective standard or test prescribed in legislation[11].

15. In our system of government, only the courts administer the rule of law. Courts are impartial and independent of the executive government. They almost always hear

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[10] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 16 [32]; see too at 16-17 [31]-[33]. In 1912, Griffith CJ decided that every person has a right to free access to, among other things, the courts of justice independent of the will of any State over whose soil he must pass in the exercise of it: *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108; Barton J agreeing at 109-110.

[11] see: *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 274-275 per Dixon CJ, Fullagar and Kitto JJ; *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189-191 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ

cases in public and publish reasons for their decisions that apply the law to the facts of the parties' disputes. All persons, including the media, have a common law right to make a fair report of any proceedings in open court[12].

16. As Sir Gerard Brennan CJ said in his 1997 *State of the Judicature* address, the judicary must be "reasonably accessible to those who have a genuine need for its remedies"[13].

Courts are not alternate dispute resolvers

17. There is a further fundamental flaw in the Productivity Commission's understanding of the role of the courts in determining disputes. The Commission's approach involves this syllogism: Courts resolve disputes. Alternative dispute resolution processes are services that also resolve disputes. Therefore, courts and alternative dispute resolution processes are the same. Accordingly, the Commission considers that the courts perform a "service" for the cost of which users, or some users, can be made to pay[14].

18. This argument is wrong because it does not understand the central role that the judiciary plays in our constitutional system of government under the rule of law. Courts are not voluntary dispute resolution processes, unlike all forms of ADR (except those ordered by courts). If parties choose to use ADR to resolve a dispute or difference they do so pursuant to an agreement. And, the resolution of the dispute by ADR processes creates a new set of rights and obligations for the parties that are not enforceable through the ADR mechanism if one party chooses to ignore them.

19. However, if one party chooses to use judicial proceedings to resolve a dispute, the party invokes the fundamental common law right of asking an arm of government to determine the legally enforceable rights and obligations in controversy. The court's decision is a final, binding determination of the law, applied to the facts of the case, and can be coercively enforced by the court itself.

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12 *Dickason v Dickason* (1913) 17 CLR 50 at 51; *John Fairfax & Sons v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 481 per McHugh JA, Glass JA agreeing; see too what I said in *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293 at 296 [16], 298 [25]

13 (1997) 72 ALJ 33 at 34; see too: *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty* (1998) 193 CLR 603 at 623 [55] where Gummow J said that the right of access to curial determination is deeply rooted in constitutional principle

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20. Most persons, including corporations, do not choose to commence or participate in legal proceedings. Generally speaking, the initiating party does so precisely because the parties cannot agree on how to resolve their dispute, including the use of ADR to do so.

21. Let me use two examples to demonstrate the misconception behind the Commission's thinking. Suppose a thief breaks into Ms Orange's computer store and steals stock for which she paid $100,000 and could sell for $200,000. The thief disposes of the stolen goods for $10,000 and spends the proceeds. Ms Orange's insurer refuses to pay her claim because it alleges that she left the store unlocked that night. For present purposes we can put to one side the consequences if the thief is caught and the Director of Public Prosecutions pursues criminal charges against him.

22. Ms Orange has legal rights against, *first*, the thief in tort for trespass to her store and conversion of the goods, *secondly*, against the insurer for a possible breach of its insurance contract and possibly, if she could find them, against the purchasers of her stock from the thief.

23. Obviously, out of those choices, she is likely to sue the insurer. The question is what "service" Ms Orange is asking the court to perform when she commences legal proceedings.

24. Any claim must be based on a contention that the defendant has not obeyed its legal duty or obligation owed to Ms Orange. She asks that the Court decide if she is right and, if so, enforce the law. She would have tried to resolve her dispute with her insurer but suppose it refuses to do so or to use ADR.

25. Only a court can decide such a dispute. Ms Orange does not *choose* to bring proceedings. She has a common law right to ask the only institution in our society that is capable of determining whether she has a valid claim under her insurance policy to hear and determine that dispute according to law.

