Courts Explained Along with their Strengths & Weaknesses

Definitions

Courts have been defined by the Butterworth's Australian Legal Dictionary as *"A place where justice is administered".*[1]

The Oxford English Dictionary defines courts as *"an assembly of judges or other persons acting as a tribunal in civil and criminal cases"*[2]

Another definition for court is *"A governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice <a question of law for the court to decide>".*[3]

It is interesting to examine the alternative definitions. The most useful definition is the definition in Black's Law Dictionary as courts are governmental bodies and they do indeed consist of one or more judges who are appointed by the crown to both administer justice and decide upon questions of law. Whether or not they actually adjudicate is another question, as in certain countries such as the United Kingdom, adjudication has recently assumed different meaning within the context of the resolution of building disputes.

With respect to the Oxford Dictionary's definition, it is a little bit loose because tribunals and courts in some respects differ and they have evolved as terms and assumed different connotations. In many jurisdictions governments choose to establish tribunals rather than courts because they harbour a view that tribunals are more cost effective and swifter than courts; a view that is not necessarily supported by corroborative evidence in many instances. Where the definition does however expand upon the definition in Black's Law Dictionary is that the definition directly states that a court administers justice in both the civil and criminal arena.

The author has nevertheless generated a definition that is a derivative of the above definitions to bring to bear more comprehensive precision as semantics do have a bearing on analysis in this book. The definition is below.

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[1] Butterworths *Australian Legal Dictionary* p. 294.
[2] *The Oxford Encyclopedic English Dictionary*, p. 333
[3] *Black's Law Dictionary* p. 378

"A crown entity where judges or magistrates preside over civil, commercial and criminal matters and apply the law; both statutory and common law to administer justice and to give effect to the wishes of the legislature."

Description

In most jurisdictions there are courts of lower, intermediate and higher jurisdiction.

The Court Hierarchy in Australia

In Australia the High Court of Australia is the highest appellate jurisdiction in Australia. A party that is intent on a appealing a decision of one of the state and territory Supreme Courts can lodge an appeal with the High Court. An appeal can only proceed if leave is granted and in many cases leave is denied. The High Court also presides over matters concerning the constitution.

Unlike New Zealand (NZ), Australia has a federal constitution hence the states and territories possess their own courts of law. Every Australian jurisdiction i.e. the 8 states and territories has a Supreme Court. Below the Supreme Court is a subordinate jurisdiction, the District or County Court or in the case of Tasmania, the ACT and the NT, the Magistrates Court.

Australia also has the Federal Court. The Federal court presides over matters that come within the jurisdiction of Commonwealth Acts of Parliament such as the Competition and Consumer Act 2010 (Cth)[4].

District Courts and County Courts in Australia are intermediate jurisdictions in that they are the middle tier, with the Local Courts and Magistrates Courts having lower jurisdiction and the Supreme Courts enjoying higher jurisdiction. NSW, Victoria, WA, SA and Queensland all feature the three tiers of judicial hierarchy and ascendancy in that each jurisdiction has a Supreme, County/District Court and a Magistrates/Local Court.

Tasmania does not have a court of intermediate jurisdiction as there is only the Supreme Court and the Magistrates court. This is also the case with the ACT and the Northern Territory. The legislature in these jurisdictions in all likelihood would have made a conscious decision to have a two tiered system because of their small populations.

[4] Competition and Consumer Act 2010 (Cth)

The courts of lowest jurisdiction in Australia are the Local or Magistrates Courts. There are additionally courts of specialist jurisdiction, like the Family Courts, the Federal Courts and the Land and Environment Court of NSW.

The financial jurisdictional limits vary between the states, territories and NZ in that the Magistrates Courts and the courts of intermediate jurisdiction do not have uniform quantum limits.

Determinations handed down by courts of lower jurisdiction, Boards and tribunals can be appealed to the courts of higher jurisdiction in circumstances where there is an error of law. Appeals will ordinarily be filed with the Supreme Court which has a supervisory or watchdog jurisdiction; a jurisdiction that is often accessed where there is a denial of natural justice or the repudiation of procedural fairness.

