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The Future of Litigation: Dispute Resolution in Jurassic Park?

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We discover perennially, and to our occasional disappointment, that although there may be new things under the sun there are many things we thought were new, that are not. The Jurassic Park of fiction to which I refer in the title of this talk, was created by the late Michael Crichton and was itself redolent of a novel written by Arthur Conan Doyle in 1912 under the title "The Lost World". Indeed Crichton's sequel to Jurassic Park bore that same title. I suspected, when preparing this paper, that the application of the Jurassic Park metaphor to litigation was itself probably not original. Inevitably, this turned out to be the case. It has evidently already been used by Professor John Langbein of Yale University Law School.

Public discontent with the judicial process is certainly not new. Examples abound in world literature from both civil and common law systems. One such is the 16th century tale by Rabelais of the impeachment of Judge Bridlegoose. Bridlegoose took a long time to decide his cases and when he decided them did so by throw of dice. The impeachment proceedings related to a perverse judgment against a tax assessor. Asked about the perversity of the judgment he said he had been unable properly to read the dice. Defending the delay between commencement and disposition, he quoted a maxim:

"Time is the father of truth."

Rabelais was aware of alternative dispute resolution. He invented a mediator called Peter Nitwit whose talent was to settle cases when the litigants were drifting to the end of their dispute anyway because they had run out of money. Nitwit's maxim was:

"Dulcior est fructus post multa pericula ductus – a fruit is sweeter for having survived many dangers."

Another example, apparently informed by the civil law system, is Kafka's great novel "The Trial". It has been seen as operating at various levels, but one of those levels appears to have been a critique of the Austro-Hungarian Court of his time¹. At the end of a long tortuous and incomprehensible legal process Joseph K, about to be executed, asks himself plaintively:

"Where was the judge whom he had never seen? Where was the High Court to which he had never penetrated?"

I have taken examples from the civil law system because contemporary critics of the common law system have sometimes cast yearning eyes in the direction of Europe. It has lessons for us but is not the solution. Studies conducted around the world over the last three decades indicate concerns about costs and delay in litigation across a number of different legal systems, including both common law and civil law systems. Professor Hector Fix-Fierro of the National University of Mexico, writing in 2003 on Justice and Efficiency in Courts, observed²:

¹ Robinson, "The Law of the State" in Kafka's *The Trial*, (1982) at 127.

² Fix-Fierro, *Courts Justice & Efficiency – A Socio-legal Study of Economic Rationality in Adjudication* (2003) at 1.

"Scientific papers and official reports diagnose the same disease everywhere and warn of its dire consequences: growing caseloads; rising costs, and longer delays; scarce financial and human resources; an inefficient work organisation. A state of 'crisis' is explicitly identified and described in large and small, rich and poor regions, regardless of their level of political and legal development, such as Puerto Rico, Italy, the United States, Spain, Quebec, Chile, Brazil, England and Wales."

Obviously, these observations must be treated with reserve as they cover significantly disparate societies and economic circumstances.

In Australia we have a strong independent judiciary and legal profession. There is a political and social culture which generally accepts and respects the independence of the courts and the importance of their constitutional function at both State and Federal levels. That is so notwithstanding sometimes robust discussion and criticism, in the political and wider public arena, of particular court decisions or trends in decision-making.

In Australia, as in many other parts of the world, there is ongoing concern about the accessibility of the civil justice system generally, its cost to society and, broadly speaking, its efficiency. As to cost, there is no doubt that there are many who would see vindication of disputed rights in the courts as beyond their economic reach. And when modest sums of money are involved the economics of litigation become questionable having regard to its costs. There have been significant contractions in the amount of civil work as a proportion of the total civil and criminal workload in some courts. On the other hand, at the level of so called mega-litigation, and indeed larger scale complex commercial litigation generally, there is an ongoing concern that it involves a disproportionate allocation of public resources to the resolution of private disputes.

As to efficiency, the decision-making process applied in the courts to resolve disputes could not be applied to the high volume decision-making of governments or

corporations. It is necessarily individualised. From an administrator's perspective it costs too much and takes too long. For that reason alone, it is sometimes denounced as inefficient albeit without any clear definition of the concept of efficiency³. Among other modes of decision-making in the public and private sectors, it can appear like a dinosaur. But they are not appropriate comparators. The kind of dispute resolution which people seek in the courts necessarily involves labour intensive marshalling of evidence and documents, identification of issues, consideration and testing of evidence and the application of legal principles to sometimes complex factual situations.

