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## 'Judicial' decision-making in Australia: Critique and redemption

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# 'Judicial' Decision-Making in Australia: Critique and Redemption

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## Landscape of 'judges'

In Australia, as in most countries, the landscape of judges is vast. Judicial activity can be categorised in many ways. For example, first there is a tiny minority of judges with 'lifelong' appointments (ie, to the age of 70 or 72 years); who are appointed by the government in power; who work in offices which look like traditional 'courtrooms'; and whose decision-making processes are usually publicised by observers and the publication of decisions and reasoning; and who, importantly, are constitutionally protected from political interference.

Second, there is a vast array of decision-makers, or conflict managers, or tribunals, who only have short-term appointments; who work by correspondence or in business-like offices; who are appointed by industry, sporting associations or government; whose decision-making is usually accessible but is infrequently publicised; and who are subject to 'interference', such as phone-calls, pressure, and hiring and firing by lobby groups and paymasters.

For every lifelong judge, there are several thousand temporary judges and 'conflict managers'. For every one decision by a lifelong judge in Australia, there are thousands of decisions by temporary conflict managers, conciliators, registrars, mini-courts and tribunals.<sup>1</sup>

Third, below tribunals are thousands of panels, committees and bosses in workplaces, universities, sporting clubs and churches. This army of informal judges settles disputes and rules upon disputes every day.<sup>2</sup>

Strangely, the historic attention of law schools and legal scholarship has been upon the formal and recorded decisions of the tiny minority of lifelong judges. The behaviour and decisions of the empires of 'temporary' judges have been mainly ignored by legal scholarship, or relegated to the subject of 'administrative law' or to business schools.

## Critiques of 'judicial' conflict management: Why such a chorus in Australia?

In Australia, as elsewhere, the critiques of judicial processes are many and constant. Why is the chorus of critics (like the critics of legal education) so loud? There are many possible reasons.

- The critics of *all* human decision-making processes are increasing in visibility and number perhaps as the insights of social psychology filter across to other disciplines and common knowledge.

- These are usually not attacks on the personalities and competence of the judges themselves – rather the systemic and generic methods of 'managing conflict'.
- In a democracy like Australia, there is a strong tradition of critical commentary of those in positions of power by the press, pub-talk and regular 'scholarly' journals.
- Australia has enduring habits and traditions of establishing independent investigatory bodies to write a flow of reform recommendations for the 'legal system'. Notable institutions include the Australian and State Law Reform Commissions, Family Law Council, and ombudspersons.
- State and Federal politicians are under constant pressure to reduce expenditure on court systems by reforming their methods of operation. In a society which has not been traumatised by civil war, violence or corruption, there are few votes to be gained by spending on courts and tribunals.
- Of course, the volume of criticism is relative to the basis of comparison. Many visiting lawyers who come to Australia from cultures where corruption and inefficiency are endemic, use the Australian system as an aspirational model.

The above reflects a strange double standard. Australians expect government 'officials' to be inefficient, yet are deeply disappointed when they are!

## What are the critiques of conflict management by judges and tribunals?

In Australia, the critiques of the process of conflict management through the courts or tribunals are constant and repetitive. To repeat, these critiques may sometimes reflect unrealistic expectations of human decision-making and of human organisations. They also echo the more general laments of psychologists, historians and philosophers about the management of conflict in human societies!

What are those critiques? No doubt there are similar versions around the world. Every lawyer expresses these critiques with varying degrees of intensity.

- The waiting times to reach a full judicial decision are too *slow*.
- The *high cost* of preparing evidence and arguments makes the courts inaccessible to any but the wealthy.
- There is only very limited *legal aid* provided to the poor and middle class.
- The legal requirements of *blame*, assertion and denial create a fog of words, and defensiveness: 'Because litigators rarely win or lose cases, they derive job satisfaction by recasting minor discovery disputes as titanic struggles. Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery, may conclude that it is more important to look and sound ferocious than to act co-operatively, even if all that huffing and puffing does not help (and sometimes harms) their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit ... Without guidance as to appropriate conduct from their elders, either at the firm or at the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it.'<sup>3</sup>
- Many lawyers who act as gladiators, are incapable of switching hats to become effective *diplomats*.