The Court Hierarchy in New Zealand

In New Zealand the highest jurisdiction is the Supreme Court which is the ultimate court of appeal. The equivalent jurisdiction in Australia is the High court. Below the Supreme Court is the High Court, the High Court has both civil and criminal jurisdiction.

District courts like the courts of superior jurisdiction have civil jurisdiction and can also hear some criminal matters. District Courts can also hear appeals from certain tribunals.

In addition there are other courts such as the Environment Court, the Family Court and the Maori Land Court.

Like Australia and most countries based on the Westminster system there are a number of Tribunals that preside over a diverse and varied jurisdiction. Tribunal decisions can be appealed to Courts of higher jurisdiction where there is an error on a point of law or administrative law error.

By jurisdictions it is ordinarily meant that a court has a monetary limit e.g. $100,000.00 being the jurisdictional limit for a Magistrates or local court and the Supreme Court has unlimited financial jurisdiction. Some intermediate jurisdictions however have unlimited jurisdictional limits.

There are also the appeal courts such as the appellate jurisdiction in the Supreme Courts or the Court of Appeal and the High Court of Australia and the Supreme Court of New Zealand or in the case of the United Kingdom the Privy Council and the House of Lords (“HOL”).

The Historical role of the UK Courts of appeal

The United Kingdom`s courts of highest jurisdiction are the House Of Lords (HOL) and the Privy Council.

These Higher Courts have fashioned a large body of seminal judicial decisions that have to a large extent proved to be the foundations of modern day common law.

A number of Commonwealth countries such as Australia and New Zealand have ousted resort to the British judicial appellate jurisdictions to achieve greater judicial independence. When resort to the HOL and the Privy Council was removed it was symbolic of a coming of age in the Antipodes of higher judiciary and an expression of confidence in the independence and competence of the Antipodian Higher Bench.

HOL and Privy Council decisions are still used as legal precedents in Australasia although such decisions are no longer binding as they are no longer ultimate appellate jurisdictions in Australasia.

Courts have both Civil and Criminal Jurisdiction

Courts also have a very extensive criminal jurisdiction and some courts have exclusive criminal jurisdictions in that criminal matters can only be heard at such forum.

Qualifications of the Bench

In Australasia Courts are presided over by Judges (in the case of courts of higher jurisdiction) or Magistrates (in the case of courts of lower jurisdiction). One must be a qualified lawyer and ordinarily an experienced barrister as a condition of appointment. There are instances where judges have been appointed to courts of intermediate jurisdiction that have not been experienced barristers, rather they have been solicitors, but this is the exception rather than the rule. In the case of the Antipodian Supreme Courts and the High Court, the Bench is predominantly populated by retired Queens's Counsel or Senior Counsel.

The difference between Local Courts and Magistrates Courts and Courts of Higher Jurisdiction

There is a quantum difference between a court of higher jurisdiction and a court of lower jurisdiction such as a magistrates or local court. The local courts could in many respects be described as the working man`s court as they cover a huge and diversified judicial terrain and in many spheres constitute the judicial entry point. The higher courts such as the Supreme Court deal with a very different terrain both in terms of quantum and complexity.

Local courts are quite remarkable in terms of the breadth and volume of work they get through; in fact law and order would be paralysed very quickly if they became dysfunctional. In many jurisdictions the local courts are the first port of call particularly in criminal and qausi - criminal matters.

In any given day an Antipodian Magistrate may process Domestic Animals Act[5] prosecutions, car fines, drink driving matters, indecent exposure, building or planning offences with a smattering of lower end white collar crime. In the United Kingdom alone "there are over 700 magistrates courts …staffed by some 24,000 lay magistrates and 52 stipendiary magistrates"[6]. Australian magistrates unlike their counterparts in the UK must have legal qualifications and most magistrates would have been practising barristers or lawyers prior to assuming a position on the "bench".

The volume of work that Magistrates (and in the case of NZ District Court judges) get through can be remarkable in that matters are dealt with quickly and soundly. Magistrates preside over a great many summary offences and on any given day there will be a number of police prosecutors appearing before a magistrate prosecuting matters ranging from small crime, to alcohol related driving offences to speeding offences.

