



***National Access to Justice and Pro Bono
Conference***

"Bridging the Gap"

**The Hon Wayne Martin
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Melbourne

12 August 2006

Australia has a terrific legal system - a system that leaves no stone unturned, no possibility excluded from consideration, however remote, in the search for an outcome in which we can have complete confidence.

It is the Rolls Royce of justice systems, but there is not much point of having a Rolls Royce in the garage if you can't afford the fuel to drive it anywhere. You can sit in it, polish it, admire it, boast about it, lend it to rich friends or hire it out to people who can afford to drive it, but you can't use it for its basic purpose, which is to get you from A to B. We might be better off trading our Rolls Royce for a lighter more fuel efficient vehicle.

Improving access to justice is not just a question of improving the efficiency of service delivery. Significant limitations upon the accessibility of justice have profound implications for the Rule of Law. If justice is not accessible to ordinary Australians, the Rule of Law becomes mythical.

Equally, if access to justice is not equal - for example, if the system is biased towards the very rich, or perhaps even if biased towards the very poor, then the justice system is not worthy of that description.

Returning to the motor vehicle metaphor with which I started, the two issues I propose to address in this paper are, firstly, the various

mechanisms which exist for providing funds in order to purchase the fuel, and, secondly, the steps that might be taken to improve our car's efficiency, so that less fuel is required.

A brief overview of funding mechanisms

Before turning to the specific mechanisms that are available to assist in the provision of funds with which people can meet the cost of legal services, it is significant for me to observe that each and every one of the methods to which I refer has developed since I left law school in 1973.

Legal aid

Much has already been said at this Conference by people who know much more about the legal aid system in Australia than I, and I will not therefore delve into great detail on this subject.

Essentially, the provision of legal aid in Australia is limited to serious criminal matters and some family law matters. The Law Council of Australia has recently announced a commendable aspiration for the provision of legal aid in civil matters, but unfortunately that remains an aspiration only at this stage.

The main problem with legal aid is, of course, the inadequacy of funding, and it seems unlikely that there will be any substantial increase in funding

available to any of the Legal Aid Commissions around Australia in the foreseeable future.

It is, however, possible to encourage Government to increase funding - particularly if a business case methodology is used. To take a recent example, when I was President of the Law Society of WA we made enquiries of the Attorney-General's Department in relation to the number of persons who were sentenced to imprisonment in the Magistrates Court without having been legally represented. We were advised that some 600 people in Western Australia were sent to prison each year as a result of sentences imposed in the Magistrates Court without having been legally represented. Rather than mounting a case with Government on the basis of the unfairness and immorality in sending people to prison without them having been represented, the case was put forward on a purely commercial basis. Imagine, we said, if legal representation reduced the number going to prison from 600 to, say, 500. The 100 less people imprisoned would save Government around about \$5M a year. That would buy an awful lot of legal aid.

The Government responded positively and has announced that funds will be provided to expand legal aid services to enable representation to be significantly expanded in the Magistrates Court, with a view to providing representation in cases in which there is a significant prospect of a custodial sentence.

However, it will likely always be the case that legal aid will be inadequately funded. Analysis has been undertaken which suggests that

the amount spent on legal aid in Western Australia, viewed on a per capita basis, is about one-fifth of that which is spent on legal aid in the United Kingdom. However, on another analysis, in Western Australia the Commonwealth Government provides \$6.74 per Western Australian by way of funding for legal aid. By contrast, in the UK, the Government provides \$230 per head for legal aid. Thus, the contribution of the Government in the UK is some thirty times that of the contribution of the Commonwealth Government to legal aid funding in Western Australia.

In real terms, funding for legal aid in Western Australia has regressed by 28 per cent in the last 10 years.

There are also issues in relation to the evenness of the funding of legal aid throughout Australia. For example, the Commonwealth Government provides \$8 per Queenslander for legal aid funding. The Commonwealth does have an elaborate funding model for the allocation of legal aid funds as between the States, but it sometimes produces outcomes that can appear strange and discriminatory. For example, in some years Western Australia has received 8 per cent of the total Commonwealth budget for legal aid, whereas it has 10 per cent of the population of the country spread over one-third of the continent, which obviously increases the cost of service delivery.

Analysis also suggests that 25 per cent less family law matters are funded per capita in Western Australia than in other parts of the country.

