What Does The Legal Profession Want From The Courts?

Presentation by Michael Gawler, Vice President, Law Institute of Victoria
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Introduction

I should make it clear that the views I will express this morning are personal, despite my attendance at this colloquium as Vice President of the Law Institute of Victoria. The hardest thing for all of us is to be objective about the service that we provide to the community. We lawyers love the precision and fairness of the law and assume that the Courts are the best forum for dispute resolution. Many in the community would now disagree.

The business of the Courts is substantially directed by wealthy and powerful interests now. In civil matters, how much business would be left to our Courts if matters involving banks, insurance companies and government were removed? Those powerful, wealthy users of our Courts are not interested in paying a premium to support the Courts and the Westminster system of government. We may lose their custom if we are not careful.

The same problems that threatened their continued custom are the reasons that the great majority of the community cannot choose to access the Courts. The greatest problem is expense. Of course, this has always been a concern to prospective Court users. The situation is worse now, because the capacity of individual lawyers to ameliorate that problem by providing services *pro bono* has diminished seriously over the last two decades. Statutory removal of legal work in Accident Compensation, Personal Injury and other areas, and market competition and conveyancing, tax and business advice and a multitude of other areas, have seen to that.

The second major problem for prospective Court users is the time it takes for a dispute to be dealt with. It is unattractive to a business person to be told that a dispute over $50,000.00 will take more than a year to be heard by the Courts and will involve a costs risk almost equal to the amount in dispute, in many cases. The harsh reality for litigation lawyers is that we are constantly asked to justify the expense and time involved in using the Courts to resolve disputes.

What the profession wants from the Courts is the same as what the community wants - quicker and more affordable justice. As it is, our Courts are very good at what they do, but too expensive to attract custom from most prospective users.

I am sure it is offensive to all of us when people involved in disputes do not exercise their rights to press a claim or defend a claim, because the costs involved in doing so are too high - either for them to afford, or in relation to the quantum of the claim.

The risk

In addition to the social in equity resulting from the Courts being unavailable to many, there is more than a slight risk that efficient entrepreneurial accountants or others in the community will bypass the Court system by finding alternative means of resolving commercial disputes. Parties to disputes all want a minimum cost, speedy, acceptable resolution. None of them care about or understand the importance of maintaining the Westminster system and strong independent Courts.

As an indication of just how imminent that threat is, I should say something about multi disciplinary practices. I am chair of the Victorian Law Institute's working party on MDPs. The Legal Ombudsman in Victoria has recently delivered a substantial report to the Victorian Attorney General, an indication that

there may well be legislation concerning MDPs in preparation soon. This is not a Victorian phenomenon. There is global interest in MDPs. I am speaking to you today because the President of the Victorian Law Institute is in Washington attending an international conference on MDPs and the President of the Law Council of Australia, Fabion Dixon, is attending a conference on MDPs in Paris. In France at the moment, the five largest law firms in the country are the creatures of five top tier accounting firms. That is an indication of the seriousness with which globally organized, powerful, commercial interests are looking for alternatives to the services that we have offered for so long.

In addition to the risks posed by entrepreneurial accountants, governments around Australia are eagerly searching for alternatives. Often those alternatives are structured to exclude lawyers and limit appellate rights. Justice Murray Kellam's new super Tribunal in Victoria, the Victorian Civil and Administrative Appeals Tribunal, permits lawyer representation only with leave, not by right.

What can be done to change?

Victorian Courts are reforming. They are talking to lawyers about reform and they are making changes. Master Kings might well say in many cases now that delays in hearings are being caused by practitioners not being ready. However, economic reality is that we lawyers don't prepare cases to the point where they are ready for trial until just before trial. There is no point in double handling. "Just in time" preparation is an economic necessity.

We all think that recent reform efforts have greatly reduced hearing delays, but what do our customers think? When we tell them that their case will take more than a year to sort out, most clients think that time line is ridiculous. If they had an alternative, they would probably take it.

To date our joint best efforts of reform have been useful but we have a long way to go. The Courts and lawyers have been asleep for too long. We have a great gap to make up before we meet our customers' expectations, and we do not have an indefinite time to do so.

The first change I would like to see is the Courts accepting a responsibility to lobby government to move away from the "user pays" principle of Court funding. In the same year that it slashed Legal Aid funding by $100 million dollars, the Federal Government more than doubled fees to access the Federal Court. That obviously makes justice less accessible and exacerbates the problems. The Courts can't leave it to the profession alone to lobby for those changes.

I would like to see more aggressive Court management, of the style introduced by the Federal Court. The docket system, in which an individual judge is assigned to each case virtually immediately it is issued, appears to be working very well. I think few in the profession would have anything but great praise for it - save, because, those who are accustomed to using delay and expense as their tools of trade.

My next concern is that the rules of procedure in our Courts should be the subject of constant examination. There needs to be a clear focus on the purpose for every rule of procedure. There should be an intention that the rules be used to achieve justice, and discretion exercised accordingly. The rules of themselves are not things of beauty, to be upheld for their own sake. They should be the subject of our constant scrutiny and we should be ready to change them.

In the course of directions hearings I think most practitioners would appreciate more intervention from judges. Each party's representatives should be invited to identify the real issues in dispute and to curtail unnecessary formality.

Perhaps it is time for procedural rules to require a denial of an allegation of fact if it is to be put in issue at trial. Use of the "not admitted" pleading on most occasions simply increases the expense and difficulty of taking a matter to trial. Perhaps it is also time to consider requiring all pleadings to be verified on Affidavit by the party filing them, and to require all practitioners to satisfy themselves on reasonable grounds that claims made and defences pleaded are reasonably justified by their instructions.

When it comes to trial, if the adoption of an early intervention directions approach results in the trial judge knowing the case, why should the judge not give greater direction as to how the case is presented, what evidence is to be heard and what cross examination is to be allowed? Of course there are risks in such an approach being taken, but perhaps the benefits of that approach would out weigh those risks.

Lastly, if a judge is confident that it is appropriate to do so, why should she or he not express a view about the evidence being given or an argument being presented at trial, where that view might assist resolution of the dispute? Again, although there are obvious dangers in following that course, the shortening of hearing time I think would more than justify the adoption of that course on many occasions.

Conclusion

Your attendance at this conference is a good indication of the seriousness of the problem we face. I am grateful for the opportunity to provide to you some practitioner perspective. Thank you for your attention.