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Private judging in Australia

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'It is therefore appropriate, as private judging has now well and truly infiltrated Australian ADR processes, that the 'pitfalls' and not just the benefits are exposed ... [so] that an informed decision can be made on the real cost that private judging levies on the administration of justice and the future for Australian ADR.'

While Australia has embraced many forms of ADR over the last decade, the scale of commercialised private judging in the US has not been replicated in this country. This is not to say that Australian retired judges do not engage in private judging or that Australian litigants do not utilise the services of retired judges. This does occur;[1] but it occurs without the regulation or apparent structure that complements the 'rent-a-judge' process in the US.

Although, superficially, private judging may resolve disputes faster, more expeditiously and with confidentiality, it must be acknowledged that significant use of this process will inevitably defile the public system of justice. It is therefore appropriate, as private judging has now well and truly infiltrated Australian ADR processes, that the 'pitfalls' and not just the benefits are exposed. It is only after these pitfalls have been realised that an informed decision can be made on the real cost that private judging levies on the administration of justice and the future for Australian ADR.

Australian private judging

> Private judging is a process in which the parties to a dispute present arguments and evidence to a neutral third party chosen on the basis of their experience as a member of the judiciary (the private judge) who makes a determination in accordance with his or her opinion as to what decision would be made if the matter was judicially determined.[2]

Private judging contemplates the use of a retired judge to determine a dispute between parties, as would occur in the public justice system. However, unlike the public justice system, the parties choose the judge and pay for the judicial service. Procedural aspects are also controlled by the litigants, who decide how, where and when the hearing will take place. The entire matter remains confidential, the parties usually agreeing to be bound by the decision of the rented judge, with no public record of the outcome (or even the dispute) being accessible as precedent.

The costs of private judging are generally split evenly between the parties. Even so, the cost of expeditious justice by a judge of your choice is likely to exceed the legal costs in the public arena. While the nature of costs will depend upon the chosen formality of the process, in addition to legal preparation fees parties must pay for the judge, the court room (or room hire), court officials (such as bailiffs or orderlies), court reporters, transcription and travel expenses.

In the US private judging, or 'rent-a-judge' as it is colloquially known, is a multi-million dollar business. However, unlike Australia, the process has been commercialised with the creation of firms such as JAMS/Endispute and Judicate.[3] With commercialisation has also come structure, as approximately one half of American states offer some form of private judging.[4] This voluntary, court annexed process allows the opinion and decision of the private judge to be submitted and adopted as a judgment of the court, with full rights of appeal being retained in some jurisdictions.[5]

'Pros' of private judging

Private judging, by its very nature, is immune from the criticisms levelled at other ADR processes. These criticisms include claims of second class justice and the deprivation of a 'day in court'. Unfortunately, these criticisms have been ➢

➢compounded by the images of vindicating and crusading court battles in television shows such as *Ally McBeal, LA Law* and even the more consumer-friendly *Judge Judy*.[6] Private judging's attractiveness is obviously its close resemblance to formal public adjudication. The parties have their day in 'court'. A winner is declared by the next best thing to a real judge: a retired judge who possesses the requisite judicial qualifications to determine the dispute.

Private judging ultimately offers parties convenience and flexibility. They are able to choose a judge, ideally on the basis of expertise (and it is not a matter of the luck of the draw). Parties can also have their dispute adjudicated on a date and at a place convenient to them, thereby becoming immune to the running list, court vacation time or judges' availability. The hearing of the dispute is controlled by the litigants with as little or as much formality as required. This allows parties to circumvent usual court processes by reducing pleadings, curtailing interrogatories and abridging time wasting interlocutory applications.

The flexibility of private judging returns ownership and control of the litigation to the disputants. This includes complete control over publication of the dispute, as the parties execute an agreement which ensures that the outcome and in fact even the dispute remain entirely confidential.[7] Confidentiality and the ability to stay outside the public open court system has obvious attractions for any litigant faced with potentially humiliating or damaging public litigation.

Private judging offers a speedy resolution to a dispute at a time when complaints of cost and delay in our court system are becoming more frequent.[8] Although Australian courts do not suffer the same backlog of cases as in the US,[9] the wheels of justice are beginning to decelerate.[10] Private judging may accelerate justice in both the public and private arena. For example, it is argued in the US that the deployment of cases from a backlogged public system alleviates public court delay, and this leaves more time, facilities and money available to those disputes left in the public arena.[11]

Private judging therefore offers the individual litigant a range of enticing benefits including speed, confidentiality and control of a process which, to most litigants in the public system, is completely foreign.

Pitfalls of private judging

Unfortunately, while the individual litigant may be attracted by immediate and superficial benefits of private judging, the problems associated with the practice adversely affect a far larger group in society.