The unevenness of funding also comes about as a result of differential access to other sources of funding. For example, in Western Australia very little of the conveyancing of real estate is undertaken by the legal profession. The consequence is that significantly less funds are held in solicitors' trust accounts than in other States, which in turn reduces the interest earned on those trust accounts which, in other States, is a significant source of funding for legal aid. For example, in 2004-5 it was expected that the funds available for legal aid from this source in New South Wales would be approximately \$18,000,000, in Queensland \$16,000,000, in Victoria \$15,000,000, in South Australia \$1.8 million, and in the ACT \$0.85 million, whereas in Western Australia something less than \$700,000 was available from this source.

Community legal centres

These centres do a great job all around Australia. However, the same funding issues arise as in relation to legal aid, and they generally lack the capacity to undertake substantial litigation on their own account.

Aboriginal legal services

My experience of the Aboriginal Legal Service in Western Australia is that it provides a very good service to its clients, and I have no reason to doubt that the services provided in other States are any different. However, the Aboriginal Legal Service's potential client base is only

about 3 per cent of the Western Australian population, although tragically they are clients that are grossly overrepresented in the criminal justice system. Approximately 40 per cent of the WA prison population is Aboriginal, and at any given time in Western Australia, one in 16 adult Aboriginal males is in prison.

Two weeks ago I visited Broome prison, in which the conditions are significantly worse than a lot of third world prisons. Six prisoners are in each cell in hopelessly overcrowded circumstances. This prison is situated about 2 kilometres away from the world-class beach resort at Cable Beach.

I regard the over-involvement of Aboriginal people in the criminal justice system as utterly unacceptable. I will keep raising these issues publicly until something is done to reduce the disparate involvement of Aboriginal people in criminal justice. There is, however, a limit to what can be done within the justice system itself to address this problem. More significant solutions will lie in addressing the causes of Aboriginal involvement in the criminal justice system, rather than in the system itself. A whole of Government approach, including health, education, housing, community development is required.

Pro bono services

These services are, of course, laudable, and their provision distinguishes the professional practice of law from that of merely conducting a business. Estimates of the amount of time provided on a *pro bono* basis

vary substantially. One report I have read suggests that the average hours provided for *pro bono* work by each practitioner in Australia is around 20, whereas another suggested it is 42.2 hours. Similarly, the estimates of the total amount of time provided around the country vary from about 600,000 hours, in one report I saw, to approximately 1.5 million hours, in another report. Another estimate suggested that the total services provided *pro bono* were approximately 20 per cent of those provided through the legal aid system.

It is unlikely that the proportion of work provided *pro bono* will ever change dramatically, although much can be done to increase its significance - for example, by the recent announcement of a target number of hours by the Pro Bono Resource Centre, and by the improvement of referral services matching supply and demand.

There might also be much to be said for the adoption in a number of the State courts of formal rules equivalent to O 80 of the *Federal Court Rules*, which formalises the procedures for the delivery of *pro bono* work and confers benefits upon practitioners - such as, for example, the right to receive costs awarded in favour of a *pro bono* represented client.

Legal assistance funds

An example of this type of funding is provided by the system which did operate in Western Australia during the nineties. It was set up with a capital base of approximately \$1,000,000, contributed by the Lotteries

Commission and from funds derived from the Public Purposes Trust. It was originally aimed at conducting test cases, and the fund was replenished by an arrangement under which a percentage of the proceeds - usually around 40 per cent, of successful cases, was required to be reinjected into the fund.

However, there were difficulties with the operation of the system, and consideration was being given to operating the fund as a disbursements only system. However, it was then thought that there might be significant issues arising under the *Credit Act*, and legal advice was sought. After receipt of that advice, it was realised that resolution of the *Credit Act* issue by the provision of exemption might take three years. Nevertheless, the fund is being refloated and it is hoped that it will be operational in the near future.

Law Access

In Western Australia, Law Access operate a shopfront lawyer service which augments Legal Aid and the advice provided by the Legal Aid Commission.

Legal expenses insurance

There are a number of types of legal expenses insurance available in different parts of the world. The systems can perhaps be classified in the following way:

- (a) add-on cover;
- (b) pre-paid legal expenses;
- (c) stand -alone cover;
- (d) after the event insurance.

Add-on cover

This type of cover is provided as an add on to a policy primarily provided for another purpose - such as, a household policy or a motor vehicle policy. Legal cover as part of household policies is very popular in Sweden, where it is provided as a standard part of all household policies. In relation to motor vehicle policies, for a time the RAC of Western Australia had a provision which entitled its policyholders to legal advice in relation to motor vehicle matters. The Law Society of New South Wales is lobbying strongly for increased add-on cover in relation to standard policies such as household and motor vehicle policies.