- Clients progressively *lose control* as a dispute moves towards a full hearing.
- Judges do not 'discover the truth', but rather *reconstruct* a version of history. (As the saying goes, 'It's a lucky client who can identify himself in his own case.')
- Multiple mandatory settlement conferences and judicial settlement practices put *considerable pressure* on over 90% of disputants to agree.
- Clients who hope to make speeches, or be heard, or have time to ask questions, find themselves 'cut off' by *time constraints* and tactical questioning.
- Experienced lawyers play *tactical games* over delay, costs, adjournments, missing witnesses, arguing every point, making wild claims, and using embarrassing publicity.
- 'Success' at any hearing depends substantially on the skill by *hired* lawyers and other experts.
- Judges have a *limited range of remedies* available, usually in the form of ordering monetary payments or transfer of property.

These and many other criticisms come from repeat customers (eg, governments, banks and insurance companies); from experienced litigation lawyers; from government funders of courts; from law reform commissions; and also from insider judges themselves.

For example, Justice Fitzgerald in one famous case commented:

'[I]t is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organised, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow.'<sup>4</sup>

Thus, lawyers try to educate clients eager for 'justice' about the many risks and side effects of litigation.

## Redemption of courts and the 'legal system' as conflict managers

This ongoing avalanche of criticism of the court systems in Australia should be balanced by many redeeming factors. However, these redeeming factors receive little publicity. Why? What are the redeeming factors?

- Importantly, judges universally attempt to apply the rule of law, and the law of rules. Judges carefully attempt not to apply their own hobby-horses, passions or currently fashionable views.
- Lifelong judicial appointees in Australia are assisted by habit, peer support, legal rules, secure salaries and per-

sonal integrity to avoid pressure from wealthy lobby groups, sensationalist media, friends, or from phone calls from politicians. They enjoy and aggressively defend 'judicial independence'.

- Despite movies and media depicting an epidemic of filing and 'full blown' litigation, the rate of 'litigation' in Australia is low. 'Full blown' litigation (ie, reaching judicial judgment) appears to have been declining in all courts in Australia and the USA since the mid-1980s.
- In almost all courts in Australia, over 90% of disputes initiated by filing, are abandoned or settled. (Of course, it can be argued that a 'healthy' society needs more litigation than this in order to create better legal precedents and publicity of corruption.)
- This very high rate of abandonment and settlement of claims made in court is encouraged by many *formal* and *informal* pressures. (Again there is an ongoing debate about whether these strong 'settlement pressures' are a strength or weakness of Australia and other societies.)
- The *formal* or *institutionalised* pressures to settle and agree include:
  - (a) Mandatory mediation in almost all courts, paid for by disputants.
  - (b) Mandatory mediation in all disputes about children, initially paid for by the government.
  - (c) Ethical rules imposed on all lawyers to explore carefully any possible avenues of settlement.
  - (d) Mandatory 'conciliation' conferences before a court official before a trial can occur.
  - (e) Mandatory 'conferences' between duelling expert witnesses.
  - (f) Making costs awards against parties or their lawyers if reasonable written offers were not accepted.
  - (g) Expensive requirements for all disputants to make 'full documented disclosure' of all material facts to the courts and to each other. This requirement is enforced by serious monetary and professional sanctions against disputants and their lawyers.
  - (h) Multiple listing of cases before the same judge on the same day when only one will be actually heard.

The *informal* pressures to settle claims filed in a court are also many! (Again, some commentators argue that too many Australians are deprived from 'access' to an independent judicial decision because of these multiple pressures to settle.) These informal pressures include:

- (a) The gradual escalation of legal costs.
- (b) The withdrawal of limited state legal aid once a settlement conference has occurred.
- (c) Escalating pressure from lawyers upon their own clients to 'settle', thereby avoiding client trauma from litigation, keeping control of outcomes, and reducing the chance that the client will criticise his/her own lawyer.<sup>5</sup>
- (d) Avoidance of public embarrassment in a court where disclosures will occur in relation to violence, tax evasion, illegal business activities, or social security fraud.
- (e) Avoiding strained relationships with friends and business associates who are called to be witnesses, and to disclose confidences.
- (f) With the passage of time and attrition, clients move through a grieving process and have less energy and emotion left to fuel the litigation.

