Proportionate Justice[1]

Thank you for giving me the opportunity to speak today. An appointment to the Bench does not mean that you cease to be opinionated. It just means that generally you should cease spouting opinions in any public or semi-public forum. This is ironic because prior to being appointed no one was particularly interested in letting me spout my opinions in any public or semi-public forum. After my appointment the only interest in me doing so usually arises from the fact that spouting opinions on mildly controversial topics in public or semi-public forums is not something I should be doing. The end result is that the only people who ever hear what I think are my family and close friends, and they have either heard it all before or they are not interested in hearing it in the first place. But for today it was nice to be asked.

In this speech I would like to outline a few thoughts on proportionate justice, the constraints on achieving it and some tentative ideas that might advance it. Of course this speech represents my thoughts only. It does not represent the views of the Court or any other judge of the Court.

When I told the organisers the title of my speech I detected a little excitement because the topic of proportionate justice sounds like an address on mandatory sentencing. Mandatory sentencing is a concept which is the antithesis of the principle that curial punishment should be proportionate to the particular crime that an offender has committed and their individual circumstances. However I am not talking about that concept of proportionality. On the topic of mandatory sentencing I think it's best to simply refer you to Chief Justice Bathurst's address at this year's Opening of Law Term.[2]

[1] Keynote address to the New South Wales State Conference of the Australian Lawyers Alliance, 20-21 March 2014.

[2] Chief Justice T.F. Bathurst, "Community Confidence in the Justice System: the Role of Public Opinion" (speech delivered at the Opening of Law Term, Sydney, 3 February 2014)

My comments today concern civil litigation and in particular two aspirations, if I can call them that; the first of which is that the cost of litigation should be proportionate to the amount in dispute or the interests at stake, and the second being that court resources consumed by litigation should be proportionate to the issues in dispute or the interests at stake.

As no doubt many of you are aware, in June 2013 the previous Federal Government commissioned the Productivity Commission to undertake an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law. The Commission is required to report by September this year. It has already received a very large number of submissions including a lengthy submission from this body.

I note that one of the sessions today concerns that inquiry. I would like to reassure the presenter of that session that I am not going to opine at length on the Commission's inquiry, or attempt to predict where it may be going. That said, I note that although parts of the Commission's terms of reference use the phrase "access to justice", its true focus appears to be dispute resolution by courts and tribunals and the utility of various alternative dispute resolution methods. I say that because often when we hear discussions about access to justice it is clear that for many people in the community that is a wider concept than being involved in litigation. It can mean simply having access to an advisor or advocate or some form of process to address a grievance.

Leaving aside the private legal profession, we are lucky to have a number of extremely dedicated and I might add cost efficient institutions both within and out of government to meet that need. An obvious example of the former is the various Federal and State Ombudsmen and an example of the latter is the network of Community Legal Centres. Their role and that performed by bodies like them in assisting the courts performing their function should not be underestimated. If basic advice, advocacy or grievance services were to become seriously underfunded then I have no doubt that disaffected citizens would simply start approaching the courts. The problems faced by the higher courts in dealing with unrepresented litigants who

have grievances, especially against the executive government, have been well documented. The courts are not advice providers and cannot assist those people to any significant degree without compromising their impartiality. Significant public resources are consumed in dealing with these cases, when often the underlying and often justifiable grievance could have been resolved at a much earlier stage by some sympathetic yet independent advice, or by someone making calls, writing letters or both.

But I digress. The Productivity Commission's terms of reference identify a range of matters for it to consider, which include various factors affecting the cost of legal representation and a broader concept of the "costs of accessing justice services". Understandably, court processes and procedures are not immune from the Commission's review.

Term of Reference 4 charges the Commission with considering "whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute". This form of proportionate justice was for a period of time something of a barbeque stopper in any discussion about the overall approach to civil litigation. It is an aspiration that I would like to discuss in a little more detail.

The aspiration to this form of proportionate justice is one that I regard as embodied in ss 56 and 57 of the *Civil Procedure Act 2005* (NSW). As no doubt many of you are aware, section 56 is a mandate to the Supreme, District and Local Court that the "overriding purpose" of that Act and the rules is to facilitate the "just, quick and cheap resolution" of the real issues in proceedings. Section 57 specifies that proceedings are to be managed having regard to a number of objects which include the need to dispose of proceedings in a timely manner and "at a cost affordable by the respective parties".