Pre-paid legal expenses

Under these schemes, an organisation such as a union will make an arrangement with a law firm for the provision of legal expenses which are paid for by the first organisation. Under those schemes, advice is provided to union members in relation to specified areas of law - such as, for example, personal injury. There have been such schemes operating successfully in Australia, although their influence is not substantial.

Stand-alone legal insurance

Under these policies, cover for legal expenses can be provided in return for a premium, in advance of the need for the legal advice arising. Such a scheme was operated in New South Wales between 1987 and 1995, although it ultimately closed. One of the difficulties for such schemes is that people who take out cover are likely to be people who are at significantly higher risk of needing legal advice, thus jeopardising the financial stability of the scheme.

However, insurance of this kind has proved successful elsewhere. For example, in Germany, in 2001, 25 million legal expenses policies were written, and, according to one report, in America, in 1997, 105 million people were insured pursuant to policies of this kind. However, the type of legal matter for which advice is provided is usually significantly constrained under the policy.

After the event legal expense insurance

This type of insurance is very prominent in the United Kingdom. The way it works is that at the time litigation is commenced, the policy will be taken out to cover the cost of the legal expenses involved in conducting that litigation. The premium will customarily be about 40 per cent of the anticipated expenses. If the litigation is unsuccessful, the insurer will pay the legal fees and, under some systems, also any costs order made against the insured. As I have mentioned, these schemes are significant in the

United Kingdom, where they are often written by the solicitors themselves as agents for the insurers.

Third party litigation funding for profit

There are about five or six commercial enterprises engaged in the funding of litigation across Australia. The terms upon which they should be permitted to undertake this activity have been the subject of significant litigation in recent times, and two significant cases are pending before the High Court - the cases of *Fostiff* and *Trendlen*. It is to be hoped that the decision of the High Court in these cases will clarify the existing law in this areas.

In addition, there is a substantial project before the Standing Committee of Attorneys-General dealing with the regulation of this business.

The difficulty with this type of business is that in essence the underwriters are only interested in major cases. Traditionally, they have been primarily interested in insolvency cases and, more recently, in class actions. Unless the amount to be awarded is in the vicinity of 3 or \$4,000,000, the economics are not sufficiently attractive enough to whet the appetite of the litigation funder.

Nevertheless, these companies do provide a means whereby funding available for litigation can be increased. Their involvement should be encouraged, although regulated essentially from a consumer protection

focus. That regulation must be undertaken on a nationally uniform basis, because these companies carry on business on a national basis.

Those States that haven't expressly abolished the law relating to maintenance and champerty should legislate in order to clarify the position.

Fee uplift schemes and contingency schemes

Traditionally in Australia, schemes under which a lawyer takes a percentage of the return from the litigation by way of a fee have been unlawful. A variant on this type of funding arrangement, however, is a fee uplift scheme, under which the practitioner agrees that in the event that the case is lost, no fee will be rendered, but in the event the case is won, the fee rendered will be a multiple of the fee normally charged, to reflect the risk that the practitioner will not be paid at all. Multiples of up to double are not unheard of.

These schemes seem to me to be preferable to contingency arrangements, in that the practitioner's reward is determined by reference to the amount of work done, rather than by the proceeds of the litigation. As with third party funding arrangements, the primary focus for regulation of these schemes should be consumer protection.

Universal access schemes

Universal medical health insurance was introduced into Australia during the seventies, and there has, from time to time, been talk of a similar approach to legal expenses insurance. However, I think it highly unlikely that we will be offered a "legibank" any time soon.

Following this review of some of the systems which are available to try to fund the litigation, it is clear that even if all these systems operate to maximum capacity, there will be large gaps left in relation to litigation, the cost of which is beyond the reach of ordinary Australians.

To take one example which came across my desk a couple of weeks ago, following a nine-day trial in the Supreme Court of Western Australia, an affidavit was filed deposing to the costs of the parties to those proceedings which were, in one case, \$750,000, and in another case \$550,000 - that is, a total of \$1.3 million dollars. Costs of this magnitude are ruinous and well beyond the reach of ordinary Australians.

So a substantial area of unmet legal need is in relation to mid-size civil cases.