Local Courts deal with a great number of debt recovery cases too. Be they debt recovery law firms or debt recovery agencies for disputes ranging from $5000.00 to $100,000.00 the Magistrates Court are the first port of call.

The author has observed that local courts are not necessarily best suited for long civil trials. The way they have been fashioned is to churn through a huge volume of matters and longer trials tend to impede the ability of magistrates to expedite the huge volume of work that is characteristic of the magistrate's courts.

As an aside one of the most amusing encounters that I have ever experienced in a court of law was in a magistrates Court. I was waiting for my matter to be heard and a young man, a student was called to appear before the magistrate. The hapless fellow was a student and he had obviously been out drinking on a Friday night and such was the quantity of alcohol consumed he needed to avail himself of quick relief. So he found what he thought to be a quiet, inconspicuous alley and relived himself by urinating on the side of a wall. As it transpired a policeman saw him attending to his business whereupon the student was apprehended and charged with indecent exposure.

The magistrate when calling him to account asked him a question. "Was it a windy night?" The young man replied "no your worship". To which his worship replied "that's a shame".

[5] Domestic Animals Act 1994 (Vic)

[6] source Legal Directory .net-UK Legal Services – article on 'Magistrates'.

Mention is made of this incident because it illustrates the humour, pathos and humanity that can be encountered in a court of law. Tribunal protagonists like to boast that informality appears to be their exclusive preserve. The fact of the matter is that it is not, courts of law are not always as austere and as alienating as court septics would suggest.

Court Procedures

Court procedures are characterised by complaints, writs, statements of claim, statements of defence, counterclaims, third party originating motions, the costly discovery process, witness statements, sometimes interrogatories and ultimately if matters do not settle the matter proceeds to trial.

Depending on the jurisdiction the interlocutory parlance differs and the court filing fees increase the higher the jurisdiction.

The most financially taxing aspect of pre-trial preparation is the discovery process. In some large cases in the courts of higher jurisdiction discovery may take weeks as the number of documents to rely upon can run into the thousands.

A trial can take anything from days to weeks and in the worst case scenarios in the courts of higher jurisdiction many months and sometimes years. There is some research that suggests that the time that it takes to get a matter to trial is increasing, this would certainly appear to be the case in the USA as the below quote from the economist suggests.

"*Less than 2% of federal cases result in a trial. The worse problem comes in the pre-trial phase known as discovery".*[7]

"So ever fewer cases are going to trial: the ratio of federal trials to initial filings in 2009 was a twelfth of what it was in 1962".[8]

The Virtues

The Courts have been around for hundreds of years. Courts are tried and true and by and large attract very high calibre judges and decision makers. Needless to say the most venerated are those in the courts of higher jurisdiction where one would find a high concentration of the finest legal minds.

Courts in democratic society also personify and give expression to the concept of the separation of powers between the state or the executive and the judiciary. Courts in non-democratic societies do not necessarily apply this maxim. Nazi Germany was a

[7] The Economist, *"The Paper Chase",* Volume 399, Number 8739, June 25 2011.
[8] *Id.*

jurisdiction where the separation of powers was not in evidence, the courts was an arm of government that was used to implement government directives form the de facto chief justice Adolf Hitler.

"The function of the Nazi Courts was judicial only in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi – judicial manner"[9]

Tribunals and statutory boards are ostensibly separate and to varying degrees maybe separate but the fact that tribunal members do not enjoy permanent tenure may make them in some instances more vulnerable to governmental whim. Mention also needs to be made of the fact that a great many statutory Boards are funded and staffed by departments that are not arm's length from the executive. The Building Practitioners Board and the Building Appeals Board in Victoria are such examples. The administrative support and legal support for the BPB is provided by a statutory regulator that appears before it regularly in a prosecutorial capacity. Respondents have often opined that there is an insufficient separation between the regulator and the statutory decision maker. No such criticism could be laid with the courts as they are totally detached and independent of the state executive and bureaucracy.