Section 57 also requires that regard be had to "the efficient use of available judicial and administrative resources". This embodies the other aspiration I referred to,

namely that the judicial and associated resources consumed by a case should be proportionate to the amount in issue or the interests at stake.

In discussing these concepts I really want to do no more than dip a small toe in a large pond and outline some of the constraints on meeting these aspirations and float some possibilities. I confess to not having undertaken any empirical research. What follows is nothing more than some thoughts that occurred to me from exposure to a variety of dispute resolution bodies during 24 years of practice and a grand total of two years as a judge.

At the outset it needs to be recalled that the aspiration is proportionate justice and not merely an aspiration to lower the transaction costs for an investment or a gamble. The overriding objective must be an outcome that is just according to law, achieved by a process that from an objective viewpoint is fair.

SOLICITORS' DUTIES

The first matter I wished to note about proportionate justice concerns the nature of the duties owed by the legal profession. A lot of the analysis addressing the costs charged by legal practitioners assumes they provide services in a competitive market. For example, many of the submissions to the Commission's inquiry have addressed such topics as restrictions on advertising by legal practitioners, a matter I will not address.

A market style analysis has its uses, but in some respects it is deficient. I will mention two deficiencies which can impact upon proportionate justice. One aspect of free market theory in relation to service providers is that consumers are not only free to negotiate over the scope and level of service, they are also free to negotiate over the standard of service. While there are fire and hygiene restrictions, if you want to stay in a one star hotel you can. I note that most of you have chosen not to. However, without delving into the technicalities, there is an irreducible standard of service that a legal practitioner must provide to their clients regardless of their clients' wishes, and that standard is well above the equivalent of fire and hygiene in

the hospitality industry. Solicitors and barristers cannot bargain with their clients to provide a sub-standard level of service.

The other matter to note is that unlike most other markets for services, in the context of litigation the overriding duty of legal practitioners is not the duty they owe to their clients but rather the duty they owe to the courts. These are not just duties of candour and honesty, but duties as to the expeditious and efficient conduct of litigation. Everyone in this room knows that the court will not accept as an excuse for a legal practitioner's failure to comply with a court timetable the fact that they agreed with their client that compliance was not necessary. At the more pointy end, a legal practitioner might agree with a client that they will only prepare the case up to the point of a hearing but will not act for them during any hearing. If they did this and it led to an adjournment, then it is far from clear whether an application that they should personally pay the opposing party's costs of the adjournment would be answered by the fact that they had an agreement with their client which excluded their appearance at the hearing.

Now these two aspects of legal practice can present difficulties with cost capping. There has been a recent trend in some areas of personal injury litigation to impose caps on the costs recoverable from the other party or between solicitor and client.[3]

In a sense, these caps achieve a form of proportionate justice. With caps on the amount of costs that a losing defendant must pay, then that party should not end up paying an amount of costs out of proportion to the claim made against them. However this form of caps has a tendency to increase the proportionate costs for plaintiffs, as the solicitor client costs consume a larger part of the proceeds of a judgement, award or settlement they obtain. I suppose that is in part addressed by the caps imposed on solicitor/client costs. At the extreme end, I note that in relation to some types of legal work, legal practitioners are precluded altogether from charging their client.[4] Who could complain about a proportionate cost of zero?

[3] eg *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 337 and s 341; *Motor Accidents Compensation Act 1999* (NSW), s 149.

[4] See *Workers Compensation Act 1987*, s 44(6)

Well, not surprisingly, the submissions from professional bodies, including this one, express strong opposition to these trends. This can easily be dismissed as self interest. For my part I can understand the frustration of a practitioner who is professionally bound to provide a reasonable standard of service in a difficult case, finding themselves working for no prospect of recovery because they are squeezed between their obligation to the client and a court on the one hand, and a costs cap of some kind on the other. In the longer term they either won't do the work or they won't do it properly.

Another topic addressed in a variety of the submissions to the Productivity Commission is contingency fees. I find it interesting that much of the debate about contingency fees occurs in the context of class actions. There was a time when the discussion of those concepts suggested that they appeared to be joined at the hip. No doubt a healthy diet of John Grisham novels has one thinking about the "King of Torts" plaintiff lawyer flying about in their personal Gulfstream jet. Maybe some of you share that dream.

