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Issues in Australian private judging: understanding the pitfalls

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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; 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. 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. With commercialisation has also come structure, as approximately one half of American states offer some form of private judging. 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.

‘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
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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. 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. 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 court delay, and this leaves more time, facilities and money available to those disputes left in the public arena.

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.

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. 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:

[If 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.]

Although there have been seemingly few retirements from the bench in the UK so far, this is not the case in the US, where approximately one third of judges retire to take up private judging positions. 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.

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'.

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held in private, the accountability of private
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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 — W Ill Travel’ (1994) 3 Queensland ADR Review 2.
3. See further Meggiorin, H ‘Justice in a Flash if You’ve Got the Cash’ (1998) 9 (4) ADR 246 at 247; and see the excerpt elsewhere in this Bulletin.
5. Ibid. See also Kim, A ‘Rent-a-Judge and the Cost of Selling Justice’ (1994) 44 Duke Law Journal 166 at 168.
8. ALRC, above, note 6.
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 Connelly 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.
15. For example, the retirement of Sir Henry Fisher from the High Court in 1970 which prompted the above quote by Dame M Ichell.
17. Kim, above, note 5 at 177.
19. ‘The Appeal of Mediation’ Proctor (1998) 18 (11) 5: For example in the Queensland Supreme Court, 444 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.