As the US experience has shown, there are serious concerns regarding the impact of private judging on the public system of justice. These concerns are equally applicable to Australia and include not only the costs of private judging together with questions of bias and accountability, but also the stagnation of legal precedent and the erosion of the central role of the courts. Most significantly, there is a possibility that courts will be seen as a second class justice system.[12]

Costs of private judging

Private judging is obviously attractive for a specific class of litigants, namely those who can afford it. While a determination is reached with speed, confidentiality and flexibility, these benefits come at a cost not only to the litigants (in terms of expense and the difficulty of monitoring the quality of judging received) but also to the administration of justice.

There is no doubt that private judging is a costly alternative. Comparable fees for the services of retired judges or barristers may be drawn in terms of daily hire fees for case appraisal or special services.[13] However, it should be remembered that there are additional costs involved in private judging, namely private transcription, the hiring of 'court' facilities or rooms, staff and in some cases travel.

With the increasingly exorbitant cost of public system litigation, private judging serves only to further widen the gap between the members of our community who have access to justice. Justice remains accessible by only the super rich (with the choice to abandon the public system and resort to private judging) or the absolutely destitute, who must rely on legal aid.

Second class justice system?

The ability of wealthier litigants to abandon the courts and to access a parallel system of private judging contributes to the public perception of a second class justice system.

And as the rich increasingly abandon the traditional courts, more big business (and money) will be directed to private judging. Consequently, with the departure of money (and arguably political power) from the public system, there remains little impetus for business to press for reform to tackle the court backlogs, or to lobby for more funding for such reforms.

Brain drain

The second class justice label is exacerbated by the concern that eminent judicial brains will leave the bench to pursue a career in private judging. This brain drain fear has been expressed in both the US and England. For example:

> [I]f the Bench becomes part of the territory for headhunters' safari, British justice will suffer in two ways. The best brains will be creamed off, reducing the quality of the Bench. Worse probably, after it became known that Judges were likely to be in negotiation with big business concerns over their future employment, their reputations for absolute impartiality and integrity … would suffer.[14]

Although there have been seemingly few retirements from the bench in the UK so far,[15] this is not the case in the US, where approximately one third of judges retire to take up private judging positions.[16] However, statistics also show that judges are not leaving the bench prematurely to pursue larger private judging pay packets. Instead, they are choosing to serve the requisite period on the bench before receipt of their judicial pension.[17]

Although Australian judges must retire at age 70, they may be enticed to retire after receipt of 60 per cent of their judicial pension at age 55 or after ten years' service. With the potential for commercialisation

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➢ of private judging in Australia, along the lines of what has happened in the US, there is reason to believe that the Australian judiciary would not be immune from the brain drain problem.

Stagnation of precedent

Surprisingly little comment has been made to date regarding the impact of private judging on common law precedent. Although private judges must apply precedent to determine cases judicially, confidential dispute resolution will inevitably cause common law precedent to stagnate. The obvious attractiveness of private judging to the wealthy litigants, who can afford to run test cases, arguably leads to the conclusion that many precedent cases will no longer be publicly tried.

Adding fuel to the fire is the possible use of private judging to settle disputes which involve taxpayers' money or public interest issues, without open, accessible or accountable processes. Confidentiality in private judging fosters ignorance of public interest issues, such as liability for defective products. By allowing these types of disputes to be resolved privately, without any public airing, there can be no possible promotion of community awareness or conscience to prevent such an incident from occurring again.[18]

Bias and accountability

While the parties usually split the costs of the private judge, there remains a concern that a perception of bias may cloud judicial impartiality, as repeat customers are likely to be given preference. Unlike the public system of justice where choice of judge is arguably the luck of the draw, choice of private judge (and the judge's own interest in a continued source of income) may result in what is known as 'repeat business bias'.

'With decisions and determinations being held in private, the accountability of private judges and the quality of judging must also be brought into question.'

With decisions and determinations being held in private, the accountability of private judges and the quality of judging must also be brought into question. Private judges are not selected by any identifiable criteria, other than their status as former public court judges. Age, lucidity, and capacity are not tested. While on the bench the judge may have been subject to discipline and even removal, in the private sphere there are no similar opportunities to ensure accountability.

As long as private judging remains confidential, there will be no scope to review the quality of judging that is being performed. Although as a minimum, private judging contemplates judicial decisions being made in accordance with law, the confidentiality agreement signed by the parties will deter the complaint of an unsatisfied litigant. To whom would the complaint be made? In Australia there is no purpose built regulatory body or organisation which acts on or takes account of complaints about the adjudicative work of retired judges.

What to expect in the future

While Australian courts have never experienced the backlog of cases that occurs in the US, the frequency of complaints of cost and delay are becoming more prevalent. The standard response of governments to date has been to privatise ADR processes. However, this response, while it appears to have reduced the backlogs,[19] inevitably raises the fundamental issue of governmental responsibility for justice.

As more and more Australian courts embrace court ordered mediation or case appraisal in the normal court procedure,[20] awareness of trial by independent third party is likely to increase.

