

Reformulating reform: courts and the public good

The annual Opening of Law Term address was delivered by the Hon T F Bathurst AC, chief justice of New South Wales on Wednesday, 4 February 2015.¹

In the years shortly following the Great Fire of London in 1666, resourceful individuals began to establish private entities which offered fire insurance.² Without any public or organised firefighting units, the insurers – perhaps quite predictably – formed and maintained private fire brigades to guard the properties they insured, as well as to advertise their new services. A mark carrying the insurer's emblem was affixed to each customer's property to help identify which fire brigade was responsible for extinguishing a blaze.

In America, a slightly different practice came about. While firefighting units in the United States were generally formed on a voluntary basis, marks were attached to insured properties to indicate to the volunteer brigades that the insurer would pay a significant sum if they managed to put out a fire.³ Apparently, on occasion, a homeowner would steal a fire mark and attach it to their own front door. This practice abruptly came to an end in one town where volunteer firefighters, who discovered they had extinguished a blaze for no reward, returned the next day and burned the house to the ground.⁴

A further little known fact is that in the early nineteenth century, New York ensured local fire regulations were rigorously enforced by allowing private individuals to prosecute violations of the local ban on gunpowder.⁵ An enthusiastic group of amateur prosecutors was all but guaranteed by the incentive that any gunpowder found to be illegal would be forfeited to the person who had brought the action. This, of course, was not unusual. Historically, the victim of a crime was generally responsible for prosecuting the alleged offender.⁶

Most of you who are present tonight will be pleased to learn that I do not intend to talk about insurance; be it fire insurance or otherwise. For some (although probably only a few outliers in the room), this might come as a disappointment. Nor do I plan to trace the history of private prosecutions, including in relation to fire regulations; as interesting as that subject may be.

The link between these two very different matters is that publicly funded fire brigades and prosecutorial services are aspects of society which are now, I think, considered to provide an inherent public good. As such, it may come as a surprise that the private versions of both continue to exist today. Private prosecutions are provided for in this state,⁷ and they seem to have experienced a resurgence in England and Wales.⁸ Far more startling is the fact that private fire departments continue to operate in the United States. Apparently they can issue sizable bills for their services, and have been known not to respond to those who have failed to pay the subscription fee.⁹

Despite this, I think it is fairly uncontroversial to suggest that

we can rightly expect that someone will come to our aid if our home catches alight, and that a group of skilled practitioners is publicly funded to prosecute alleged criminal offences. They are both entrenched aspects of our society today.

This leads me to my topic for this evening: the public good of our judicial system, the contribution of the courts to the economic prosperity and social harmony of modern Australia, and the extent to which the idea of 'user-pays' justice conflicts with that public good. Unsurprisingly, it is an issue on which many have spoken previously. What is more, some will suggest that raising the subject this evening is the ultimate act of preaching to the choir. Others have warned against too readily broaching the topic of independence in the belief it can lead to a degree of public cynicism.¹⁰ The latter is a legitimate caution against courts falling into the trap of crying wolf. However, these are not sufficient reasons to avoid the issue entirely. In fact, I would suggest there has sometimes been a tendency for the judiciary to acquiesce too easily in the shifting discourse about the role of courts in our society.

My remarks tonight have been prompted by the Productivity Commission's recent report into *Access to Justice Arrangements*.¹¹ As you may know, the report was commissioned to consider Australia's civil dispute resolution system, with a focus on promoting access to justice. There are, however, two important caveats that apply generally to my comments. First, in my view, the justice system in this state is fundamentally sound; fortunately there is a productive working relationship between the judiciary and the Executive. Second, the Supreme Court has pursued a number of important reforms in recent years with the goal of achieving efficiencies to improve access to justice. I will say something later about some of those changes. However, we cannot afford to ignore intrusions into the functions performed by courts, along with the dangers that arise from ideas of user-pays justice.

Courts and the public good: the threat of user-pays justice

The concept of user-pays justice and the shifting discourse about the role of courts are by no means recent developments. For instance, a well-known cartoon by the late J. B. Handelsman appeared in the *New Yorker* in 1973. In it, a bowtie-wearing attorney sits behind his desk and offers the following words to his anxious client: 'You have a pretty good case, Mr Pitkin. How much justice can you afford?'. The same idea has appeared elsewhere.¹²

However, early references to user-pays justice are not only to be found in satirical comics. Recent events have given me reason

The Hon TF Bathurst AC, 'Reformulating reform: courts and the public good'

to reflect on a review into the New South Wales court system that was completed 25 years ago.¹³ In it, the authors, while 'recognising the principle of accessibility of justice', indicate that they 'find it hard to see justification for taxpayers' funds to be used to finance some types of civil cases'; and further, that the 'long term aim should be to establish cost recovery principles' so the total costs of certain matters are recovered in full.¹⁴ A quarter of a century later, the Productivity Commission has adopted a strikingly similar approach to user-pays justice.