26. A second example of the potential for misuse of court fees can be seen in the recently announced increases in court fees for family law proceedings and other proceedings in all Commonwealth courts. On 25 June 2015, the Senate disallowed the family law increases. Of course, sensible adults should be able to agree on how to divide up their property and make arrangements for their parenting of any children. But in relationship break ups, common experience shows that the idea that one party

"chooses" to begin such proceedings is frequently baseless. An abused or destitute spouse or partner rarely chooses to be in that position, but she or he has a right to invoke the power of the State, by commencing court proceedings, to resolve the relationship dispute authoritatively and in a way that can be enforced. ADR is not an alternative. The decision of the court in each case is not a service.

27. Parliaments enact laws that are intended to be applied by courts to regulate just these questions. The courts are there so that persons do not take the law into their own hands and so create anarchy.

28. Courts sit and decide cases in public. They can compel the joinder of all parties to the controversy in order to decide it. The courts' decisions are, or reflect, the law that binds everyone in our society.

29. In contrast, all ADR involves a private process that, ordinarily, the parties have agreed to undertake. An ADR process cannot compel a person who has not agreed to participate to be bound by the result. If it succeeds, ADR produces a result that is useful to, and, more importantly, known only to, the immediate parties. Other than in references to which one party is a government body[15], all arbitrations, including awards, are confidential processes. They produce no result affecting or known to the public. The same is normally true of mediations, conciliations and early neutral evaluations. There is no policy reason why users of ADR ought not to pay for the cost of the ADR process that they agreed to utilise. Critically, the law cannot be expounded or made known to the public through ADR.

30. The public decision of a court that resolves a dispute does not produce a "spillover" public good, as the Commission asserted. The constitutional function of a court of justice is, and only is, to quell a controversy by the exercise of judicial power. It is fundamentally wrong to characterise the benefit to society from that use of the power of the third arm of government as a "spillover" good. This misconception has its roots in the Commission's extraordinary statement that[16]:

> a party would not contest a matter in court unless the expected private benefits of taking action outweighed the expected private costs of bringing the matter to court…. the decisions of many parties to currently engage in litigation, even when the costs to themselves can be significant, necessarily implies that there are private interests at stake.

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15 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10

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31. Take family law disputes between bitter, estranged former parties over children and property division. The contests in those matters are not necessarily driven by rational behaviour on one or both sides. Sometimes one party is so hurt by the separation that he or she cannot see or act with reason. A court is the only way to resolve such a case, if one or both parties is not to start taking the law into his or her own hands.

32. Fee exemptions for impoverished family law disputants do not justify the imposition of significant fees generally on other parties, or one of them, who may have money to pay. Oftentimes, separations or custody disputes involve highly emotional people, some of whom, as experience sadly shows, may seek to take the law into their own hands if they are not told by a court order, after a fair and impartial hearing, how the custody or property issue has been resolved with the force of law.

33. The public good in such a court order is that it decides the rights and liabilities of the parties to the dispute in accordance with law, in particular, a law made by the Parliament to govern *all* such disputes. There is no question that the result in each case is a "spillover" of anything. The court orders are the manifestation of the law of the land. The elected legislature enacted that law and conferred jurisdiction on the courts to determine controversies arising under it to ensure that everyone in the community, including the particular parties to such a dispute, could resort to the courts so as to have their controversy resolved finally and authoritatively. The legislature also intended that such a law, and orders made by the court in exercise of its independent powers, would be enforceable and obeyed to give effect to the rule of law.

34. On 16 June 2015, the Law Council of Australia criticised the significant increases to filing fees in family law matters that are proposed to take effect on 1 July 2015 as being "particularly cynical when there is no option for divorcing parties other than to apply to the Court". The Law Council referred to the proposed fee increase of over 40%, from $845 to $1,195, for filing for divorce in the Federal Circuit Court. The JCA agrees with that criticism. Those fees do nothing for access to justice. They amount to a revenue raising exercise that applies even if the parties do not require any hearing by the court.