Regardless of whether the judiciary presides in a court of higher or lower jurisdiction, the governments of the day through the offices of the Attorneys General or the Department of Justice are loathe to appoint anyone to the Bench who is not in possession of years, if not decades of legal experience. Furthermore the Attorneys' General need to be satisfied that those whom are nominated for the bench are by and large outstanding practitioners.

A highly developed sense of ethics and probity is also expected and there are very clear accountabilities. Rigorous checks are carried out on candidates for the bench and the successful candidates must indeed be free of any ethical blemish.

There is also a well established tried and true interlocutory rigour that has been honed over multiples of generations of decision making application.

Probably the most important function of the courts of highest jurisdiction is to provide binding precedents for tribunals, arbitrators and adjudicators and courts of subordinate jurisdiction. The courts of higher jurisdiction could be regarded as the "judicial cathedrals" in this respect and they provide judicial leadership to the broader subordinate jurisdictions.

In an article titled: *Judges in Fight to Defend Their Own Turf*[10], Justice Bruce Lander stated that "...it was vital that courts not be prevented from adjudicating disputes, particularly those between citizens and government, because it was an important

[9] Linder, D- "*A Commentary on the Justice Case 2000*" at p.16.
[10] *'Judges in Fight to Defend Their Own Turf'* published in the Australian Financial Review on the 15th of July 2011.

means of interpreting and developing the law….if everything goes to alternative dispute resolution, nobody is ever considering what the law is…..In administrative law matters we are what stands between the decision maker and the citizen. A court can tell the state what it has to do, and because of the rule of law, the state will accept the instruction from the court"[11]

The courts of lower jurisdiction contrary to popular misconception move with controlled alacrity. Many matters such as building, planning or driving prosecutions can be concluded within weeks of the filing of the originating motion in circumstances where there is a plea rather than a contest. Typical debt recovery matters are normally concluded within 12 months of the initiation of proceedings.

When critics of the courts malign the courts for taking too much time to progress matters it must be recognised that such criticism should not be levied against the courts of lower jurisdictions. It would be difficult to conceive of any other resolution theatre that could hasten the conclusion of quasi criminal and lower tier criminal matters.

Furthermore it is not always the case that courts take a long time to process proceedings. One case that is mentioned in a later chapter, *Lyall Dix v the Building Practitioners Board NSW*, a case that the author knows intimately as his firm had conduct of this matter on behalf of the appellant, moved with extraordinarily alacrity. The case concerned an appeal of a State Board's determination. Within 10 days of the determination being made, the decision was appealed to and heard by the NSW Supreme Court, whereupon the presiding judge handed down a decision within 2 hours and the decision was published within the ensuing 7 days.

Another far higher profile case established a new Australian High Court Record and mindful of the very significant sovereign and international gravitas of the case illustrated remarkable alacrity in the deliberating and handing down of a decision. The case concerned the granting of a permanent injunction against the federal government with respect to the transferring of asylum seekers to Malaysia. According to the Law Institute of Victoria Friday Facts bulletin of 2/092011 it was the "fastest High Court case in history-the case provided a new legal record – from no piece of paper to judgment in the High Court in 25 days".[12] The then Prime Minister Ms Julia Gillard was none too ceremonial in her response to the decision. "In an extraordinary attack on the judiciary, the Prime Minister… accused the court of missing an opportunity to send asylum seekers a message, sparking opposition charges that she has breached the doctrine of separation of powers."[13]

<u>The consolidation of proceedings</u>

Importantly the courts allow for multi-party proceedings and the consolidation of multi-defendant matters. This is rarely possible with arbitration or adjudication and is a

[11] *Ibid* at p. 42
[12] Law Institute of Victoria, *Friday Facts bulletin,* of 2 September 2011.
[13] The Australian, 2 September 2011, p.1.

serious shortcoming in respect of the latter and possibly one of the reasons for the demise of what was once a very well patronised system of dispute determination.

In many cases such as building cases there will be a number of actors responsible for the problem. Whether the problem is cause by negligent design or inspection, poor workmanship or defective engineering computations the matter ought to be best determined in circumstances where those primarily responsible for construction are called to account.