At the outset, it must be acknowledged that there are a number of extremely valuable recommendations in the commission's report. Like the various inquiries into access to justice that have been conducted over the past few decades,¹⁵ lessons will be learned and changes implemented as a result of the commission's work. For instance, significant attention has already been given to the recommendations that an additional \$200 million should be invested into the system for civil legal assistance services, and that funding for legal assistance should be stable enough to permit long term planning.¹⁶ The current state of funding for legal aid certainly warrants close attention.

Mention should also be made of the broader framework that the Productivity Commission adopts in relation to the role of courts in our society. It is, in a number of respects, appropriately considered. The commission recognises that courts form the 'central pillar of the justice system'.¹⁷ The report also accepts that well-functioning courts promote justice outside the courtroom;¹⁸ that individuals and businesses require 'fair and equitable access to legal redress, regardless of their circumstances';¹⁹ that public as well as private benefits result from the courts' work;²⁰ and significantly, that an effective legal system is necessary 'first and foremost to uphold the rule of law'.²¹

Unfortunately, I would suggest that these reasonably basic concepts, which have been set out with a degree of care at the outset of the 1,000-odd page report, have to some extent been overlooked or disregarded in a number of the substantive chapters. The following matters are of particular concern.

First, while initially identifying the courts as the central pillar of the justice system, the report consistently conceives of the work done by courts as a 'service'.²² Comparisons are drawn with toll roads, and the point is made that courts will need to reduce their reliance on general taxation for funding as a result of 'competing demands for other government-funded services'.²³ The commission charitably acknowledges that while 'the courts comprise the third arm of government, it is unclear why the judicial arm should not be seen as a service provider for those parties who choose to use the courts'.²⁴ Admittedly, it

is only the first clause of that sentence that is at all charitable.

Second, as I have mentioned, the report emphasises the importance of fair and equitable access to justice. The focus of the inquiry was undeniably premised around improving access; indeed, it is there in the report's title. However, several aspects of the report seem to have very little to do with increasing access to justice. In particular, the commission focuses on the need for courts to move toward a much higher level of cost recovery. While the recommendations in this respect are perhaps less strident than those in the draft report,²⁵ the commission does propose that cost recovery should be increased, and that courts should recover *all* costs in substantial cases.²⁶

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However, as the report makes clear, the purpose of greater cost recovery is not simply to raise revenue. According to the commission, it is a matter of introducing appropriate 'price signals' for those who wish to access the courts.²⁷ This, it is said, is because some parties do not face 'adequate incentives' to attempt private forms of dispute resolution before they seek to enforce their rights in the courts 'at the taxpayers' expense'.²⁸ What is essentially taking place is a move to introduce a cost-benefit analysis for potential litigants, so the court's so-called services are 'only accessed where the benefits outweigh the costs'.²⁹ However, it is not clear precisely whose benefits and whose costs are being referred to. Is it the plaintiff, so that the benefits and costs to the defendant are irrelevant? Or is it some balancing factor? This simply highlights one of the difficulties with the analysis.

At this juncture it is worth referring to Dame Hazel Genn's 2008 Hamlyn Lectures, entitled *Judging Civil Justice*. In her first lecture, Dame Hazel makes the following relevant observation:

The report is called 'Access to Justice', but the narrative precisely reflects the two competing stories about civil justice in the late twentieth century – too little access, too much litigation. On the one hand the report seeks to break down barriers to justice, while on the other it sends a clear message that diversion and settlement is the goal...³⁰

While Dame Hazel's comments were in fairly robust terms and obviously directed at a different inquiry, it might equally be suggested that the aim of certain parts of the commission's report is to increase barriers to the courts.

The Hon TF Bathurst AC, 'Reformulating reform: courts and the public good'

Finally, as I have said, the report correctly recognises the role of the courts in upholding the rule of law. Nevertheless, the commission draws a sharp distinction between private and public benefits derived from litigation.³¹ The consequence is, to use the commission's words, that a service should only be 'subsidised' where the private benefits or interests at stake are likely to be insufficient.³² What is most startling, and let it be clear that I am quoting the report: 'In the commission's view the courts themselves are not, in an economic sense, a public good'.³³ Instead, courts provide so-called positive spillovers to society, which include, among other things, the rule of law.

I think it is fair to suggest that to measure the importance of a judicial system available to all citizens by reference to some economically measured spillover or externality reveals a misapprehension of our constitutional structure.