35. Court fees should not be used as a form of taxation or a mechanism to sell justice to litigants. Ch III of the *Constitution* establishes the Federal judiciary as an arm of

government. Under s 51(ii), the Parliament may make laws to impose taxation. Taxation is the usual way in which the Parliament raises money to conduct the business of executive government and to provide the resources necessary to run both the other two arms of government, namely the Parliament and the judiciary. Imagine how unacceptable it would be if people were made to pay, let alone at user pay rates, separate charges to have access to a Senator, Member of the House of Representatives or Parliamentary Committee, or to petition one of the Houses.

36. In the current financial year, the Parliament appropriated, in two separate Acts[17], a total of $320,156,000[18] to run itself. In the *Appropriation (Parliamentary Departments) Bill (No 1)* 2015-2016, there is a 13% increase in the first of the two annual Parliamentary appropriations to $233,415,000. The total appropriation for the High Court, Federal Court, Family Courts and Federal Circuit Court for 2014-2015 was $271,644,000[19]. The proposed appropriation for those Courts in the next financial year has increased by only 1.8% to a total of $275,058.000[20].

37. The expenditure of these public moneys is for the public good in providing funding for the two non-executive arms of government. Neither the Parliament nor the judiciary is or should be a generator of revenue. That is the function of taxation and such services as the Parliament authorises the Executive to use to earn income.

38. If the common law right of access to justice is to have meaning, it cannot be turned into a privilege, based on financial or other selective criteria. There is no justification for economists categorising courts as an alternative to other, voluntary, private dispute resolution processes. The existence of private ADR processes, which are user pays, is not an acceptable or principled basis for economists or the other arms of government to convert the courts into a user pays or ADR process. That approach will raise significant issues under the *Constitution* as to whether substantial court fees amount to an unlawful interference with the rule of law or a form of taxation. Similar issues are raised by the Commission's objective of driving citizens and others to use ADR

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17 *Appropriation (Parliamentary Departments) Act (No 1)* 2014-2015 (No 65 of 2014) and *(No 2) 2014-2015* (No 30 of 2015)

18 comprised of $206,319,000 in the first Act and $113,837,000 in the second

19 being $17,431,000 for the High Court, $96,746,000 for the Federal Court and $157,467,000 for the Family Court and Federal Circuit Court as provided in *Appropriation Acts (No 1), (No 2)* and *(No 3)* 2014-2015

20 *Appropriation Bill (No 1)* and *(No 2)* 2015-2016: Sch 1

instead of exercising their constitutional right of access to the courts, the only institution in our society that can administer justice.

39. Access to the courts is not a commodity that is for sale. In a democracy governed by the rule of law, there is no alternative to justice according to law administered by the independent, impartial and honest judiciary that Australia is fortunate enough to have.

Are differential fees fair or just?

40. The Commission's report stated[21]:

> As previously noted by the Commission, the mixture of private and public benefits arising from use of the courts has implications for the efficient balance between the public funding of courts and recovery of costs through fees:
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> > Spillover effects may have an influence on the way in which cost recovery is implemented and who is charged. Where a government supplied activity or product has positive spillovers, subsidies to decrease the costs to users may be appropriate. (PC 2002, p. 17)

41. It then disputed the Law Council of Australia's characterisation of the courts as a public good, with immeasurable public benefits that uphold the rule of law and support the systems of government, commerce and trade. The Commission retorted[22]:

> However, spillovers and public goods are not necessarily synonymous …. In the Commission's view the courts themselves are not, in an economic sense, a public good, as:
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> - their usage is rivalrous – when two parties litigate, they tie up resources of the court that could otherwise be used to service other parties
> - there are excludable private benefits produced by litigation – for example, if a party receives an award for damages.
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> **Instead, a more appropriate characterisation of the courts is that their use by parties for private benefit also produces positive spillovers to the rest of society, such as the 'rule–of–law', which can have public good characteristics.** (emphasis added)

42. The Commission justified its proposal for user pays cost recovery of court fees as based on what it asserted was "the well-established notion that – given the scarcity of

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resources – a service should only be subsidised by government where the private benefits from using the service are likely to be otherwise insufficient"[23].