Consolidated proceedings are the proceedings that are most conducive to ensuring that the principal actors are brought into the judicial and forensic mix. A plaintiff can issue proceedings against the builder for instance and if the builder considers that the architect has a case to answer then the builder is at liberty to join the architect. The architect can then through third party proceedings join other partiers such as the engineer or the building surveyor. Tribunals have the same sorts of powers in certain jurisdictions.

Regardless of whether a case is in a local court or a court of higher jurisdiction the power to involve multiple parties into the same set of proceedings is established and complemented by joinder rules and procedures.

The issue of tenure and remuneration by the Crown rather than the disputants

There is an additional consideration that is often overlooked, magistrates and judges have permanent tenure and are employed by the Crown, not by the litigants. This means that they are not remunerated by the parties to the dispute.

"The judge, by law, must be impartial and the judge's paycheck is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case"[14]

In the case of arbitrators, adjudicators or experts engaged to issue determinations the one thing they all have in common is that they are remunerated by the parties to the dispute; normally on a 50/50% basis.

Sceptics have been known to opine that where parties are paid to resolve disputes there may be a financial incentive for proceedings to be protracted. The Bench has absolutely no financial incentive to promote or acquiesce in the protraction of legal proceedings. In fact senior judges have on occasion gone on record as expressing their frustration with the legal fraternity`s sometime predilection for lengthy proceedings. It does not escape the attention of the bench that protracted litigation is very much conducive to high legal fees. Hence the well known and very old cartoon that features a cow with the plaintiff pulling the tail and the respondent pulling the cow`s head.

[14] Arthur Mazirow '*The Advantages and Disadvantages of Arbitration as Compared to Litigation*' Speech delivered at the Counsellors of Real Estate, Chicago, 13 April 2008.

Underneath the cow, the cow presents with very ample udders with a lawyer pulling vigorously on the milk laden endowments.

No conflict of interest, permanent tenure and the Separation of Powers

As judges and magistrates enjoy tenure and are remunerated by the Crown the potential for there to occur a conflict of interest would be most remote. Probity considerations require disclosures of any possibility of a conflict of interest or a consideration that may compromise impartiality or the perception of impartiality.

A judge could not preside over a matter where one of the litigants had a pecuniary relationship with the judge. This is not so clear in the case of arbitrators or adjudicators.

Many years ago the author had conduct of a matter that went to arbitration. It was a matter concerning monies allegedly owed by the developer client to a concrete contractor. There was a dispute as regards the quality of the workmanship. It came to the author's attention that the arbitrator who was also a well-known building consultant in the building industry had retained the other side's law firm from time to time. The arbitrator when queried on point stated that he had used the law firm on five separate occasions and had a matter where they were engaged on foot. The author wrote to the arbitrator and requested that he abort his retainer on account of there being a perception that his proximity to the law firm could compromise his objectivity.

Initially the arbitrator declined to remove himself so the author`s firm on behalf of the client issued proceedings in the Supreme Court requesting the removal of the arbitrator on the basis of there being the potential for there to be a conflict of interest. At the door of the court the arbitrator consented to his removal.

This is one of the problems where one has part time decision makers who also operate and derive their livelihood from the same sorts of professional communities that they preside over.

Separation of Powers

In both NZ and Australia the doctrine of separation of powers is no more evident than its application to the Courts. A very high profile case that illustrates the resilience of the Bench from governmental interference concerned an injunction that was initiated against the Crown to prevent the federal government from "exporting" a refugee and detainee to Malaysia pursuant to the so called Malaysian Solution[15]. Needless to say Ms Gillard's hopes for a refugee detainee solution were dashed by the High Court`s ruling but the High Court was not swayed in its deliberation's by the political wrangling and subterfuge, rather it robustly asserted its judicial independence and came up with a ruling that was corralled to the strict application of the law as it saw it.