To briefly expand on this, the commission's thesis essentially seems to be that there are a limited number of what it considers to be 'public goods'. The essence of a public good is this: first, it is available to all people at no additional cost – in the sense that consumption by one person does not diminish consumption by others – and, second, it is non-excludable – that is, it is difficult to exclude anyone from benefiting from it.³⁴ The commission offers two examples of what is a public good: national defence and lighthouses (although, I note that no mention is made of the protracted debate among some economists about whether lighthouses are in fact a public good³⁵). The commission then suggests that non-public goods – that is, goods which do not have these characteristics – can be subsidised to account for the beneficial externalities or spillovers which result from providing the service.

I think it is fair to suggest that to measure the importance of a judicial system available to all citizens by reference to some economically measured spillover or externality reveals a misapprehension of our constitutional structure. The framers of our Constitution, in incorporating Chapter III, recognised the fundamental importance of the judicial system. The difficulty with the apprehension of the commission is immediately exposed by describing the absence of the rule of law as a *negative* spillover. Most people who have encountered an inadequate legal system would, I suggest, express their concerns in far

stronger terms. One has only to look at concerns expressed when citizens, rightly or wrongly, believe that the judicial system has failed them. The importance of avoiding this 'negative spillover' can be demonstrated by the fact that any major investment in a state or country involves consideration of sovereign risk, a crucial part of which is whether there exists an independent, transparent and accessible judicial system. However, even if the distinction is accepted, the commission fails to fully appreciate the extent of the benefits that we each derive from a stable and accessible legal system.

Nonetheless, in my view, the analysis is flawed. Lighthouses and national defence both cost money; and defence, particularly significant amounts. Ultimately, the benefit that society derives from a highly skilled and well-resourced defence force is security. In a similar way, the public benefit to society from a stable and effective judicial system is that we can each be confident that a mechanism exists to enforce the law and resolve disputes, thus enabling the orderly administration of society. It is misleading to consider whether the benefits of such a central aspect of our social order can be determined by a hypothetical consideration of externalities. This, however, is not merely the view of a lawyer. The great economist Paul Samuelson wrote in the seventh edition to his seminal text *Economics*:

...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 its contracts.³⁶

This, I believe, highlights a number of the fundamental flaws in the approach taken by the Productivity Commission; not least in characterising the third arm of government as a service provider that is not – irrespective of it only being in an economic sense – a public good. However, I want to avoid responding to particular aspects of the commission's report any further. Instead, I would prefer to offer some general observations about the role of courts in society, and the need for our judicial system to remain accessible.

An appropriate place to begin this discussion is to return to Dame Hazel's Hamlyn Lectures. I would suggest that the general thesis of her papers is twofold: first, there has been a devaluing of the civil justice system as a result of a number of interrelated factors, and second, there is a broader need to re-assert the public value of civil justice.³⁷ To an extent, there is merit in the notion that civil justice has been devalued. It is true that most public attention in relation to the court's work concerns the criminal law.

The Hon TF Bathurst AC, ‘Reformulating reform: courts and the public good’

Consistent with what was said by Dame Hazel, it is essential that public discourse about the justice system and proposed reforms to it – especially those that search for efficiencies with the aim of improving access to justice – should be informed by, and shaped around, the central role performed by courts in our society. It goes without saying that courts determine rights and responsibilities, protect against excesses of government power, and administer the criminal law. In the words of former Chief Justice Brennan:

What the Judicature does or does not do largely determines the character of the society in which we live... [As a consequence] the state of the Judicature is the concern not only, nor even chiefly, of the officers of the Judicature; rather it is the concern of the people of Australia who are protected by, and are subject to, its jurisdiction.³⁸

In this sense – and particularly in the civil sphere – it is incorrect to suggest that courts simply adjudicate disputes between individual litigants. Such a view more accurately reflects commercial arbitration. Judgments will often have a broader effect on our social and economic wellbeing, which can be overlooked by focusing solely on the impact of a decision for the parties involved. This broader influence has been termed the shadow of the law.³⁹

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If a shadow is the most appropriate analogy (and I must admit that I have not managed to craft one that is any better), then it is a long shadow indeed. A great deal occurs in this particular shade: contracts are negotiated and completed, government departments make decisions within the bounds of legislation, disputes arise and are settled on the basis of previous decisions, and we are deterred from engaging in conduct which has been criminalised.

As a result, the health of the justice system has a considerable effect on economic prosperity. Certainly, a reputable legal system is a prerequisite if business is to prosper. For example, even international arbitration relies upon stable domestic legal systems for the enforcement of arbitral awards. Some commentators have attempted to calculate the extent to which judicial independence facilitates economic growth.⁴⁰ However, while I am by no means an economist, I would suggest the value

of an established legal system – both socially and for business efficacy – is almost immeasurable. If any value can be placed on social order and an environment conducive to commercial activity, it surely must be greater than a mere positive spillover.