43. It then asserted that the parties "ideally" should bear the full cost of court or tribunal resources devoted to a case if "there was no public benefit associated with a case"[24].

44. As Chief Justice Bathurst recently pointed out[25] this argument is at odds with what the Nobel Prize winner for Economics, Paul Samuelson wrote in 1967[26]:

> … government provides certain indispensable public services without which community life would be unthinkable and which by their nature cannot appropriately be left to private enterprises … Obvious examples are the maintenance of national defence, of internal law and order, and the administration of justice and of contracts.

45. The Commission seems to think that it is possible to evaluate a court case and conclude that there was no public benefit associated with it. That is wrong: *D'Orta-Ekenaike*[27]. Every case has a public benefit. Of course, the case will resolve a controversy between the parties and so achieve a benefit for them. But because the court decides each case in public and gives reasons for that decision, its decision necessarily has a public impact. The decision identifies the law that applies to the factual situation and what the result is.

46. The Commission adopted the opinion of Chief Justice Wayne Martin that governments should not "subsidise" litigation between substantial corporations or others with substantial incomes[28]. His Honour observed that there was "a lot to be said for a regime in which there is a capacity to full cost recover from those sorts of litigants"[29]. I disagree.

47. One problem with this approach is its unstated premise that the decision in the court's reasons for judgment affects only those rich parties. It does not – it clarifies or decides the law for the whole community. Another is that the approach fails to recognise that everyone is equal before the law. If it were adopted, it would be a form

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25 opening of Law Term address: *Reformulating Reform: Courts and the Public Good:* 4 February 2015 at [22]
26 P A Samuelson, *Economics: an introductory analysis* (McGraw-Hill Book Company, 7th ed, 1967) at 47
27 223 CLR at 16 [32]
28 Vol 1 p 557
29 Vol 1 p 558

of taxation by government on particular litigants who meet a particular criterion, perceived wealth or income, where they exercise their rights to access justice.

48. How would this arbitrary criterion for charging litigants apply? Would it apply to a well-resourced litigant suing a government or vice versa? Should this be different if the government is not AAA credit rated? After all, governments are well resourced users of the judicial system on both sides of the record.

49. The use of differential fees produces arbitrary results. The first difficulty with different fee scales for different classes of litigant or different classes of litigation is that they do not result in treating everyone equally before the law.

50. The two longest cases I have heard and decided each lasted 26 hearing days. The first involved a group of individuals mostly of modest means, backed by a litigation funder suing the developer of an apartment hotel. The second involved a corporate vehicle of a very successful businessman suing the supplier of equipment.

51. The Commonwealth Government's proposed fees, that would be payable from 1 July 2015 in the Federal Court, include some significant increases over the current fees. No particular logic appears in those proposed scales, as becomes clear if one considers how the new fees would apply to the two cases I have just mentioned.

52. The proposed hearing fees for an individual would be about 40% of those for a corporation. After a "setting down fee" for a hearing of $2,505 for individuals and $6,090 for corporations, that includes the first day, the next three days would cost individuals $995 each day and corporations $2,435. The fees would increase by about 60% for individuals and 80% for corporations after the first four days, then increase again by another 100% after the first nine days, and then by a further 50% from the 15th day onwards when individuals would pay in court fees of $5,010 per day and corporations $12,970. Over a 26 day trial, individuals would have to pay $90,610 whereas a corporate plaintiff or applicant would have to pay $234,185.