However, believe it or not, the bulk of personal injury claims in the United States is not conducted via class actions and does not involve runaway juries. There are a multitude of individual claims many, if not most, of which are for modest amounts. In many of those cases the plaintiff's lawyers charge fees determined by reference to a percentage of the settlement or award. It would be interesting to see if the proportion of fees charged to injured claimants who are not part of a class action in a contingency fee environment was lower or higher than time based charging on a no win/no fee basis, which is the basis on which most personal injury litigation is conducted for plaintiffs in this country.

I am not here to advocate in favour of contingency fees for individual or smaller cases. All I suggest is that it is something that plaintiff lawyers and institutional defendants should think about at least in the context of cost capping and proportional justice overall. If a legal practitioner acting for a plaintiff is to be subject to cost capping, then to allow some form of regulated contingency fees may enable them to

make up what they lose from the operation of the cap, while still keeping costs proportional to the amount of the claim from the perspective of both sides.

It is notable that many of the caps are set by reference to a percentage of the amount awarded or the settlement sum agreed upon.[5] These caps are a type of a reverse contingency fee limiting the amount that can be recovered by reference to a percentage, but effectively requiring time or task based charging as well. If a percentage of the award is a proper basis for capping fees, why isn't it also a proper basis for charging fees?

No doubt the devil would be in the detail of any regulatory system that authorises contingency fees. A number of issues would need to be worked through. The obvious concern is the potential conflict between a solicitor's interest in achieving an early settlement and the client's interest in maximising their recovery. However it needs to be remembered that conflicts between interest and duty can arise where there is time based charging, especially where the legal practitioners are retained on a no win/no fee basis.

If cost capping really is denying or removing the opportunity for proper representation of clients in complex areas, then it needs to be looked at. Contingency fees in capped environments might be a start. If they do not turn out to be evil, then there could be scope to extend them to claims that are not part of any class action. It is a pointless exercise to confer rights under complex statutory schemes or regulate existing rights by even more complex schemes, but then impose measures that effectively deny the opportunity to enforce them.

NATURE AND COMPLEXITY OF LAWS

One limitation upon the Productivity Commission's remit is that the obstacles presented by our substantive laws to achieving proportionate justice cannot be looked at. One can understand that, given that to do otherwise would turn the

[5] See, for example, clause 9(1) and Schedule 1 to the *Motor Accidents Compensation Regulation 2005*.

Commission into a roving law reform commission with no end to its inquiry likely to be achieved in the foreseeable future.

However, that is no reason for others to ignore the problems that our substantive laws can represent. There are two related problems with our substantive laws that represent real barriers to achieving proportionate justice of either kind that I have mentioned. The first is the sheer complexity of our laws, and not just judge made law but some of the statutory schemes creating new rights and regulating existing ones. The second is that by and large our substantive laws have the same operation regardless of the amount in dispute. Put another way, theoretically the net cost of fully litigating the same dispute can be the same if the amount in issue is $50,000 or $500 million. Many of our laws do not differentiate in their operation depending on the amount of one party's actual or alleged loss, or even provide some easier means of proof of certain forms of loss.

Let me say something briefly about complexity. In a speech delivered in 2011, prior to his retirement, the then Chief Justice of South Australia, the Honourable John Doyle AC, identified a number of factors which he predicted would lead to the demise of civil litigation as we know it.[6] One of the factors he identified was the increasing complexity of the law. It has not always been so.

Sitting in the Louvre is part of a set of stone tablets that record the Code of Hammurabi. It dates back to around 1700BC. The stones record a very detailed legal code enacted, if that is the right word, by the sixth Babylonian king, Hammurabi. The code covers the criminal law, but also extends to contract law and professional liability.

Two of the rules in the code caught my eye. What is sometimes referenced as clause or rule 229 states: "If a builder builds a house for a man and does not make

[6] Chief Justice John Doyle, "Imagining the Past, Remembering the Future – the Demise of Civil Litigation" (Speech delivered at the 8th Gerard Brennan Lecture, Queensland, 24 June 2011; reproduced at (2012) 86 ALJ 240.

its construction firm, and the house which he has built collapses and causes the death of the owner of the house, that builder shall be put to death".