As such, we should be careful to avoid devaluing or downplaying the value of an effective justice system – both civil and criminal – in modern Australia. It is by no means a service that is equivalent to others which are provided by government; and in that comment I do not intend in any way to criticise essential public services. However, as Lord Neuberger noted in an address several years ago, the central functions of government are these: to defend the nation from abroad, and to maintain the rule of law at home.⁴¹ Of course Lord Neuberger was simply emphasising the importance of the government’s role in maintaining the rule of law. Governments obviously perform a range of beneficial functions. However, the maintenance of a stable and efficient justice system is vital for the overall wellbeing of society.

Taking all of this into account, the operation of courts cannot be reduced to a simple equation of what litigants are prepared to pay. Equally, it is false that the extent of access to justice should be assessed in each case – with fees levied on the basis of a futile attempt to measure the public benefit of an individual matter or class of case. The court system is not at all like a toll road, where you can either pay for access or otherwise elect to take the less desirable route. In fact, rather than asking what the public benefit of a certain piece of litigation is, or what an individual litigant is prepared to pay to enforce their rights in court, it may be far more valuable to consider the counterfactual. What would our society look like if we did not have an effective justice system? What would the cost be to our general social wellbeing? Just how much justice are we actually prepared to go without?⁴²

We should, in my opinion, be extremely cautious about the language of user-pays justice. It suggests there is a market for the functions performed by the courts.⁴³ Just as there is no market for representative government, so too there is no market for an independent and accessible justice system – be that in relation to enforcing the criminal law or resolving civil disputes. In this respect, while there has certainly been a much stronger emphasis on user-pays theories in relation to civil disputes, it is the case that questions of cost recovery can arise in both the civil and criminal spheres.⁴⁴ However, it is not simply a matter of considering the nature of the dispute itself. Rather, it is an issue which goes to the underlying structures of our democratic system of government, guided by a real and robust separation of powers.

The Hon TF Bathurst AC, 'Reformulating reform: courts and the public good'

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Despite my concern about theories of user-pays justice, I am not suggesting that we seek to maintain the status quo. There is always value in considering how litigation is conducted, and ways in which the system might be adjusted to minimise costs for litigants to improve access to justice. This year marks the tenth anniversary of the Civil Procedure Act. It has in no way been a static piece of legislation, and I am confident that future adjustments – both to the Act itself and to court procedure generally – will continue to improve and refine the litigation process. However, any reforms must be predicated on the essential role of courts in society, and the need for them to be accessible. To again quote the words of former Chief Justice Brennan:

It should never be forgotten that the availability and operation of the domestic courts is the unspoken assumption on which the provisions of our Constitution and laws are effected, on which the entire structure of government depends, on which peace and order are maintained, on which commercial and social intercourse relies and on which our international credibility is based.⁴⁵

These values should underpin broader discussions about the courts and the challenges of improving access to justice. As part of that conversation it is reasonable for governments to expect that court funding will be efficiently used. As I have said previously, in this regard there is potential for a degree of institutional blindness.⁴⁶ This alone is reason enough for regular external reviews, such as that led by the Productivity Commission. However, the task of realising efficiencies is one to be arrived at between the courts and government. As I noted at the outset, in this state there is a positive relationship between the Judicial and the Executive arms of government. However, so-called efficiency dividends should not be imposed on courts without fully appreciating their effect. Likewise, moves to modernise court systems must be determined *with* the courts, and designed for the task.

Part of this discussion is that litigants should make some contribution to the costs that are associated with running the court. This is achieved in two ways: directly, through filing fees, and indirectly, by the courts ensuring that practitioners and litigants do not conduct themselves inefficiently. The latter

requires the court to both encourage and enforce efficiency.⁴⁷ I am of the view that this obligation will need to be exercised with increasing force in the coming years, particularly having regard to the goal of minimising the costs imposed on parties, as well as reducing the fiscal burden that is placed on government. This, however, does not mean that the cost of accessing the courts should be based on cost-recovery values; let alone full cost-recovery.

Ultimately, I am confident that the courts will continue to provide effective recourse for those who require it. In this regard, the accessibility and efficiency of the Supreme Court has been improved by a number of reforms.

Maximising the public good: recent reforms

As the Productivity Commission acknowledges, courts in Australia have themselves driven changes which are directed at reducing cost and delay.⁴⁸ This has certainly been the case in terms of reforms in the Supreme Court.

At occasions such as this, it need hardly be said that the guiding principle in civil proceedings is to facilitate the just, quick and cheap resolution of the issues in dispute.⁴⁹ This is also the case in criminal proceedings, where the principles of case management are directed at reducing delay, to ensure that proceedings are dealt with efficiently.⁵⁰ It will come as little surprise that those same guideposts are used when considering possible reforms.