The inescapable requirements to define issues and to present evidence and arguments mean that there are bounds upon what can be done to improve the working of the system without abandoning its fundamental objectives. There may be various formulations of those objectives. They all come back to the nature of the judicial function, the primary character of which was described in the High Court in *Fencott v Muller*⁴:

"The unique and essential function of the judicial power is the quelling of ... controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."

³ By one definition an "efficient" judicial process minimises the sum of two types of costs:

. error costs being "the social costs generated when a judicial system fails to carry out the allocative, or other social functions assigned to it"; and

. direct costs being "the costs (such as lawyers', judges' and litigants' time) of operating the dispute resolution machinery.

Fix-Fierro, op cit at 36, citing Posner, "An Economic Approach to Procedure and Judicial Administration", (1973) II *Journal of Legal Studies* at 399-451.

⁴ (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

The function of "ascertainment of the facts" would be understood to the reasonable non-lawyer as ascertainment of the truth of the matter. The days are long gone, if they ever existed, in which we could be satisfied that the "truth" of the facts of a case can be defined simply by the outcome of the adversarial process. We can no longer, if we ever could, shrug our shoulders and wash our hands and say "what is truth" in answer to those who would criticise indifference to whether the adversarial system yields accurate results in terms of facts found. In so saying it must be acknowledged that accuracy comes with a cost. As one recent writer on the economics of courts and litigation has observed⁵:

"... there is an optimal level of accuracy in legal proceedings. There is a trade off between two costs: the costs of error, and the costs of the procedure in question. ... As procedures become more summary, the probability of an error being committed – all other things equal – increases."

If Bridlegoose had avoided delay simply by identifying the issues then throwing his dice, he would have been an extremely efficient judge in terms of the costs and time of his process. But the incidence of factually accurate and legally correct results would have been random⁶. It is fair to say that the constitutional conception of the judicial power accords broadly with its popular conception and that the popular conception places high value on the accurate ascertainment of the facts. While economic realities deny the possibility of an indefinite asymptotic pursuit of truth, its importance in the process places bounds upon the extent to which it can be traded off for lower costs.

⁵ Cabrillo and Fitzpatrick, *The Economics of Courts and Litigation* (2008) at 74.

⁶ An analogous metaphor is used in Miller, "The Legal-Economic Analysis of Comparative Civil Procedure" (1997) 45 *American Journal of Comparative Law* 905 at 906.

Despite the bounds set by the nature of the judicial function the demands of our society for accessible justice and the requirements of a complex economy to operate efficiently in competitive international markets provide a constant impetus for improvement. The drive in that direction from within and outside the profession and the courts has, broadly speaking, been fairly constant when viewed over a 30 year time span. The public record shows an ongoing and high level of interest and application of public resources to investigations into how to improve the system. That level of interest shows no sign of abating. It requires all involved in the legal system to stand outside that system, to identify, scrutinise and question assumptions about its operation to review established practices and to be creative about new approaches.

When I joined the Federal Court in 1986 it already had in place rules which provided for a mandatory directions hearing following the filing of the initiating process and appearance. Routinely, in the Perth Registry, that directions hearing was held before a Judge and, generally speaking, the same Judge would hear the trial of the action. The intensity of that judicial case management has increased over the years. Civil case management is also widely applied in State and Territory courts. Recent enhancements of judicial management in the Federal Court are reflected in the Victorian "Rocket Docket" system of which Justice Gordon will speak later in this session.

The individual docket system leaves judges with a degree of flexibility in the development of their own case management tools. Some will be found effective, some ineffective and some appropriate only to particular circumstances. My own adventures in case management in my time as a Federal Court judge involved a number of experiments with case management procedures, some of which worked and some of which didn't. They included:

1. *Procedures for achieving adherence to time limits or supervised extension of limits.* Enforcement was achieved by a kind of low level harassment requiring defaulting practitioners to file affidavits at their own cost explaining the reasons for delay. Parties were required to apply for

extensions before the expiry of the relevant limit and could, if the extension were agreed, submit consent orders. Such orders were effective if approved by the judge. Such approval would be withheld if the proposed extension was unreasonable or the extensions were unreasonably repeated.