53. But what if the corporation were a small family company that bought a franchise operation and was suing a multinational franchisor by alleging that the franchisor had engaged in unconscionable conduct, in contravention of ss 20 or 21 of the *Australian Consumer Law*[30]? Such a person would have exercised rights given by the Parliament in legislation to apply to the court for relief under ss 232-236 of that law. Why is the

[30] Sch 2, *Competition and Consumer Act 2010* (Cth)

small family company treated the same as a company owned by a tycoon or a subsidiary of a multinational?

54. The purpose of the small corporate franchisee bringing the litigation is entirely self-interested, in the sense that it is asking for justice according to law. So is the interest of its franchisor. Moreover, the franchisor is likely to have significant financial resources, and can, if it choose, raise many issues to lengthen the proceedings. And, because it is being sued, it does not have to pay the Commission's access to justice fees. Similarly, individuals who bring proceedings can be backed by a litigation funder, or can have had their name used by an insurer who is subrogated to their insured's rights.

55. The burden of paying court fees falls on the party who brings the proceedings, although if he, she or it wins, it will probably obtain and can then enforce an order for costs. However, those court fees will only be recoverable years later. Any small individual or corporate plaintiff would struggle to pay many tens or hundreds of thousands of dollars in court fees in addition to his, her or its own legal fees, particularly given the loss of revenue due to the party's involvement in running the litigation. This example is typical of anyone suing another person whom the first alleges has committed a legal wrong, including a breach of contract, a tort or a breach of a statutory right.

56. The circumstances of each individual plaintiff or applicant are infinitely variable. Individuals can range from the average person of modest means, to the very rich or poor. They may be backed by litigation funders or insurers. Yet all are lumped together to pay one fee. In contrast, corporations also can have a huge range of financial circumstances, and most are the vehicles of people who use them to run their family or small businesses and whose financial circumstances are often very similar to those of individuals.

57. Again, because of the arbitrary categories of individuals and corporations, all those people are not treated equally before the law. They do not all have the same access to justice as others. Thus, people whose financial circumstances are substantially the same must pay different fees to exercise their right to come to court depending on an entirely arbitrary categorisation that has no hint of fairness about it.

58. There are no satisfactory, let alone just, criteria to determine how any particular category of legal claim should qualify for higher or lower fees, or why particular litigants should be given differential fee treatment as decided at the whim of the executive government in fixing fee criteria. Those who advocate discriminatory fees, perhaps from the best of motives, are putting forward, in substance, a system where all persons will not be equal before the law. And the members of the different categories can be discriminated against by one of their potential opponents, namely a government.

59. I am not ignoring the potentially very great expense that parties can be required to pay for legal representation. However, a person's decision to pay legal fees involves making choices and agreements about what and how much they pay. But exercising a right to go to court for the redress of a real or perceived grievance by an independent, impartial judge or jury, usually is not a real choice for the plaintiff.

60. Also, well-resourced and sometimes highly strategic defendants can and do make cases longer and more complex, as the Supreme Court of Canada recently observed[31]. The Commission's user pays model requires only the party who brings the initial case to pay the fees up front, as a precondition to being able to exercise the common law right of access to the courts. Where is the fairness or justice in that, let alone the provision of access to justice?

How does the apparent value of the issue affect the charging of a fee?

61. Sometimes cases about very small amounts of money can have highly significant impacts in clarifying the law for many persons, or a whole industry or sector. For example, *Fothergill v Monarch Airlines Ltd*[32] was a case about a passenger's lost contents from his baggage. The contents were worth £16.50. The case concerned whether a claim made at the airport by a passenger that his luggage had been damaged could also include a claim for the lost contents that he discovered were missing on his return home. He failed to inform the airline of his claim for the lost contents until after the seven days limitation period under the *Warsaw Convention*[33] that governed

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31 *Trial Lawyers Association of British Columbia v Attorney-General of British Columbia* [2014] 3 SCR 31 at 60-61 [62]-[62]

32 [1981] AC 251

33 *Convention for the Unification of Certain Rules relating to International Carriage by Air* done at Warsaw on 12 October 1929, as amended by the *Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air* done at The Hague on 28 September 1955, set out in Sch 1 and 2 of the *Civil Liability (Carriage by Air) Act 1959* (Cth)

such claims for international air travel. Thus the issues concerned whether the initial claim covered all loss and how the international convention should be interpreted.