The object of any reform is to implement better systems and procedures which enable proceedings to be dealt with as capably and efficiently as is possible. Greater efficiency assists those who are involved in a dispute by lessening the pressure and financial costs that litigation inevitably inflicts. As Chief Justice Allsop once put it when president of the Court of Appeal:

...parties are entitled to expect that the costly and stressful, though necessary evil that is litigation be resolved with reasonable despatch so as to minimise, where reasonably possible, the time during which people are subjected to its rigours and strains.⁵¹

However, greater efficiency not only benefits the litigants in question. It also aids those who are waiting to gain access to the system, and ultimately the broader community by minimising the costs associated with the courts.⁵²

I have emphasised on previous occasions that court rules and procedure – and reforms to them – are not ends in themselves.⁵³ They should not, in my view, be overly prescriptive or inflexible. Put simply, this is because the judges of the court are highly skilled and experienced. Case management should be determined by judges, drawing upon their considerable

The Hon TF Bathurst AC, 'Reformulating reform: courts and the public good'

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professional expertise, in conjunction with the parties involved and their legal representatives. Case management must be tailored to the matter in question, rather than simply being determined by static written procedures.

In recent years, the Supreme Court has pursued a number of reforms with the goal of achieving greater efficiencies while also maintaining flexibility. For instance, the Productivity Commission made several recommendations in relation to the scope of, and costs associated with, discovery.⁵⁴ It is a matter in relation to which the court has already taken several major steps.

As you know, in early 2012, changes were introduced in the Equity Division which provide that, unless there are exceptional circumstances, an order for disclosure will not be made until the parties have served their evidence.⁵⁵ In addition, no order for disclosure will be made unless it is necessary for the resolution of the real issues in dispute. The purpose of these reforms is to reduce the burden of discovery, and also to require parties to identify the case they seek to prove at an early stage.⁵⁶ Initially, it is fair to say that these changes were marked by a chorus of grumbling from the profession, along with murmurings that proceedings would be commenced elsewhere.

Almost three years later, I think we can declare that the changes have been a resounding success. It is true that there was an initial period of adjustment. Numerous motions were filed on the basis of exceptional circumstances, and some short-lived attempts were made to circumvent the reforms by way of subpoenas and notices to produce.⁵⁷ However, after a brief period of initial complexity, the practice in relation to discovery has now settled down.

There have, I believe, been a number of significant benefits. First, cases are coming on and getting to the issues in dispute with greater speed. This is a direct result of parties being required to put on their evidence at an early stage. There has also been a reduction in applications for disclosure. In principle, the effect of these developments should be a drop in costs for the parties involved. Anecdotally, I also believe it is leading to a greater degree of cooperation among practitioners regarding the disclosure of documents, and, I hope, less time being spent by junior lawyers reviewing materials in poorly lit rooms. Finally, there has not been the mass exodus from the Equity Division which some predicted. In fact, it remains busier than ever.

The second reform can be dealt with in greater brevity. Last

year there was considerable change in relation to the procedures for defamation matters. Under the new regime, a listing date is fixed as soon as a statement of claim is filed.⁵⁸ Prior to that date, the parties are obliged to discuss any objections to the pleadings, and are expected to be in a position to argue any that are maintained at the first hearing. At a second listing, the court may consider whether to make orders for discovery or interrogatories; it must be satisfied that either is necessary to resolve the real issues in dispute. Finally, where the Practice Note or a direction of the court has not been complied with, the court has the capacity to call a show cause hearing as to why the matter should not be dismissed, or the defence struck out and judgment given.

Again, these reforms are directed at improving efficiency while also retaining flexibility. While they have only been operating for a few months, I believe that the changes have been well-received by those practising in the area. Notably, interlocutory disputes are occupying far less time, which results in a saving both of the court's time, as well as the costs borne by the parties.

Equally, significant reforms have been in place in relation to family provision matters for a number of years.⁵⁹ It is an area that has, I believe, benefited from more detailed obligations on parties in terms of case management, and it demonstrates the fact that a one-size-fits-all approach cannot be applied to litigation generally. The changes emphasise diversion to alternative dispute resolution – in fact there is a presumption that applications will be referred to mediation. There is also a series of requirements which aim to keep both the parties and the court informed about the costs of the litigation (and, in turn, how those costs compare to the overall value of the estate).

The fourth important set of reforms concerns representative proceedings, or class actions.⁶⁰ The court has implemented procedures aimed at ensuring continuity in the management of class actions,⁶¹ while also maintaining maximum flexibility in bringing proceedings to trial. The court currently has a number of significant ongoing class actions, including several which relate to the 2013 bushfires in the lower Blue Mountains, as well as proceedings regarding the floods in Brisbane in early 2011.