2. *Interrogatories.* The Federal Court Rules required leave to interrogate. Experience with interrogatories over a period of time persuaded me of their extremely limited utility, if not total uselessness. Parties had to be reminded that interrogatories were not a form of pre-trial cross-examination. Applicants for leave were urged to agree all facts of which they sought admissions and to do so without resort to interrogatories unless there was a fact on which agreement could not be reached and the Court could be persuaded that it was appropriate to grant leave. Today interrogatories are something of a rarity.
3. *Discovery.* The abandonment of the Peruvian Guano⁷ test for one of direct relevance has permitted more control and limitation of discovery. It nevertheless remains a difficult and challenging aspect of pre-trial disclosure. Limiting techniques such as discovery by category have not proved particularly fruitful. In complex cases they tend to generate arguments about the scope of the categories. Electronic discovery is convenient but it is necessary to plan it in advance to avoid debates about lack of compatibility between the respective computer systems of those providing discovery and those receiving it. The avoidance of discovery on the basis of provision of pre-trial witness statements together with documents upon which reliance was to be placed by each side has, in some cases, enabled discovery to be avoided or significantly reduced.

⁷ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

4. *The case management conference.* The case management conference where the judge sits around a table with counsel and solicitors (and sometimes the parties) was the most effective technique which I experienced in relation to pre-trial management of complex litigation. The psychological landscape of the case management conference, as a roundtable meeting of counsel and solicitors (and sometimes clients), presided over by a judge differs significantly from that of a directions hearing with its attendant formalities. It can become a kind of pre-trial procedural negotiation, assisted by the judge. It is a forum in which particular techniques for pre-trial case management can be crafted. One example from my own experience concerned the resolution of issues of statutory professional privilege said to attach to documents produced under subpoena by patent attorneys. A privilege committee was set up comprising solicitors from the three law firms involved in the case to negotiate a reduction of the areas of difference. The solicitors on the privilege committee were solicitors not involved in the relevant litigation and with appropriate undertakings could examine between themselves all documents and negotiate privilege claims. In the particular case in which the technique was used, all privilege claims were ultimately waived.

There is also much to be said for fixed limits on trial time. Where limited time is available for the trial of an action the case management conference can be a very effective tool for ensuring that the case is dealt with properly within the allocated time. This happened in *Australian Gas Light Company v Australian Competition and Consumer Commission*⁸ where only three weeks was available for trial and judgment had to be given three weeks thereafter. AGL sought a declaration against the ACCC that its proposed acquisition of an interest in a base-load generator in Victoria would not involve a substantial lessening of competition in the market for the provision of electricity in that State. The timeframe for the acquisition was short

⁸ [2003] FCA 1101; (2003) ATPR 41-956.

as the vendors' bankers were in a position to call upon a \$3.5 billion repayment within a month or so of the completion of the proposed trial. The case management conference enabled a better definition of the issues than appeared from the pleadings and, in particular, enabled protocols to be set up under which confidential documents obtained under subpoena from third parties in the market place could be referred to by counsel and solicitors and relevant experts in preparation for trial. Management of expert evidence was also dealt with by directions arising out of these conferences.

Alternative dispute resolution has also become a very important element of pre-trial case management. When I commenced as a Judge in 1986 the concept of court-annexed alternative dispute resolution was in the early stages of its development. Mediation of litigious disputes was beginning to emerge as a professional service which could be offered by legal practitioners although in its early days it was not seen as being particularly remunerative. Provisions for referral to mediation and arbitration were inserted in the *Federal Court Act* and provisions included in the Rules covering referral to mediation. There were experiments with a number of forms of alternative dispute resolution. These experiments included the use of judicial mediation, mini trials and early neutral evaluation. They were part of a wider program of improvement in the litigation process. Alternative dispute resolution, largely in the form of mediation, is now provided by trained judicial registrars and, what appears to be, a thriving private mediation sector.

The impetus for reform of the judicial system has existed for over thirty years. Its existence was recognised in the Report of the Cost of Justice produced in February 1993 by the Senate Standing Committee on Legal and Constitutional Affairs. The Committee acknowledged that:

"While there remains much to reform in the legal system, the Committee's inquiry showed that there is now a widespread commitment to change."

The report sought to put in train a mechanism for systemic review by placing reform of the legal system permanently on the agenda of those with the capacity to improve the system⁹. The Committee had observed in its Report that the submissions and testimony which it received over the duration of the inquiry had painted "a truly bleak picture". It agreed with the community perception that the cost of taking legal action was unreasonably high. It said¹⁰:

"In part, this arises from the complexity of the law and its administration. It was put to the Committee that any legal system truly concerned with producing justice was inherently expensive to operate. It was also put to the Committee that reforming many of the antiquated processes of the legal system would produce just results at less cost. The Committee concludes on the evidence before it that the legal system can be made more accessible without compromising its integrity."