(g) At the door of the court, a client experiences considerable loss of control, anxiety about judicial behaviour, and pressure from lawyers and judges to settle before it is 'too late'.<sup>6</sup>

### Individual benefits from the court system

There are a number of situations where the response of filing in a court, without actually reaching a preliminary or full hearing, is helpful.

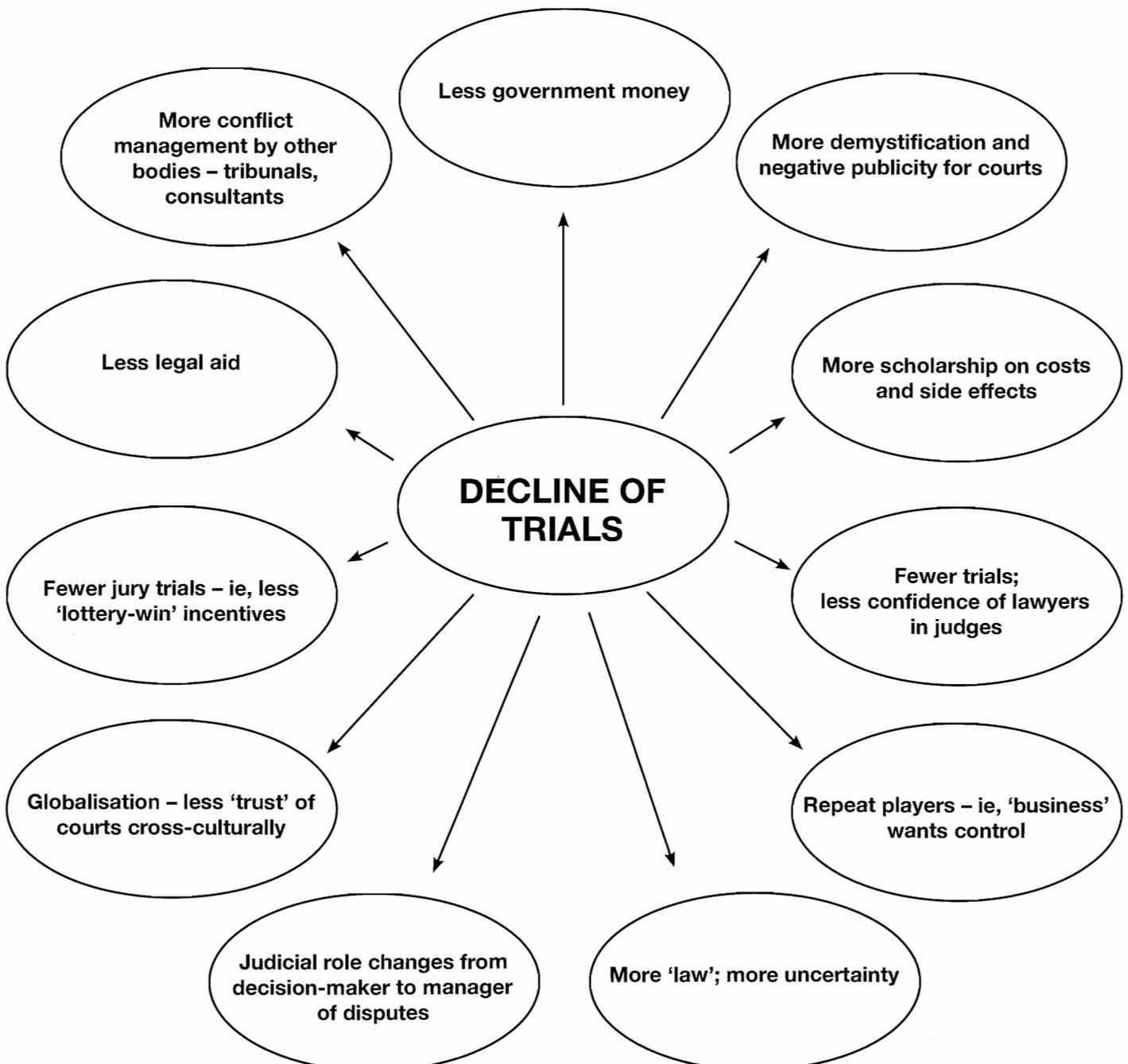
#### 1. Diagnostic reasons for beginning or filing in court

The following are some of the situations where beginning a court action may be helpful to an aggrieved individual.