Both in relation to class actions – and also more broadly – the court will continue to ensure that judges with particular expertise are deployed to hear relevant matters.⁶² For instance, there is a fixed panel of judges who hear class actions – three

The Hon TF Bathurst AC, 'Reformulating reform: courts and the public good'

each from the Common Law Division and the Equity Division. In addition, as you know, the court has a specialist commercial list to deal with increasing levels of demand in this area. This year, four judges will sit in that list, each of whom is highly experienced in commercial law, along with two judges sitting full time in the corporations list.

Reforms in the criminal area have also taken place. Arraignments are now conducted electronically, thus avoiding the expense of prisoners on remand coming to court. Already, in the short space of time this development has been available, 94 people have had their arraignments conducted electronically rather than being brought to the Sydney Supreme Court. Proceedings are case managed by the arraignment judge, and ultimately by the trial judge who deals with pre-hearing issues before the jury is empanelled. This minimises the time spent by jurors in criminal trials, and lessens the risk of the possibility of trials being abandoned as a result of unexpected events which can occur in the course of a hearing.

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Technology is the final area of change that I want to raise this evening, and it is one which will remain a central focus for the court in the years ahead. In terms of physical developments, this year the court will open a new legal suite, as well as a remote witness room, both within the main Law Courts building. These improved facilities will allow practitioners to speak privately with their clients via AVL, and will assist victims and other vulnerable witnesses to give evidence from a separate location in the court precinct.

In the electronic space, there has been a significant take up of the court's online registry service. About half the originating processes for corporations matters are now being filed online, and for certain documents in relation to possession matters, around three quarters are being submitted using the online facility. This year also marks the launch of a redesigned Caselaw website, and versions of the website are now available for tablet and mobile devices. The court will continue to focus on developments in the electronic space, as we steadily move away from a reliance on paper-based materials.

Ultimately, as the Productivity Commission recognised, the court has itself continued to drive reforms to increase the efficiency of the litigation process, with the broad aim of reducing litigant costs and improving access to justice. What

I have said is not meant to simply heap praise on the Supreme Court; although I should take the opportunity to recognise the work of the judges of the court, their staff and those who work tirelessly in the registry. On the contrary, my view is that courts across Australia are constantly working to achieve similar improvements, although no doubt in slightly different forms.

However, reforms of this nature require the input and cooperation of the broader profession. The court already has a range of committees which include practitioners. In addition, last year I met with a group of solicitors and barristers in Parramatta regarding additional services that the court could offer in Western Sydney. My broader message this evening in terms of reforms to the court is this: we are listening. I want to hear the views of the profession about things we could improve, and how we could go about achieving them. All opinions are welcome. They are important and they will be treated seriously. Cooperation between the judiciary and the profession will remain a significant contributing factor in improving access to justice.

Conclusion

To conclude, I believe the Supreme Court has taken a number of important steps in the past few years to drive efficiencies, to enhance the experience of those who appear in the court and, ultimately, to reduce costs in order to improve access to justice. Each of the changes I have referred to have had a significant effect on the way in which litigation is conducted in the court. We will, of course, continue to pursue reforms – particularly in relation to technology – with, I hope, the valuable input of the profession. However, court costs are only one component of the issues which arise in relation to legal need and barriers to justice.⁶³ These are challenges which the courts, the government, the profession and the community must face together.

We should be extremely wary of calls for greater cost recovery and notions of so-called user-pays justice. As I have said, these proposals are by no means new. Despite the enthusiasm with which they have been promoted over the past few decades, I think we can agree that imposing 'price signals' represents an attempt to dissuade people from entering the system, rather than increasing access to justice.⁶⁴ To borrow words from Jeremy Bentham's essay, *A Protest Against Law-Taxes*, such barriers fall upon a person at the very time when the likelihood of them wanting that ability is at its utmost.⁶⁵

We do not, I believe, want to revert to a position where we have to rely on private fire brigades, or where private criminal prosecutions are the norm.⁶⁶ So too, we must not allow our

The Hon TF Bathurst AC, 'Reformulating reform: courts and the public good'

courts to become another public service that is viewed only as a mechanism for resolving private disputes, and which is founded on the principle of what potential litigants are prepared to pay.

Our courts are a fundamental aspect of society. They have a considerable effect on our social cohesion and economic prosperity. The benefits that we derive from an effective justice system cannot be reduced to a mere positive spillover. If anything, the extent of criticism and public debate in relation to the work of the courts illustrates the central role which they perform in society. We must not allow the justice system – both in relation to enforcing criminal laws or deciding civil disputes – to be devalued as simply a service.

It is the case that I have dedicated some time this evening to dissecting the work of the Productivity Commission and offering some general 'feedback'. However, I would like to conclude by reading a short passage from early in the commission's report, which says the following:

An effective system is required first and foremost to uphold the rule of law. To do so, the system must be acceptable to the Australian public, whose behaviour it seeks to regulate. Laws, and the system that upholds them, must both be accepted if society is to flourish.⁶⁷

These words reflect the importance of the justice system to the nature and character of our society. It is a passage about which I think we can agree.