62. The House of Lords resolved an issue that affected international air travel not just in England, but internationally. And, their Lordships gave considered speeches on construing international conventions. It was a very important case for a very large industry involved in international trade, and one that affected all travellers by air. Yet, it was a case for a trivial amount, between an airline and an insured traveller in whose name the insurer brought the proceedings.

63. How do such test cases fit into the Federal Government's existing and proposed differential fee structures or that proposed by the Commission? The States and Territories also have a variety of substantial court fees, though none are as high as those in Commonwealth courts. And, what if the case is between an infrastructure entity, like an electricity supplier, and a State over the level of fees that the supplier can charge customers in an industry worth billions? The issue affects many people in the State and the State itself. Why should the supplier party pay full cost recovery fees, half of which could be payable by the State, when the case resolves not only an issue between the litigants but also one for the benefit of the citizens of the State? Why should the other litigant pay more than anyone else to establish the true legal position?

64. No satisfactory, or just, test can be devised to determine in advance whether any particular case has no public benefit so as to qualify for the suggested liability for full cost recovery fees. Indeed, the reason most cases that do not settle, especially those involving sophisticated or well-resourced litigants, go to court, is because the law and the facts are not clear and the parties need authoritative resolution.

Differential fees can control and deny justice

65. In civil litigation, the disputes can be between private parties, such as individuals or companies, or between private parties and the executive government. When the executive sets court fees, it can use its power to make it more difficult, or practically impossible, for a private party to challenge the lawfulness of a governmental decision.

66. There is a significant threat to our democratic values if the executive or the courts can use fees to regulate or control the rights to equality before the law and unimpeded access to the courts. That is especially so where a party brings proceedings to

challenge the legality or correctness of a government decision. Governments can set court fees at levels that discourage legal challenges to their own or their agencies' conduct.

67. Last year, the Supreme Court of Canada held that a Provincial government, like one of our State or Territory governments, did not have constitutional power to impose hearing fees that prevented people from having their private and public law disputes resolved by Canada's superior courts[34]. Writing for the majority, McLachlin CJ said that access to the courts is fundamental to the rule of law. Her Honour applied an earlier decision[35] that held:

> [t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

68. The majority drew that implication from s 96 of the *Constitution Act 1867* (Can) which created the power of the Governor-General to appoint the judges of the Canadian Provincial Courts. A similar power exists in s 72 of our *Constitution.* McLachlin CJ said that[36]:

> If people cannot challenge government actions in court, individuals cannot hold the state to account – the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.

69. The majority also held that laws cannot prevent citizens from accessing the superior courts and that there were constitutional constraints on the power of the Provinces to impose hearing fees. They said that the power was limited to imposing hearing fees that do not cause undue hardship to a litigant who seeks a determination of a superior court. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may be unconstitutional, absent adequate exemptions. The majority concluded that "hearing fees must be set at an amount such that anyone who is not impoverished can afford them"[37].

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34 *Trial Lawyers Association of British Columbia v Attorney-General of British Columbia* [2014] 3 SCR 31 at 50 [35]-[37] (2014 SCC 59) per McLachlin CJ, Le Bel, Abella, Moldaver and Karakatsanis JJ

35 *BCGEU v British Columbia (Attorney-General)* [1988] 2 SCR 214 at 230

36 [2014] 3 SCR at 52 [40], citation omitted

37 [2014] 3 SCR at 54 [48]

70. Their Honours said that the Court had to have a discretion to waive hearing fees in any case where the fees effectively would prevent access to the courts if the fees would require litigants to forego reasonable expenses in order to bring claims[38]. And, as McLachlin CJ said, the Canadian hearing fees, which only went up to $800 per day after 10 days of trial, did not promote the efficient use of court time. Rather, she held, at best, the fees promoted *less* use of court time. On these bases, the Court held that the fees were constitutionally invalid[39].