- Where someone has engaged in self-help – eg, moved

- money overseas; put a business up for sale; started destroying documents.
- As a method to gather key information by subpoena, or by court deadlines to disclose documents.
- To put wandering negotiations on a schedule with an ultimate door-of-the-court deadline.
- To compel a meeting in a court corridor or doorstep.
- To create embarrassing publicity and pressure to settle.
- The applicant gains several advantages such as meeting limitation periods, and controlling the language of conflict and the venue for filing.
- Where filing incorporates new people into the dispute such as experts and lawyers who bring new insights and codes of ethics to the conflict.
- As a demonstration of seriousness – 'I will not go away'.<sup>7</sup>

### Why are all kinds of full blown 'trials' diminishing steeply in numbers since the 1980s in western democracies?<sup>8</sup>



## 2. Diagnostic reasons for actually obtaining a court judgment

The following factors overlap with, but also differ from, the 'appropriate' reasons for going beyond filing, or beginning a court action, to actually obtaining the judgment of a court.

- One or more of the disputants, such as a middle manager or government department, needs to shift responsibility for outcomes to somebody else. ('It's not my fault, it was the foolish judge'.)
- A person who is engaged in many conflicts (a 'repeat player'), such as a builder, or bank, wants to maintain a tough reputation as a negotiator, by litigating say every hundredth case. The other 99 are thereby intimidated to settle.
- 'Repeat players', such as banks and construction companies, need to litigate certain disputes to the end in order to control judicial precedents which may be used against them in many future disputes.
- One disputant, such as a minority group, wants a judicial hearing to continue for as long as possible so that the embarrassing spotlight of publicity falls on a powerful group such as police officers, farmers, the medical profession, or stockbrokers.
- The disputants either have incompetent lawyers, or they do not listen to their lawyers, about the risks and side-effects of 'full blown' litigation. They persist with the delusions of 'winning' and 'justice'.
- One of the disputants has 'nothing to lose' – he/she is unemployed, poverty-stricken, angry and persistent – and is using litigation as a 'scorched-earth' policy.



## Social benefits of litigation ('redemption' continued)

Society tends to take garbage collectors for granted until they go on strike. Then they are appreciated as a key element of 'civilisation'. Likewise with competent and independent judges and courts.

How much conflict and litigation does a healthy society need? The answer is 'some'. In Australia, there is rarely public discussion of the following benefits from litigation to society. The overlapping benefits to individuals are set out in the previous section.

- Society needs a continuing bank of *publicised precedents*.<sup>10</sup> These provide a 'market rate' to guide the 'fair' settlement of hundreds of other similar disputes. The court system would become unbearably clogged if the settlement rates dropped below approximately 90% of commenced actions.
- A certain number of fully litigated cases is necessary to *keep judges competent* and in practice (just as brain surgeons and tennis players need regular practice).
- In similar fashion, a moderate diet of litigation *keeps litigation lawyers competent* and in practice. Thereby they can give better service to the public, and are more able to make realistic guesses about what might happen in a court case.
- A regular trickle of fully litigated cases has the benefit of *exposing hidden corruption in society*. The assembly of 'secret' documents and fearful witnesses in a public courtroom, regularly exposes bribes, laziness, kick-backs, violence and exploitation amongst police, politicians, lawyers, airlines, banks and manufacturers.
- Regular and publicised litigation (ironically) also *enhances the reputation of courts*. Observers and the press are able to witness on a daily basis that judges are honest and intellectually vigorous, and that they apply the rule of law, and are independent from the pressures of politicians, bribes and lobby groups.
- A decision by an accessible and independent judge, backed up by reasonably efficient enforcement mechanisms, provides a *vital refuge for the weak and oppressed in society*. There are many people who when left to the market-place – where, in negotiations, they may experience fear, force and fraud – will be crushed emotionally and financially. These include victims of domestic violence, administrative error, racial discrimination, medical negligence, police brutality, financial fraud, and wrongful accusation of crime.
- Courts provide a publicised environment where *debates can take place on important social issues*. This role is especially important where such debates do not occur in any helpful or intelligent fashion in the press or in Parliament. In Australia, such grand dialogues have occurred in relation to many topics including native title, freedom of speech, protection of refugees, and equality of women.
- Courts provide not only the venue for grand dialogues, but also for *social change*. Courts are able to implement *gradual* incremental change to the legal rules and to patterns of social behaviour; and sometimes sudden change in areas of life where politicians are inert and fearful.
- Another important social function of courts is to *put an end* to a certain number of conflicts so that citizens can 'get on with their lives'. Disputants often may agree with