There is, in my view, another rapidly emerging area of unmet legal need in the administrative tribunals which are becoming much more prominent around Australia. For example, on any given weekday the number of

hearings conducted for the Victorian Civil and Administrative Tribunal will be more in number than in any court in Victoria. The Commonwealth Administrative Appeals Tribunal now has jurisdiction under more than 400 pieces of legislation, and the State Administrative Tribunal in Western Australia is rapidly increasing its activities. There are also lower tier tribunals such as the Social Security Appeals Tribunal, the Veterans Tribunals, and the Immigration Tribunals. Although there are arrangements for legal representation in some of these tribunals, their increasing significance leaves a substantial demand for legal services in that area.

Improving efficiency

In my view, the general theme of the steps that we need to take to improve the efficiency of our system and thereby reduce the amount which is spent on legal expenses must start with getting away from our traditional obsession with trials and the adversarial process. In the Supreme Court of Western Australia, less than 2 per cent of the matters that are commenced in the Court are resolved by a trial. Thus, any system that is to reduce costs must focus upon identifying those cases that can be resolved otherwise than by a trial, and by facilitating their early resolution.

Mediation

Mediation must be an essential part of any such process. I notice that there has been contention in the UK as to whether or not mediation should be mandatory. I am firmly of the view that mediation should be compelled, whether the parties wish it or not, and experience shows that in a number of cases in which the parties have resisted mediation, it has, in fact, succeeded in bringing the dispute to an end.

It is also important that mediation be seen as a process and not an isolated event - a process to be holistically intertwined with case management generally.

It is often said that mediation is not possible in criminal matters. I do not accept that proposition. In Western Australia we are shortly to trial a process modelled on steps which I believe have been taken in Queensland in the criminal area. Cases that appear suitable for the process will be referred to a senior criminal practitioner, who will bring the parties together and discuss whether the level of charge is appropriate, whether there is some prospect of a plea to one or more of the charges resolving the case entirely, whether full prosecutorial disclosure has been made, and if not, what remains to be disclosed, whether any admissions can be made by the defence which will simplify and shorten the trial, etcetera.

Pre action protocols

In the UK, pre action protocols have been in place for some time, under which the parties are required to exchange information and consider mediation prior to the commencement of litigation. Anything that can be done to discourage the parties from commencing proceedings in court would seem to me to be worthwhile, and we propose to implement such protocols in Western Australia in the not too distant future.

Active case management

As I have already mentioned, the key focus of case management has to be the early identification of the real issues in the case, and thereafter focusing attention upon those issues.

Timeliness

We all know that work expands to fill the time available to do it. Thus the longer it takes for the matter to come to trial, the more legal work will be done, and the more it will cost the parties. We must focus our efforts on bringing matters to mediation and trial as quickly as possible. Any procedure which is likely to significantly delay the preparation of a case for trial must be justified by reference to its contribution to the just disposition of the case.

Time costing

Although time costing is almost universal throughout the legal profession, there is much to be said for the proposition that it can tend to reward inefficiency and delay. The reintroduction of lump sum scale fees as between solicitor and client may well be beneficial. Systems for capping the fees that can be recoverable by the successful party should also be tried, as fixing the cap at a realistic level may encourage the parties to undertake their own budgets with that level in mind.

Reduction of interlocutory disputes

The Supreme Court of Western Australia will actively discourage interlocutory disputes. There are far too many technical points being taken at an interlocutory level, slowing down the case and increasing cost.

Proportionality

The Supreme Court of Western Australia has resolved to adopt the principles of proportionality implemented by Lord Woolf in the UK.

Essentially, under those principles, the interlocutory processes and the resources of the Court will be allocated in a way which is proportional to the value and significance of the dispute. That is not to be measured only in monetary terms, but having regard to the importance of the dispute for the parties to it, whether measured in pecuniary terms or not.

Diminish adversariality

Our justice system is fundamentally based upon the proposition enunciated as long ago as 1822 by Lord Eldon, namely -

"Truth is best discussed by powerful statements on both sides of the question".

However, the fairness and efficacy of the adversarial process presumes that each party will have equal access to legal resources. That is not a valid assumption in contemporary Australia. If the parties have unequal access to legal resources, the adversarial process can become an instrument of unfairness. Regrettably, that happens regularly in Australia today.

The other fundamental difficulty with the adversarial process is that it is being used in a system which is, after all, intended to resolve disputes. It seems odd indeed, that a system which is intended to resolve disputes would adopt a methodology which is calculated to exacerbate dispute and push the parties further apart.