[15] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship,* [2011] HCA 32

Separation of Powers is the term which is used to define the independence of the Legislative, Executive and Judicial branches of government. Particularly important is the independence of the judicial arm, which acts to avoid an unhealthy concentration of power in the hands of any currently elected party. The doctrine means that the government itself is subject to the law, and decisions made by the government can be reviewed by the High Court and overturned if they are made in excess of the Executive's power.

The alternative is the experience where the courts act in cahoots with the governing party, or where the courts simply do not have the power to restrain the governing party. These situations historically are much more conducive to authoritarian rule. In these systems citizens are not protected from arbitrary and unjustified decisions at the whim of the government.

In the 'Malaysia Solution' case, the Plaintiffs challenged the power of the Minister for Immigration to make the decision determining that Malaysia could be a specified country for the offshore processing of illegal entrants claiming refugee status. The Plaintiff's argument was that the Minister legally must be satisfied of certain facts about the protections offered by the country being specified, and he could not have been satisfied of these facts in relation to Malaysia, and therefore did not have the power to determine that Malaysia could be specified.[16]

There were a great many commentators who voiced opinion in the newspapers about Ms Gillard's forthright pronouncements and in the main they were saddened that the Prime Minister had deigned to criticise the Highest Bench. The disquiet revolved around the idea that the rulings of the highest court of the land are pretty much sacrosanct and those adorned with the privilege and responsibility of higher office should be loath to take issue in the public domain. Reason being from a perception point of view it could undermine the separation of power.

The Malaysian migration case nevertheless bears testimony to the robustness of separation of powers and recognition that this is a seminal virtue of modern and enlightened democracy. It is very reassuring that this is the disposition and the power of the bench.

Interestingly this decision has drawn praise from the Malaysian Bar Council[17], an institution which has notably had to fight the good fight, most memorably during Malaysia's 1988 Constitutional Crisis through the actions of refusing to recognise the successor to Lord President of the Supreme Court Tun Salleh Abas after his dismissal by Prime Minister Mahathir.

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[16] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship,* [2011] HCA 32

[17] Clara Chooi, *'Enact refugee protection laws, Bar Council tells government', 1 September 2011<* http://www.themalaysianinsider.com/print/malaysia/enact-refugee-protection-laws-bar-council-tells-government/>.

The antipodes is very fortunate that the Bench is immune from the currents and whims of the government of the day. If one looks further aboard however one may speculate that not all Courts in the West may be blessed with ability to enjoy or continue to enjoy the level of political detachment that we are able to bear witness to in local Westminster based systems. Jurisdictional Economics can it would appear play a part in the undermining of separation of powers particularly where the funding of the Bench is not a given.

In a paper titled "The Cost of Justice: Budgetary Threats to Americas Courts - The Constitution Project"[18] an ominous discourse was forthcoming discussing the ramifications of a cash strapped America and the consequences of the underfunding of the American judiciary and its institutions.

"Judicial independence in American politics has been hailed as a means of preserving individual liberty and minority rights against the actions of the majoritarian branches of government. Recently, however, legal professionals and scholars of the courts have begun to question the magnitude of judicial independence, suggesting that budgeting and finance issues pose a threat to judicial independence. This article explores whether state judiciaries are being threatened on this front by soliciting the perceptions of key state officials. Using surveys of court administrators, executive budget officers, and legislative budget officers in the states, we examine three aspects of the politics of judicial budgeting: competing for scarce resources, inter-branch competition, the Constitution Project and pressure to raise revenues. The survey responses suggest that, in a substantial number of states, judicial independence has, at times, been threatened by inter-branch competition and pressures to raise revenues."[19]

"There is significant potential for court funding to affect judicial independence in a variety of ways. The amount of money granted, the budget process, the flexibility allowed in expensing the budget, and even the withholding of appropriations in response to court decisions are all legitimate concerns for those committed to the rule of law and an independent judiciary on which it depends…. Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signalling Device,* 20 the Journal of Legal Studies (January 1991).

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[18] The Constitution Project, '*The Cost of Justice: Budgetary Threats to Americas Courts*' 2006, Washington DC.
[19] James W. Douglas and Roger E. Hartley, '*The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*' 63 Public Administrations Review, No. 4 (July/August 2003). Presented at the 73rd Annual Meeting of the Southern Political Science Association, Atlanta, Georgia, November 7–10, 2001.