A sort of compensation to relatives clause is the addendum in clause or rule 230 which states: "If it causes the death of a son of the owner of the house, they shall put to death a son of that builder".

One thing I am prepared to bet is that Babylonian houses were well built. As a rule of liability and when it comes to specifying relief these provisions are generally clear. It can be expected that litigation of a claim under these clauses was quick, although I suspect it was fairly hard fought. Of course we lawyers spot omissions. For example, what would happen if the builder had no sons or had unfortunately lost all of them from litigating over previous house collapses? What if he had more than one son, who decides which son takes the fall? No doubt the principles of statutory interpretation would come to our aid, if not to the builder's or what remained of his or her family. I have referred these provisions to the judges who supervise the Supreme Court's building and engineering list. Apparently a practice note is being prepared.

Now, let us consider a current example of complexity which many of you are familiar with and about which you will hear more in this conference, namely the *Civil Liability Act 2002* (NSW). There are many adjectives that can be applied to describe that legislation, but simplicity is certainly not one of them. Its origin was, of course, the insurance crisis that followed the collapse of HIH and the withdrawal of a number of insurers from the market.

Every time I look at that Act I find something curious to me and potentially fatal to one party or another. The starting point is that it is not a code. It did not replace the law of negligence. Instead it created a parallel set of concepts that have to be negotiated in addition to the law of negligence. The Act does not deal with duty of care. It is questionable whether the concept of "precaution" in section 5B is the same as the concept of "breach" in the common law of negligence. The Act includes a concept called "risk of harm" which has a role in the common law, but under this legislation is the focal point of the entire analysis. It is a concept that still awaits

detailed elucidation at an appellate level, more than a decade after the *Civil Liability Act* was enacted. Otherwise the Act includes a very significant number of defences and exonerating provisions, as well as significant limits on the damages that may be recovered.

Obviously many of the provisions pose real problems for the parties. I do not propose to take issue with the vibe of the legislation to the extent that it generally reallocates where legal responsibility lies as between injured persons and defendants. Parliament has determined that balance and it must consider the consequences either of truncating commercial and governmental activity, or forcing injured people to fend for themselves or rely on social security if it has got the balance wrong.

I just note two problems. The first is that the *Civil Liability Act*'s complexity and limits on damages mean that the cost of litigating small or medium claims is often disproportionate in both the senses that I have referred to. The second is that, with the variety of defences and exonerating provisions in the Act, in some and perhaps many cases an injured person has little or no means of obtaining information concerning their overall likelihood of success prior to commencing proceedings. This is especially the case in the context of litigation against public authorities, where information such as the bodies' financial position or the road authorities' knowledge of a particular hazard is not available to a plaintiff prior to commencing proceedings, yet may prove critical to defeating their claim.

The end result is that litigation governed by the *Civil Liability Act* is more costly and fraught with risk than it needs to be. Those who are injured and have no assets may have nothing to lose by starting, provided a solicitor will take it on a no win/no fee basis. However what about those who do have some assets, say a home and only a home? Should we really make people who have suffered a reasonably significant injury double down and risk everything on litigation?

I will just raise three matters for consideration with particular reference to the *Civil Liability Act*, but which are capable of application in other contexts.

The first has been hinted at already. If a scheme operates like the *Civil Liability Act* does, namely by conferring special privileges on certain classes of defendants such as road authorities, then it should at least provide a cheap and effective mechanism for persons to ascertain specific information and documents prior to any litigation. People can then make informed choices and not be confronted with a defence the merits of which they had no means of assessing prior to commencing proceedings. Freedom of Information legislation may be of some assistance, but it contains exemptions, it does not apply to private bodies and even with public bodies sometimes documents do not tell you much without an explanation.

The second point is that there needs to be a serious look at the costs rules operating in higher courts, at least in relation to legislation like the *Civil Liability Act*. Stripped of all of its nuances, the governing rule in the Courts is that the losing party pays the successful party's costs. Of course there are exceptions but generally this rule applies regardless of what interest the losing party sought to vindicate and sometimes applies regardless of why the successful party succeeded.