Wade: 'Judicial' decision-making in Australia the *substantive* outcome of a judicial decision. Nevertheless, like in a soccer game, *some* decision is necessary so that the players can return to business. (Of course, this 'benefit' of litigation also highlights a common criticism that in many other cases, a judicial decision does not 'resolve', but rather escalates, the conflicts.)

- The whole legal system of competent lawyers, police, rules and courts serves a vital function in a civilised society to *modify violent self-help* and vigilante justice. Enraged citizens are often restrained from all sides with the double messages that there are (eventually) judicial remedies for illegal activities, and that their own violent self-help will be punished.
- Where local courts consistently model independence and the rule of law, this can have the effect of *attracting global business* to that locality. Most global businesses are attracted by predictability, speed, and absence of corruption in local dispute resolution processes. Where these elements are missing, global business may move offshore, or try to relocate dispute resolution to relatively 'independent' arbitrators. Interestingly, there are now various 'corruption rankings' of the judiciary and administrators in each country of the world.<sup>11</sup>

## Case management

Courts in Australia have been profoundly affected by certain 'management' theories and practices. These theories basically require courts to set 'goals', collect information, and to measure numerically whether the goals have been met. Thus over the last twenty years, courts have been required to keep statistics on filing and settlement rates, number of adjournments, hours of court times, and degree of litigant satisfaction.

This 'case management' movement emphasises that judicial time is a *limited public resource* (like water and hospital time) which: (a) should not be controlled by lawyers or customers; and (b) should be carefully allocated by court administrators. This managerial philosophy is reflected in Australia and elsewhere by the gradual emergence of court rules or practices requiring time-limited hearings; more written submissions and summaries; more judicial settlement pressure; more asking of questions by judges; more informal meetings with judges; more rigid timetables for preparation; more compulsory negotiation and mediation; more dramatic costs orders against lawyers or clients who are slow, or use the court process as a bargaining tool; fewer adjournments; shorter judgments; use of only *one* expert (ie, prohibition of 'duelling experts'); and court hearings extending into the night.

Lawyers often comment that these 'managerial trends' have made courts 'less friendly' for lawyers.

## Tribunals

Another positive trend in Australia and elsewhere for the court system is the proliferation of alternative 'mini-courts' or tribunals.<sup>12</sup>

Market forces have repetitively created mini-courts or arbitrators which are allegedly faster, cheaper, and more expert than 'traditional' courts.<sup>13</sup> Traditional courts have usually not welcomed the implied criticism in these alternatives, and have often attempted to supervise the newcomers. Eventually, supervision of the competition becomes too onerous, and the newcomers are gradually set free to experiment with forms of cheap, fast and specialised decision-making.

Following normal marketing patterns, the newcomers' 'case management' features are copied to *some* extent by the older court system. As the new tribunals become more delayed, expensive, rigid and ritualistic, the old courts become less so. Competition provides both alternatives and reform to the traditional courts.

## Conclusion

The formal court system in Australia reflects a corner of a vast landscape (or the tip of an iceberg) of many quasi-judicial decision-making bodies. These bodies are proliferating and acquiring 'legal' characteristics. This pattern of expansion guarantees work for those with 'legal' training.

In Australia, there is a chorus of critiques of both formal and informal 'judges'. This is unlikely to abate. Are we a nation of complainers with unrealistic expectations? Or are eternal critiques and vigilance a necessary price for cherished liberties?

Whatever the chorus of complaints and ongoing cyclical reforms to Australian courts, it is vital that there also be a balancing dialogue of 'redemption' of these court systems. Compared to other times and places, the advantages of what we have in Australia are immense.