Endnotes

- I express my thanks to my research director, Haydn Flack, for his assistance in the preparation of this address.
- See H Johnson, 'The History of British and American Fire Marks' (1972) 39:3 *The Journal of Risk and Insurance* 405 for a history of fire insurance and fire marks.
- Ibid at 416.
- Ibid.
- W Novak, 'Public-Private Governance: A Historical Introduction' in J Freeman and M Minow (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) at 31.
- See e.g. Sir J F Stephen, *A history of the criminal law of England* (Macmillan, 1883) at 244–245, 493, discussed in M O'Neill, 'Private Vengeance and the Public Good' (2010) 12:3 *Journal of Constitutional Law* 659 at 665–672.
- Criminal Procedure Act 1986* (NSW), ss 14, 49, 174.
- See e.g. *Zinga, Pillai v R* [2012] EWCA Crim 2357; [2013] Lloyd's Rep FC 102; *R v Zinga* [2014] EWCA Crim 52; [2014] 1 WLR 2228 in relation to a private prosecution brought by Virgin Media Limited for offences of conspiracy to defraud. In *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52; [2013] 1 AC 484 at [123], Lady Hale (albeit in dissent) described the right of access to a court to prosecute an alleged offender as being 'as much a constitutional right as a right of access to a court to bring a civil claim.'
- See e.g. D Lohr, 'Arizona Firefighters Charge Family Nearly \$20,000 After Home Burns Down', *Huffington Post* (11 August 2013), http://www.huffingtonpost.com/2013/11/08/justin-purcell-fire_n_4242734.html; M Laris, 'Tenn. family's loss after not paying fire fee resonates in Montgomery', *The Washington Post* (13 October 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/13/AR2010101307592.html>.
- The Hon M Gleeson AC, 'The Role of the Judge and Becoming a Judge', National Judicial Orientation Programme (Sydney, 16 August 1998).
- Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014).
- The cartoon by JB Handelsman is extracted, and other similar examples are discussed, in M Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* (University of Wisconsin Press, 2005) at 244–246.
- Coopers & Lybrand WD Scott, *Review of the New South Wales Court System* (May 1989).
- Ibid at [1215]–[1220]. At [1219] the authors note that 'In general principle, we consider that the long term aim should be to establish cost recovery principles such that the total costs of appropriate civil court activities are recovered in full, through a combination of initial and time-based fees and charges.'
- See e.g. Australian Law Reform Commission, *Managing Justice: a Review of the Federal Civil Justice System* (ALRC Report 89, 2000); Victorian Law Reform Commission, *Civil Justice Review*, (Report No. 14, 2008); Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (December 2009).
- Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014), recommendations 21.4–21.5.
- Ibid at 2, 14, 76, 383.
- Ibid at 76, 138.
- Ibid at 139.
- Ibid at 142.
- Ibid at 144.
- See e.g. Ibid at 534–535.
- Ibid at 534, 556.
- Ibid at 535.
- Compare recommendations 16.1 and 16.2 (Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 549, 560) alongside draft recommendations 16.1 and 16.2 (Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 482, 488).
- Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 558.
- Ibid at 534, 541, 555–556, 569.
- Ibid at 555.
- Ibid at 556.
- H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 53.
- See e.g. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 536–538.
- Ibid at 540.
- Ibid at 539.
- Ibid at 539. See also Productivity Commission, *Cost Recovery by Government Agencies* (Inquiry report No. 15, 16 August 2001) at 13.
- See e.g. the discussion of the British lighthouse system by the late Nobel laureate in economics, Ronald Coase, in R Coase, 'The Lighthouse in Economics' (1974) 17:2 *Journal of Law and Economics* 357.
- P A Samuelson, *Economics: An Introductory Analysis* (McGraw-Hill Book Company, 7th ed, 1967) at 47. This passage is noted in R Coase, 'The Lighthouse in Economics' (1974) 17:2 *Journal of Law and Economics* 357 at 358.
- H Genn, *Judging Civil Justice* (Cambridge University Press, 2010).
- The Hon Sir G Brennan AC KBE, 'The State of the Judicature', Opening of the 30th Australian Legal Convention (Melbourne, 19 September 1997), reported in (1998) 72 *Australian Law Journal* 33.
- H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 20–21, 35, referred to in Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report,

The Hon TF Bathurst AC, 'Reformulating reform: courts and the public good'