There have been some changes in relation to costs recently. It is common when tribunals are created for a special costs regime to be enacted. Further, there are some instances of bodies such as community organisations which have brought test cases obtaining an order capping their costs exposure in advance of the case being heard. But generally I am not aware of any proposal to reconsider the criteria governing the awarding of costs in higher courts, and specifically one that allows a broad consideration of the interests sought to be vindicated by the losing party. At an emotive level, one could ask whether a genuinely injured person who conducts a bona fide but unsuccessful case should wear the successful party's costs, or whether a parent who unsuccessfully brings a case on behalf of an injured child should bear the successful party's costs? Of course, as framed, those questions are hard to say no to, but to answer them one needs to know the consequences for the winning party in such cases of being deprived of a costs order. At the very least this is an issue that is worthy of consideration. Perhaps the Productivity Commission is looking at the topic. If it is, I look forward to reading what it has to say.

Lastly, in terms of proportionate justice it is too much to ask for a wholesale rewriting of complex laws to a code of Hammurabi-style simplicity, but at least in some areas, perhaps not the *Civil Liability Act*, but elsewhere, some consideration should be given to providing a more straightforward means of establishing some aspects of a cause of action where the claim is modest. For example, in smaller commercial disputes the legislation could identify the forms of damage suffered and a prima facie means of establishing it.

INSTITUTIONAL CONSTRAINTS

To this point I have discussed some matters principally affecting the first aspiration of proportionate justice, that is, that the costs incurred by the parties should be proportionate to the amount in dispute or the interests at stake. I now want to mention some matters that concern both that aspiration and the other aspiration that I mentioned, namely that the Court resources consumed by litigation be proportionate to the issues in dispute or the interests at stake.

In this context there is also a tendency to treat courts as a form of service provider operating in a market. Generally that type of analysis is misconceived. Courts are not mere service providers. They do not bargain with any counter-party and there is no negotiation over the level or type of service they supply. Instead there are irreducible minimum standards that they must conform to in determining parties' rights. Courts must act fairly, conduct proceedings in public court, determine disputes according to law and provide proper reasons for their decisions. Their independence must not be compromised. However all these matters do not mean that they are not accountable and in particular that they should be immune from comparison with other available models for dispute adjudication. What is important to understand is that those comparisons have their limits, although some lessons learnt about service providers can be useful in considering the position of the Courts.

One comparison that achieved some traction in the debates around a decade ago was the relative advantages and disadvantages of what was loosely described as the inquisitorial style of decision making, compared with our traditional adversarial

model whereby the parties define the issues for determination and decide upon what evidence should be presented. This inquisitorial approach was said to be at least in part derived from aspects of the systems in use in some European countries. So far as I know, litigants in those systems generally incur less cost in litigating disputes than under adversarial systems.

To date, the closest we have to any operating inquisitorial model in this country is some of the specialist Federal tribunals mostly in the immigration area. There is no contradictor in proceedings before those tribunals. The only party is the aggrieved applicant. The issues are not identified by the applicant but by the governing statute. The tribunal member has broad powers to collate evidence and question the applicant. What is notable for present purposes is that to date this model has only proved feasible in narrowly specialised areas and in circumstances where there is no competing party other than the government. In the commencing days of the Administrative Appeals Tribunal ("AAT") it was hoped by some that it would operate in an inquisitorial manner, however their hopes were dashed. I know they blamed "traditionalists" for that outcome, but in my view it was simply a matter of resources that prevented the AAT operating in an inquisitorial manner. The more general the jurisdiction of a body becomes, the larger the resources that are necessary for that body to operate if it wants to assume some form of responsibility for investigating and not just deciding the cases before it.

It is doubtful that the wholesale adoption of an inquisitorial system by any federal court would be consistent with Chapter III of the Constitution. Further it is also doubtful whether its adoption by the Supreme Court or any state court exercising federal jurisdiction would be consistent with the High Court's judgment in *Kable*[7] and the decisions that followed it, including *Kirk*.[8] However all this is theoretical. I cannot imagine the community ever being prepared to devote the resources that would be required for a wholesale move to an inquisitorial style court system. Its adoption

[7] *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51.

[8] *Kirk v Industrial Relations Commission (NSW); Kirk Group Holdings Pty Ltd v WorkCover Authority of (NSW) (Inspector Childs)* [2010] HCA 1; 239 CLR 531.

would amount to an extreme form of cost shifting from private parties to the Court system and thus to the taxpayer. It can be put to one side.