71. The English Divisional court reached a similar result in 1997 in respect of the Lord Chancellor's decision to increase court fees and repeal fee exemptions for persons in receipt of income support. Laws J said[40]:

> Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door.

72. In commenting extra-judicially on this decision, Brennan CJ said that "user pays" is consistent with the rule of law only to the extent that every genuine user can pay. He also said that "user pays" puts a premium on financial power, not on the genuineness of a need for legal protection[41].

McKenzie friends

73. The Commission recommended[42] that each jurisdiction, its courts, tribunals and legal professions should:

- work together to facilitate the use of McKenzie friends to assist self-represented litigants, including through developing and implementing guidelines for courts and tribunals and a code of conduct for McKenzie friends;
- develop and implement guidelines on other forms of non-lawyer assistance in courts and tribunals, where they are not readily available[43].

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38 [2014] 3 SCR at 53-54 [45]-[48]
39 [2014] 3 SCR at 61 [63]
40 *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 586G
41 72 ALJ at 36
42 Ch 14
43 Recommendation 14.3

74. The Commission recognised that the traditional role of a McKenzie friend is a non-lawyer who offers a litigant in person basic assistance such as moral support, help with paperwork, (both before and during court) and, sometimes, sits next to the self-represented litigant and quietly assists during a hearing.

75. The use of the McKenzie friend has become widespread in the United Kingdom. It has led to a number of concerns. The situation in England and Wales is summarised in a report of the Legal Services Consumer Panel, "*Fee-charging McKenzie Friends*", of April 2014[44]. That report identified a number of concerns with the manner in which McKenzie friends can operate in that jurisdiction.

76. The JCA supports the proposal of the Productivity Commission. The "light touch" regulation which might be appropriate should be developed by courts rather than governments. The Courts are best placed to provide insight as to the manner in which McKenzie friends can assist, or in some cases damage, the presentation of a case in court.

Payment of legal costs for litigants in person

77. Recommendation 13.5 of the Report reads:

> In addition to out-of-pocket expenses such as disbursements, successful self-represented litigants (including those who have purchased 'unbundled' legal services) should be able to recover legal costs from the opposing party in courts where costs are awarded.

78. While this is a matter of policy for government there appears to be a double standard involved in the recommendation. The Commission reported[45]:

> The time and effort expended on a case by SRLs [self-represented litigants] are still costs borne by them. While SRLs are not legal professionals, an SRL obtaining a judgment in their favour suggests that they likely expended as much (if not more) time and effort on their case than a lawyer would have in achieving the same outcome. As such, there is little logical basis for arbitrarily compensating the time and effort of one person over another, when the outcome attained by both is the same.

79. The inconsistency in that approach is that it would allow a litigant in person[46] to, in some way, recover costs for the time spent by the litigant in person on litigation, yet would not

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44 Legal Services Consumer Panel *Fee – Charging McKenzie Friends* (17 April 2014) available at http://www.legalservicesconsumerpanel.org.uk [accessed 24 June 2015]

45 Vol 1 pp 477-478

46 called SRL by the Commission

allow recovery for a person who was expending the same amount of time and effort, but who is represented by a lawyer.

Court processes

80. The Commission has made some helpful recommendations that individual courts might consider to assist in managing cases. These include the potential benefits that might flow from courts reviewing their discovery rules and practices, in light of litigants' increasing use of electronic communications that are also stored electronically[47].