"Congress can use the budget as a device for signalling its own preferences and for rewarding or penalizing the agencies for their activities. To the extent the agency members value budgetary rewards, they will respond to the legislative signals by changing their behaviour in the direction desired by the legislative body. The role of the budget as a signalling device has not been applied to the judiciary. Instead, economic analysis of the judiciary and, in particular, of the Supreme Court, has generally focused on the institutional features that foster independence of the Court. Congress, however, appropriates an annual budget to the federal judiciary in the same manner that it appropriates a budget to other agencies. Given that Congress has this control device, an obvious question is whether it uses the budget to signal preferences to the Supreme Court and to make it subject to political influences."[20]

It is troubling that one of the casualties of the economic decline of one of the world's most established democracies could be the effectiveness and the independence of the courts. Enlightened decision makers in the US supreme Courts have over the centuries fashioned a rich legacy of judicial thinking and decision making, that has from time to time, served to emancipate, liberate and give expression to the noblest of ideals. The Bench's ostensible independence has been critical to creating the environment that culminates in judicial epiphanies; if that independence were to be threatened there could be far more judicial claustrophobia and more restraint brought to bear on judicially virtuous innovation. The observation that congress has a control device that could be used to give effect to preferences is cause for a measure of biliousness.

History has shown that absent judicial independence and the separation of powers and one can have judicial environments that become de facto arms of the state. Nazi Germany is case in point. In Hitler's Germany there was no separation of powers between the executive or the administration and the judiciary. The abominable dictator was a de facto Chief Justice of the higher bench..."Hitler declared, and the Reichstag agreed, had the power to intervene in any case".[21]

The separation of powers is a paramount foundation in democratic society. If a society is intent on practicing real democracy separation of powers is integral to the ability of that society to fulfil democratic aspirations. It thus follows that the courts must be well funded, which means a budget priority and they must be immune from the headwinds and the ebb and flow of economies. Economies are cyclical, the application of enlightened rule of law is not and the giving of expression to same is inextricably interwoven with a capable, independent and well-resourced judiciary. It is hoped that the Malaysian case represents a zenith of the application of the rule of law and judicial independence that proves to be a perennial zenith.

Now to venture into the more mundane terrain of court machinery.

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[20] Frances Kahn Zemans, '*Court Funding',* Briefing paper, American Bar Association Standing Committee on Judicial Independence (August 2002).

[21] Doug Linder, 2000, '*Nuremberg War Tribunals: the ministries cases'* (the Nazi Judges Cases) p. 3.

The court interlocutory procedures

To initiate legal proceedings in a Court of Law one must have regard to the rules that govern the particular court jurisdiction. The rules differ as do the times for complying with interlocutory deadlines.

This being the case a general overview will be provided in respect of the way proceedings typically unfold.

The initiation of proceedings will be commenced by filing an originating motion. The origination motion might be called a writ, a complaint or a statement of claim depending on the particular jurisdiction. The term statement of claim will be used as an interchangeable term.

The statement of claim has to be filed in the correct originating motion documentation.

In some jurisdictions before a statement of defence is filed a document called a notice of appearance has to be filed with the court. Within a given number of days, typically 21 days the statement of defence has to be filed.

In circumstances where there is a counterclaim the counterclaim will be filed with the statement of defence.

The plaintiff will file a response to the defence and counterclaim.

An order for discovery will be forthcoming and both parties will be ordered to draft and file an affidavit of documents comprising all documentation relating to the contract of the dispute.

There will be an order for discovery whereby both parties will be afforded the opportunity to inspect the other party`s documents.

Normally the parties will be desirous of retaining expert witnesses to provide specialist opinion on matters that make up the ingredients of the dispute. Expert witness statements then have to be prepared, served and filed.

There may be an order that the matter is sequested out to mediation although this is optional.

There will be further orders providing that the parties will be required to attend further compliance directions hearings to ensure that the time frames for submitting and filing interlocutory pleadings are indeed filed by the due date.