Gone are the days when judges retired to travel or garden. Finding a retired and willing judge is no longer a problem. Many now adopt the practice of inserting the words 'Hon' and 'Retired' alongside their names.[21]

But while reputable, retired judges and prominent barristers engage in versions of private judging, Australia has yet to embrace the commercialised process which has emerged in the US.

Private judging in Australia is presently amorphous and in need of attention. It cannot continue unchecked. Ignoring the predilection of litigants to pursue private judging for speed, convenience and confidentiality will mean the death knell for the public justice system for future generations.

Consequently, governments cannot ➢

➢ continue to abdicate responsibility for regulating private judging. The situation requires guidelines, rules and institutionalisation to ensure that a satisfactory and accountable level of services is provided. Commercialisation of the processes along American lines is to be avoided. Further, measures such as the filing of decisions (abridged if necessary) with the public court is essential to ensure that the precedent resource is not lost.

If Australia is to learn from the American private judging experience, it will have to respond quickly to prevent erosion of public confidence in the system of justice. ❖

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Endnotes

1. See for example, Cavanagh, P 'Have Gavel — Will Travel' (1994) 3 *Queensland ADR Review* 2.

2. *Alternative Dispute Resolution Definitions* The National Alternative Dispute Resolution Advisory Council Canberra March 1997 available at http://law.gov.au/aghome/advisory/nadrac/adrdefinitions.htm (17 January 1999).

3. See further Meggiorin, H 'Justice in a Flash if You've Got the Cash' (1998) 9 (4) *ADRJ* 246 at 247; and see the exerpt elsewhere in this Bulletin.

4. Chernick, R, Bendix, H and Barrett, C. 'Private Judging: Privatising Civil Justice' National Legal Center for the Public Interest, available at http://www.nlcpi.org/books/briefly7/ddtext.html at 4 (27 January 1999).

5. Ibid. See also Kim, A 'Rent-a-Judge and the Cost of Selling Justice' (1994) 44 *Duke Law Journal* 166 at 168.

6. 'Popular culture has yet to fashion a popular interest in and knowledge of alternative dispute resolution';. 'The litigation culture' in Australian Law Reform Commission, *Issues Paper 20* (April 1997) at 7.

7. Cavanagh, above, note 1.

8. ALRC, above, note 6.

9. Cox, G 'The Best Judges Money Can Buy' (1987) *The National Law Journal* 4; private judging can apparently provide a 5-year head start on public system litigants.

10. See for example, 'The cost of Federal civil litigation', ALRC, above, note 6 at 2. This deceleration is being addressed; see for example note 19 below on the reduction in number of cases entered for trial following the introduction of mandatory ADR processes in the Queensland Supreme Court.

11. Although the available American statistics show that private judging has provided no significant benefit to the backlog of cases in the public system. See Rolph, E, Moller E and Petersen L 'Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles' (1996) 2 *Journal of Dispute Resolution* 277 at 286.

12. ALRC, above, note 6 at 2. See also Meggiorin, above, note 3 at 249.

13. For example, see '$23,000-a-day lawyers' bill for probe into CJC', *Courier Mail* 12 June 1997 p 1, where retired judges Connolly and Ryan were remunerated at a rate of $3,000 a day and counsel fees ranged between $2,400 and $3,600 a day. Some private judges reputedly command fees upwards of $5,000 a day.

14. Dame R Mitchell 'Retirement from the Bench and Life Thereafter' (1989) *Law Society Bulletin,* July, 161 at 163.

15. For example, the retirement of Sir Henry Fisher from the High Court in 1970 which prompted the above quote by Dame Mitchell.

16. Field Van Tassel, E 'Why Judges Resign: Influences on the Federal Judicial Service 1789 to 1992' (1993) Federal Judicial Center available at http://www.fjc.gov/JUDJUDACT/judgeres/judgeres.html (27 January 1999).

17. Kim, above, note 5 at 177.

18. Chambers, M 'Sua Sponte' (1992) *The National Law Journal,* June, at 15.

19. 'The Appeal of Mediation' *Proctor* (1998) 18 (11) 5: For example in the Queensland Supreme Court, 444 new civil cases were entered for trial in Queensland in 1995. This number dropped to 265 in 1997 and 237 in 1998. Similarly the number of civil cases entered and ready for trial at the end of the 1996 financial year was 300; there were 258 in 1997 and 147 in 1998. So, too, in the Queensland District Court where 470 civil cases were awaiting trial in 1997 compared with 262 in 1998.

20. See for example *Courts Legislation Amendment Act 1993* (Qld) which provides for court annexed mediation and case appraisal in all court matters before the Supreme, District and Magistrate Courts in Queensland.

21. See also Cavanagh, above, note 1, who states that in 1994 there were at least 12 former judges acting as private judges.

Might the existence of private courts in 19th century Britain have deprived us of Dickens' description of the Jarndyce litigation? Or might the parties to the dispute not have had the means to purchase the services of an adjudicator in the private sector?

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in the course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. A long procession of chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its weary length before the court, perennially hopeless.

Charles Dickens
Bleak House 1853.