81. I should note that the Australasian Institute of Judicial Administration has just agreed to fund research by Prof David Bamford of Flinders University Law School into a project to ascertain the impact of current disclosure processes on parties, practitioners and courts and to compare observed differences between discretionary and standardised disclosure processes. When that research is completed, hopefully by late next year, it may help courts to assess how their current mechanisms for disclosure might be improved.

82. The Commission also recommended that courts assess the potential for greater use of individual dockets and other approaches to facilitate consistent pre-trial management, with a view to improving the fair, timely and efficient resolution of proceedings[48]. This recommendation is sensible, because it takes into account that each court, in making such an assessment, will have regard to the individual nature of its jurisdiction and whether adopting such procedures will assist that court in discharging its judicial functions.

Litigation funding

83. Litigation funding is now an accepted means by which matters can be pursued in courts. The Commission did not address the significance of any impact that the availability of such funding has had on access to justice for others, including the use of court resources. Class actions can consume a large amount of those resources because they are generally complex cases that take many weeks to hear, once they have been case managed to that point. Moreover, the trial judge must then spend

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47 Recommendations 11.4 and 11.5

48 Recommendation 11.3

many more weeks analysing the usually bulky evidence and lengthy submissions of the parties when writing reasons for judgment.

84. Litigation funders are not altruists. Because they are businesses, they see their goal as profit making, not as providing access to justice. Class actions can aggregate for a litigation funder very small losses that individual class members may have suffered, into very large ultimate awards. Thus, litigation funders can earn very large rewards for their shareholders from running class actions over relatively trivial, but multiple, individual losses.

85. The Commission recommended that litigation funders be regulated by licencing provisions to ensure their capital adequacy and that they act appropriately in respect of information that they give to their "clients"[49]. I understand the Commission, when referring to funders' clients, to mean the funded parties and any class of persons whom they represent. That recommendation is appropriate.

86. So too is the Commission's recommendation that if courts cannot already do so, they should *first*, be given the discretion to award costs against non-parties in the interests of justice, and *secondly*, require the disclosure of funding agreements[50]. The Commission also recommended that these powers apply equally to litigation funders and to lawyers charging damages based fees.

Legal Aid

87. In December 2014, the JCA welcomed the Commission's recommendations to improve legal aid services, including by increasing funding for legal assistance to adequate levels[51]. The almost inexorable reductions of legal aid funding by governments over recent years has added greatly to the burden on persons of relatively modest or little means in their conduct of minor or lesser criminal proceedings and their conduct of all classes of civil proceedings. This, in turn, has significantly increased the numbers of litigants in person who, understandably because they are not lawyers, can take up large amounts of court and judicial resources and time, as well as those of their litigious opponents.

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49 Recommendation 18.2
50 Recommendation 18.3
51 Ch 21

88. The funding of legal aid raises important policy and financial issues for governments in difficult economic times. However, the Commission's economic analysis of the justification for increased government funding of legal aid is an area in which it has expertise and its recommendations ought be given weight.

Pro Bono services

89. The JCA also broadly agrees with the Commission's recommendations for improving support for the legal profession's ability to give pro bono legal assistance to persons not able to afford a lawyer[52]. Such assistance also facilitates the courts being able to hear and decide cases more efficiently because a party's evidence and arguments will be presented by a lawyer who can focus on the real issues.

Conclusion

90. The Commission's report, like the curate's egg, is good in parts. However, in this paper I have concentrated on what the JCA regards as the Commission's serious misconception that persons can and should be made to pay significant sums to exercise their common law right of access to a court of justice when they have a civil controversy involving a government or another person. That misconception cannot be left uncorrected.

91. The courts are and must be open to all so that they can perform their constitutional function, expressed in the judicial oath, of doing right to all manner of people, without fear or favour, affection or ill-will. Access to justice must be a meaningful reflection of equality of all persons before the law. No member of our community should be required to pay substantial, arbitrarily set fees to governments for that right.

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[52] Ch 23