The third problem with the adversarial process is that it means that each party separately and expensively prepares for trial. So that in a case in which there are two parties, both sides fully prepare the case for trial - and in a case with three or four parties, the same work is done three or four times. This is inefficient and expensive.

Reducing legal work

In my opinion, the problem with legal costs in Australia is not caused by lawyers charging too much, it is caused by lawyers doing too much work. The "no stone unturned" approach to litigation is very expensive - often more expensive than the parties can afford, and entirely disproportionate to the value of the subject matter in issue.

Modern technology has the capacity to reduce the amount of work done by lawyers, by speeding up electronic communication and simplifying the production of documents. However, technology is a double-edged sword. Many commentators have observed that the advent of the photocopier had an explosive effect upon the cost of litigation. There is therefore a danger that modern information technology might result in a significant reduction in discriminatory assessment of the relevance of material, and encourage people to include the kitchen sink, whether it is relevant to the resolution of the dispute or not.

Pre-trial disclosure

The obligation enunciated (appropriately) in the *Peruvian Guano* case to disclose any document which might possibly have any bearing whatsoever upon any possible line of inquiry in the case imposes a disproportionate burden upon the parties to litigation - disproportionate in the sense of the significance of that burden to the achievement of a just result. Consideration must be given to the provision of disclosure in

stages, or limited to specific topics, being the topics that are central to the resolution of the issue.

Pleadings

Far too much time and expense is spent in the elaborate process of pleading which is involved in contemporary litigation. Experience in a variety of other systems, such as commercial arbitration and administrative tribunals, shows that it is perfectly possible to resolve quite complex cases without the need for convoluted, complicated and expensive pleadings.

The oral tradition

We have an assumption of an oral trial in Australia - that is to say, a trial in which all the witnesses give their evidence orally. It is an assumption which is probably borne from a time in which trials were all before juries, and therefore the evidence had to be presented orally. However, civil juries are obsolete in Western Australia and many parts of Australia, and there are quicker and simpler ways of putting evidence before a court than producing somebody to regurgitate their imperfect recollections of events.

Contemporary studies have also shown that the assumption that oral evidence is more reliable is misplaced, as is the assumption that an

experienced Judge will be able to determine who is telling the truth from observing the demeanour with which evidence is given.

There is therefore much to be said for processes which enable evidence to be presented before the Court in writing without the need for the attendance of witnesses. There is, of course, a limit to the extent to which this can take place if the trial is by jury.

Expert evidence

A lot of time and expense is absorbed in relation to the gathering and tender of expert evidence. In the UK, court appointed sole experts are now quite standard, and although the experience in Australia in the Family Court, in particular, has been somewhat patchy in this area, there is much to be said for continuing to explore methods for achieving a sole expert witness on a particular area of expertise in each case.

Other ways in which the costs of expert evidence can be substantially reduced is to encourage the parties to agree the facts which the expert or experts are to assume for the purposes of their opinion, and the particular issues upon which the experts are to opine.

Conferral between the experts prior to giving their evidence is now commonplace in Western Australia and must be encouraged. Concurrent evidence of experts - that is, a process whereby they give their evidence at the same time (or hot-tubbing as it is sometimes called) has been found

to work well in a number of non-judicial fora, such as commercial arbitration and administrative tribunals. It is appropriate for the courts to adopt this process in a suitable case.

Assistance to self-represented litigants

Self-represented litigants are here to stay and are likely to be an increasing feature of modern litigation. Systems for the provision of assistance to those persons will assist the courts to discharge their functions and avoid the risk that a self-represented litigant can interrupt the flow of the judicial process. Modern information technology can be particularly cost effective in this area.

Reduction of oral argument

There is increasing acceptance of the move away from the traditional of oral argument in our courts and greater acceptance of the presentation of argument in writing. While this trend is certain to continue, care must be taken to prevent an emerging practice of inordinately lengthy written submissions, which can add substantially to expense and delay, and significantly increase the difficulty of the judicial process.

Summary

The steps I have set out above are all desirable means of attempting to reduce the time and expense involved in contemporary litigation. However, even if all are implemented and all are successful, it is highly

unlikely that they will completely bridge the gap between the costs of contemporary litigation and the capacity of the community to fund that cost. However, they are undoubtedly steps in the right direction, and it is to be hoped that the combination of improving methods of funding litigation, and reducing the amount that needs to be funded, may reduce the gap between the community's need for legal services, and its capacity to pay for those services.