The Committee identified those with direct responsibility for the maintenance and repair of the legal system as parliament, the executive, the judiciary and the legal profession¹¹.

The multi-dimensional character of the challenge was apparent from the Committee's proposals. Its difficulty was evidenced in their generality. They included making the law comprehensible to the community, improving the transparency of the legal system and changing the culture of those dealing with its users, particularly judges and the profession. The concept of judicial monitoring of the progress of litigation through the system was endorsed. So too was the proposition that the profession has a responsibility for making the most efficient use

⁹ Report by Senate Standing Committee on Legal and Constitutional Affairs, *The Costs of Justice – Foundations for Reform*, February 1993 at [31].

¹⁰ Ibid at [16].

¹¹ Ibid at [47] and [48].

of the system and not simply applying a variant of the old saying that "all is fair in love and war".

There was consideration by the Committee, in a Discussion Paper which preceded its Report, of the implications of inquisitorial procedures for Australia. Reference was made to the inquisitorial system as it operated in Germany. It noted an estimate by Lord Devlin that the adversary system was some three times more expensive than the inquisitorial system. But as the Committee acknowledged the adoption of the German system in Australia would involve the appointment of many additional judges and the expenditure of large amounts of public money. At that time West Germany had more than 20,000 judges¹². Even so, the Law Council acknowledged that the adoption of particular aspects of inquisitorial procedure might help to reduce the cost of litigation. These included greater judicial control over proceedings, case flow management, a restrictive adjournment policy, the establishment of compulsory pre-trial settlement conferences and more flexible court hours. And that is what has occurred.

In 2000, the Australian Law Reform Commission produced a major report entitled "Managing Justice"¹³. It was concerned with the federal judicial system and federal review tribunals. There was an emphasis upon the use of technology in litigation and techniques to reduce the areas of dispute and therefore time and cost involved in the use of expert witnesses. The individual docket system of the Federal Court was the subject of a number of recommendations in relation to national procedures. The development of harmonised rules and originating processes where appropriate for Federal Court and State and Territory Supreme Courts was also urged. There were many other recommendations.

¹² Senate Standing Committee on Legal and Constitutional Affairs, *Costs of Legal Services and Litigation*, Discussion Paper No 6, (1992) at [3.17] to [3.21].

¹³ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System*, Report No 89, (2000).

In 2008, the Victorian Law Reform Commission produced a substantial report on the civil justice system¹⁴. It included recommendations relating to the facilitation of early resolution of disputes without litigation, standards of conduct expected of participants in civil litigation, the improvement of alternative dispute resolution and case management. Chapter 6 of the Report, entitled "Getting to the Truth Earlier and Easier", included recommendations for pre-trial oral examinations. The difficult topic of discovery of documents was addressed¹⁵. These included the abandonment of the Peruvian Guano test for a direct relevance test. Procedural flexibility in respect of discovery was proposed¹⁶. Expert evidence and the role of expert witnesses, the improvement of remedies in class actions, funding mechanisms, the cost of litigation and ongoing civil justice review and reform were also dealt with.

The Federal Attorney-General's Department is concerned to reform the federal judicial system in a variety of ways. The Senate Standing Committee on Legal and Constitutional Affairs has recently commenced an inquiry into the judicial system. The Standing Committee of Attorneys-General has produced a Discussion Paper on the reform of the judicial system nationally. There are many other substantial inputs into the reform of the judicial system of litigation which indicate, perhaps paradoxically, an underlying acceptance of the necessity of a judicial dispute resolution process and a commitment to its future.

Despite the need for change which undoubtedly exists, there is a public interest aspect in the resolution of private disputes in the public forum of a law court

¹⁴ Victorian Law Reform Commission, *Civil Justice Review: Report*, (2008).

¹⁵ *Ibid*, Recommendations 80 to 92.

¹⁶ *Ibid*, Recommendation 85.

and that interest endures. In a celebrated article sceptical of the alternative dispute resolution process, Professor Owen Fiss wrote in 1984 in the *Yale Law Journal*¹⁷:

"Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximise the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and Statutes; to interpret those values and to bring reality into accord with them."

That, of course, is not an objection to alternative dispute resolution for without alternative dispute resolution the courts would be overwhelmed by litigation. Rather, it is a reminder of the public necessity of a judicial system in a representative democracy. It is a reminder that while the process needs ongoing reform and improvement and requires the close engagement of all who practice in and preside over the courts, it has an ongoing future. The shape of that future is very much in our hands as practitioners and judges.

¹⁷ Fiss, "Against Settlement", (1984) 93 *Yale Law Journal* 1073.