## References

<sup>1</sup> For example, in the State of Queensland, a recent review of decision-making bodies included the following tribunals (these are bodies established by legislation whose members usually have an appointment lasting 3-5 years): Anti-Discrimination Tribunal; Children Services Tribunal; Guardianship and Administration Tribunal; Mental Health Review Tribunal; Commercial and Consumer Tribunal; Retail Shop Leases Tribunal; Office of the Commissioner for Body Corporate and Community Management Queensland; Misconduct Tribunal; Commissioners for Police Service Reviews; Fisheries Tribunal; Veterinary Tribunal; Animal Valuers Tribunal; Small Claims Tribunal; Information Commissioner; Legal Practice Committee/Legal Practice Tribunal (practitioner panel/lay panel); Racing Appeals Tribunal; Computer Games and Images Appeals Tribunal; Film Appeals Tribunal; Publications Appeals Tribunal; Commissioner of State Revenue; Gaming Commission; Land Tribunal; Building and Development Tribunals; Health Practitioners Tribunal; Nursing Tribunal; Medical Assessment Tribunals (general and specialist). Specialist tribunals under the *Workers' Compensation and Rehabilitation Regulations* 2003 (Qld) include: Cardiac Assessment Tribunal; Dermatology Assessment Tribunal; Disfigurement Assessment Tribunal; Ear, Nose and Throat Assessment Tribunal; General Medical Assessment Tribunal; Neurology/Neurosurgical Assessment Tribunal;

Ophthalmology Assessment Tribunal; Orthopaedic Assessment Tribunal. See <https://www.justice.qld.gov.au/ourlaws/papers/Tribunal-discussionpaper.pdf>.

- <sup>2</sup> M Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) *Journal of Legal Pluralism* 1.
- <sup>3</sup> D Yablon, 'Stupid Lawyer Tricks: An Essay on Discovery Abuse' (1996) 96 *Columbia Law Review* 1618.
- <sup>4</sup> *Studer v Boettcher* [2000] NSWCA 263 (Handley, Sheller and Fitzgerald JA). See also judicial critique by G Davies, 'Fairness in a Predominantly Adversarial System' in H Stacy and M Lavarch (eds), *Beyond the Adversarial System* (1999).
- <sup>5</sup> Note the repeated Australian studies which demonstrate that clients have high satisfaction with their own lawyers, until their dispute reaches a full hearing – then satisfaction plummets. See, eg, P McDonald (ed), *Settling Up* (1986).
- <sup>6</sup> Eg, J Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 375; A Rogers, 'The Managerial or Interventionist Judge' (1993) 3 *Journal of Judicial Administration* 96; M Galanter and M Cahill, 'Most Cases Settle: Judicial Promotion and Regulation of Settlements' (1994) 46 *Stanford Law Review* 1339; Australian Law Reform Commission, *Managing Justice* (2000).
- <sup>7</sup> For a more complete discussion of the possible diagnostic reasons for beginning or completing a court action, see JH Wade, 'Don't Waste My Time on Negotiation or Mediation: This Case Needs a Judge – When is Litigation the Right Solution?' (2001) 18 *Mediation Quarterly* 259.
- <sup>8</sup> D Spencer, 'The Vanishing Trial Phenomenon' (2005) *NSW Law Society Journal* 58; M Galanter, 'A World Without Trials' (2006) *Journal of Dispute Resolution* 7.
- <sup>9</sup> For a lengthy discussion of some of the social benefits of litigation, see D Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 *Georgetown Law Journal* 2619.
- <sup>10</sup> RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.
- <sup>11</sup> See [www.transparency.org](http://www.transparency.org) for yearly updates.
- <sup>12</sup> Galanter, above n 8.
- <sup>13</sup> See BA Cotterell, 'Beware Tribunals?', Paper presented at the conference *Beyond the Adversarial System* (Brisbane, 1999).

### Where do you stand?

*Review the many criticisms and redeeming factors put forward in this article. Do any accord with your own views about Australia's legal system? How would you answer the author's concluding questions: 'Are we a nation of complainers with unrealistic expectations? Or are eternal critiques and vigilance a necessary price for cherished liberties?'*