- December 2009), Ch 4 at [1.10] and Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 142, 537.
40. See e.g. D Klerman, 'Legal Infrastructure, Judicial Independence, and Economic Development' (2006) 19 *Global Business & Development Law Journal* 427; L Feld and S Voigt, 'Economic growth and judicial independence: cross-country evidence using a new set of indicators (2003) 19:3 *European Journal of Political Economy* 497. Studies have also sought to measure the effect of reduced funding for courts.
 41. Lord Neuberger, 'Justice in an Age of Austerity', Tom Sargant Memorial Lecture 2013 (15 October 2013) at 2–3. See also Sir J Fortescue, Kt, *The Governance of England* (Oxford University Press, 1885) at 127.
 42. Questions of a similar nature are posed in the Hon M Gleeson AC, 'The Purpose of Litigation', Martin Kriewaldt Memorial Address (Darwin, 12 August 2008), as published in (2009) 83 *Australian Law Journal* 601 at 607; and H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 76.
 43. The point has repeatedly been made that there is no market for the services which are provided by courts. See the Hon M Gleeson AC, 'The Purpose of Litigation', Martin Kriewaldt Memorial Address (Darwin, 12 August 2008), as published in (2009) 83 *Australian Law Journal* 601 at 607.
 44. For instance, several states and territories impose levies on persons who are convicted of an offence. The levy does not form part of the sentence: e.g. *Victims Rights and Support Act 2013* (NSW), s 106; *Victims of Crime Act 2001* (SA), s 32. Such levies are generally used to fund schemes to assist victims of crime. However, others are used more broadly to contribute to the costs associated with law enforcement and administration: see *Penalties and Sentences Act 1992* (Qld), s 179A.
 45. The Hon Sir G Brennan AC KBE, 'The State of the Judicature', Opening of the 30th Australian Legal Convention (Melbourne, 19 September 1997), reported in (1998) 72 *Australian Law Journal* 33, 35.
 46. The Hon T F Bathurst, 'Separation of Powers: Reality or Desirable Fiction?', Judicial Conference of Australia Colloquium (Sydney, 11 October 2013) at 20.
 47. See *Civil Procedure Act 2005* (NSW), ss 56(2), 59. See also *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [51]–[57].
 48. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 385–387.
 49. *Civil Procedure Act 2005* (NSW), ss 56.
 50. *Criminal Procedure Act 1986* (NSW), ss 134, 149E.
 51. *Richards v Cornford* (No 3) [2010] NSWCA 134 at [44], referring in part to *White v Overland* [2001] FCA 1333 at [4].
 52. As the plurality made clear in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [93], extracting a passage from *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849.
 53. See the Hon T F Bathurst AC, 'Accessing justice and dispensing it justly: some assorted thoughts', Salvos Legal Lecture Series (Sydney, 8 November 2014) at [44]ff.
 54. See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014), recommendations 11.4–11.5 (at 396–407).
 55. Disclosure in the Equity Division (Practice Note No. SC Eq 11, 26 March 2012).
 56. See e.g. *Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd* [2014] NSWSC 1326 at [13]; *Bauen Constructions Pty Ltd v New South Wales Land and Housing Corporation* [2014] NSWSC 684 at [26]; *SkyMesh Pty Ltd v Ipstar Australia Pty Ltd* [2012] NSWSC 696 at [7]–[9].
 57. See *The Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502 at [23]–[24].
 58. Defamation List (Practice Note No. SC CL 4, 5 September 2014).
 59. Family Provision (Practice Note No. SC Eq 7, 1 March 2013).
 60. Representative Proceedings (Practice Note No. SC Gen 17, 12 August 2014).
 61. Judicial continuity or ownership was an issue dealt with by the Productivity Commission. See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 394–396.
 62. Specialisation is also an issue addressed by the Productivity Commission. See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 584–589.
 63. The Productivity Commission estimates 'that, on average, court fees comprise roughly one tenth of a party's legal costs': see *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 553. The extent of legal need has been addressed at length. The commission provides a summary of the research in relation to unmet legal need: see *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 84–111. See also R Denniss, J Fear and E Millane, 'The Australia Institute, 'Justice for all', Institute Paper No. 8 (March 2012) and C Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in New South Wales* (Law and Justice Foundation of NSW, 2012).
 64. See concerns recently raised by the lord chief justice of England and Wales regarding the increase in court fees announced in England and Wales in January 2015 (Letter from the Hon Lord Thomas of Cwmgiedd to Ministry of Justice, 19 December 2014, <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/20141219-lcj-response-tomaj-civil-fees.pdf>).
 65. J Bentham, 'A protest against law-taxes, showing the peculiar mischievousness of all such impositions as add to the expense of appeal to justice' in *The Works of Jeremy Bentham*, published under the superintendence of his executor John Bowring (1843) at 573, 576.
 66. In *R v Zinga* [2014] EWCA Crim 52; [2014] 1 WLR 2228 at [55], the court observed that 'the bringing of private prosecutions as an alternative to civil proceedings has become more common; some lawyers and some security management companies now advertise their capabilities at mounting private prosecutions and the advantages of private prosecution over civil proceedings.'
 67. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 144.