The other type of comparison that has been undertaken is revealed by the debates over the years as to the relative advantages and disadvantages of courts compared with tribunals. This debate is also subject to constitutional restraints of the kind that I have just referred to. At a federal level, Chapter III of the Constitution effectively dictates what type of disputes can be resolved by a tribunal and what must be decided by a court. There is more flexibility for State governments, although again *Kable* cannot be ignored.

Leaving those issues aside, the various issues that have been knocked back and forth in the debate over courts and tribunals have included relative cost for the parties and the state, independence, formality, speed and quality of decision making. Any proper consideration of either access to justice or proportionate justice which decides to weigh into the debate over the relative advantages of courts compared with tribunals would have to look at all of those matters.

In terms of proportionate justice and access to justice, what I am more interested in is addressing the situation where more than one court or tribunal can deal with a case. In particular, who decides which one and according to what criteria?

Let me give you an illustration. If a party wishes to litigate in this State over what would be described as a medium size commercial dispute, say around $400,000 to $500,000, then there at least four possible forums in which they can litigate: the Supreme Court's Common Law Division, Equity Division, and possibly the Commercial List, as well as the District Court. Although there are potential costs consequences for litigating claims under $500,000 in the Supreme Court, these will often not be material if there are other claims for relief. If a non-colourable federal element can be introduced to the case, such as a claim that a corporation engaged in misleading and deceptive conduct, then the party can add the Federal Court and possibly the Federal Circuit Court to their smorgasbord of choice. If the dispute concerns a retail lease and the amount ultimately sought does not exceed

$400,000.00 they can also apply to the Civil and Administrative Appeals Tribunal,[9] thus making seven possible bodies to approach.

The State courts all operate under the same rules, but even amongst them there are differences including the level of case management, the form in which evidence is prepared, the approach to discovery and the expected time to trial. Of course these differences start to multiply when one adds in the other three forums.

There are various means by which proceedings can be transferred between some of these forums,[10] although usually a reason beyond inconvenience has to be demonstrated. The courts can order a transfer of their own motion, but the instances of this being done are infrequent.

The end result is that one party, namely the plaintiff, appears to be vested with a generous array of choices as to where they wish to litigate. They can choose the forum that best suits them in term of case preparation, cost and delay. The defendant has little opportunity to make the same choices. Further, the courts that must devote resources to these cases have little control over their own work flow. There is no particular reason why the forum that is chosen by a particular party will reflect that forum's position in the judicial hierarchy even though, ideally, less complex cases should be in the lower courts and tribunals.

The example I have given is not unique. Discrimination claims, defamation, some tenancy, credit disputes and smaller personal injury claims are just some of the areas in which there is more than one forum in which claims can be heard.

In his somewhat apocalyptic speech that I noted earlier, former Chief Justice Doyle predicted the existing system of civil litigation would be abandoned altogether. He conceived of a future in which all civil claims would be presented at a single registry by the filing of a simple form. A judicial officer would then supervise the claim and

[9] *Retail Leases Act 1994* (NSW) , s 73

[10] see eg *Civil Procedure Act 2005*, s 146; *Federal Court of Australia Act 1976*, s 32AB.

identify what "stream" it would be allocated to and thereby control the level of public resources devoted to it. This would result in control over the forum and progress of the case being removed from the parties. It is not necessary to dwell on whether this would be a good or bad outcome. For my part I have difficulty in comprehending how such a system would ever actually come into being unless we are talking about evolution over geological time periods.

I am content to remain less gloomy or ambitious depending on one's perspective, and say that in a semi-ideal world there would be a transfer of cases between forums to smooth out anomalies in terms of delay and to reflect the hierarchy of the various forums. The High Court's decision in *Wakim*[11] obviously creates significant obstacles to transferring cases between the state and federal systems. Leaving that problem aside, one would have thought there was some scope for exploring a more efficient allocation of cases between the courts, and possibly tribunals, which does not necessarily involve the parties. There must be a common pool of cases that can be heard across divisions, courts and tribunals. It seems to be assumed that a party who starts in a particular court has a prima facie right to stay there, whereas I would have thought they only had a right to a fair hearing by an independent court. In the medium term the aim should be that each forum decides cases of appropriate complexity having regard to its position in the hierarchy. Cases of similar size and scope should incur the same cost to both public and private and take the same time with, hopefully, the same outcome regardless of where the plaintiff commences proceedings.

I will add only one further observation in this context of considering the Court's position. I stated earlier that we can perhaps learn some things from looking at the position of service providers. On that score there is a school of thought that with education and health care providers there should be a conferral of greater autonomy over managing a budget on the entity that provides the service, rather than leaving a central authority to manage or micro-manage budgets. Presumably the rationale is

[11] *Re Wakim; Ex parte McNally & Anor* [1999] HCA 27; 198 CLR 511.

that the entity with more "skin in the game" in dealing with the public will be more responsive to making budgetary decisions that improve performance on that score.

For a significant period the courts have been calling for greater independence in their budgetary situation. A particularly significant speech that addressed that topic was given by Chief Justice Bathurst to the Colloquium of the Judicial Conference of Australia on 11 October 2013.[12] Mostly the appeals invoke the Court's independence as justifying autonomy in budgetary matters. For what it's worth, my view is that this focus is right, but government stakeholders should also remember that when it comes to addressing the needs of litigants, the courts have more "skin in the game" than any other arm of government.

WHOSE COSTS AND WHEN ARE THEY PAID?

The last point I wish to discuss is really only to note that we, and hopefully the Commission, must always bear in mind whose costs were are talking about and when they are incurred.

If one was to step back and review the various changes to court and tribunal procedures over the last thirty or so years, it seems to me to be clear that there has been a general trend to the adoption of a more interventionist approach via case management procedures and the like.

Prior to these changes, litigation commonly proceeded by simply the filing of pleadings, perhaps the service of the odd expert report, the obtaining of a hearing date and the trial being conducted by the leading of oral evidence from witnesses. Prior to the hearing, the parties may have attended court only once before a registrar.

Over time, courts have tended to move away from the approach of letting the parties drift along and identifying the issues based on the pleadings. To minimise court time involved in hearing a case and the prospect of a party being taken by surprise,

[12] Chief Justice T.F. Bathurst, "Separation of Powers: Reality or Desirable Fiction" (Speech delivered at Colloquium of the Judicial Conference of Australia, Sydney, 11 October 2013)

courts have insisted on evidence being given in the form of witness statements and affidavits. The parties are often required to file a great deal of documentation at relatively early stages and commence engaging with each other and the relevant court in an effort to narrow the issues in dispute and shorten hearing times.

I want to stress that I am not a critic of this approach. Quite the contrary. The Supreme and other courts could not perform their function of deciding civil cases if the old methods prevailed for every case. The length of hearings would expand dramatically. The likelihood of adjournments would increase as more and more parties were taken by surprise by something that emerged during the trial. If extra judges were not recruited and court rooms built, then the delays in the system would increase rapidly. Just because a trial adjourns today does not mean that you can tell someone else to start a murder trial tomorrow.

In his speech about the demise of civil litigation, former Chief Justice Doyle queried the utility of case management and, in particular, whether it was wise to front load extra costs on all litigants when a sizable majority of them will settle their cases before trial. He doubted whether it achieved a net benefit.[13] He concluded that the system of civil litigation was broken because it involved a case management role for a judge being grafted onto a system that is premised on party autonomy. This was said to result in an unsustainable system that "moves disputes through a pre-trial stage to a trial, taking time and with high cost, when only a small percentage of the disputes ever go to trial".[14]

He said that three years ago. Three years later, from where I sit, I don't see a system slowing down but rather a perpetual fountain of cases until I reach the minimum and then maximum ages of retirement. However, this is all too impressionistic. In the end we need data about what costs are being incurred, who is incurring them and when they are being incurred.

[13] 86 ALJ 240 at 245

[14] id

I can say that if the Commission was to solely look at the costs imposed on the parties by case management, without considering their necessity in terms of managing court resources, then its analysis will be deficient. A set of recommendations for the relaxation of pre-trial requirements to lower costs that does not consider the courts workload is likely to only shift costs back to the court system and lead to other inefficiencies unless taxpayers chime in, a prospect I would not bet on. In the end the crucial question, or at least a crucial question, is what is the optimal combination of cost allocation between the litigants and the court system and when should they be incurred, bearing in mind the need to ensure that the outcome is procedurally fair and just according to law.

Where that leaves us is that, instead of providing answers at the end of judgments, I pose questions at the end of speeches. Finding answers to such questions is the value of conferences and I commend this one to you.