Once matters have progressed to the extent that relevant pleadings have been filed and served, discovery has been completed and expert witness statements filed the matter will be set down for hearing.

The Shortcomings

Matters can take a long time to resolve; in fact it is misleading to use the word resolve. Courts don't really resolve disputes in the true sense of the word. Rather they effect a determination or a conclusion to a matter that has proved incapable of resolution. Furthermore the party that loses the case will rarely form the view that the matter has been resolved, in fact the converse could be the case. If the determination is onerous and the consequences dire, the judicial determination will be regarded as a penalty of sorts, particularly if there are punitive damages. It should thus come as no surprise that there are some who are ill disposed to the use of the courts as a means of effecting dispute resolution. One Alex Kozinski, Chief Justice of the US Court of Appeals for the Ninth Circuit in the USA being such a person. In an article in the *Australian Financial Review*, titled Judge Sees Threat to Privacy his Honour stated that "if you go to court you have already lost"[22]

The Courts provide a theatre where somewhat of a pugilistic form of dispute resolution is found, hence the term adversarial. Just think of the language statement of claim, statement of defence, counterclaim, and interrogatories. In many respects this fractious vernacular is about interlocutory altercations, it is about winners and losers but rarely does the winner take all. It is probably more accurate to say the loser suffers greater but both parties are ravaged by costs, time and the severance of commercial relationships.

Litigation tends to attract Type 'A' personalities. Echoing the author`s sentiments, the above mentioned Chief Justice in said AFR article stated that "we have inured to the legal culture that has developed in the United States – that you hire a lawyer to be a fighter, gladiator for you."[23]

The judges observations of the litigator's disposition in the USA is very much in keeping with the author`s experience. Over the years legal brethren have definitely observed that many litigators approach a dispute with an abject lack of conciliation. One of the saddest facets of litigation is that there is little reward for lawyers whom are intent on early settlement achieved by conciliatory dialogue. For every conciliator there will be an antagonist who will construe an eagerness to negotiate as a sign of weakness. In the author's experience aggressive invective is not conducive to result betterment and moreover if an "altercationist" alienates his or her opposing counsel the "negotiation draw bridges" go up and the time it takes to resolve the matter extends.

[22] Australian Financial Review, '*Judge Sees Threat to Privacy'* 20 September 2011.
[23] *Ibid* at p.22.

This high costs paradigm is not however the exclusive domain of the higher courts; the same costs affliction can be encountered in some tribunal lists and arbitration. The factor in common with arbitrations, some of the tribunal lists (like the building lists and arbitration) is the long time that it takes to resolve the dispute. Where lawyers and consultants are paid by the hour, it is time that is the litigant's enemy and delay that becomes the killer.

Cost Impacts

Courts of higher jurisdiction are expensive dispute resolution forums Justice Bruce Lander an Australian federal court Judge was quoted in the *Australian Financial Review* newspaper on the 15th of July 2011 as saying that " litigation is a very expensive process….to lose is very, very expensive, but even to win is very expensive. You can win litigation and not recover as much as it cost running the process.''[24]

In the same article he described one large litigation as "extraordinarily wasteful bordering on the scandalous".[25]

His Honour is correct with respect to his observations, in so far as they relate to the costs of courts of higher jurisdiction particularly when they concern mega litigations.

But to make a "broad brush" statement that courts are expensive, per sea, is simply not correct. Such statement is as incorrect as to state that ADR is cheap as some forms of ADR that are every bit as expensive as the courts.

There are some aspects about the courts that are much cheaper than ADR counterparts such as arbitration. In a court of law the litigant does not have to pay for the judges, nor does the litigant have to pay for the magistrates. This makes this form of dispute resolution significantly cheaper than either arbitration or adjudication. It is quite wonderful that a citizen can access some of the finest legal minds in western lands in circumstances where the citizen be it natural or corporate does not have to pay the court for their Honour`s deployment. This could be regarded as one of the seminal virtues of modern and enlightened societies.

If a case proceeds to trial with the result that an award or determination is handed down a qualified "to the victor the spoils" result will be forthcoming. The person who wins the case is awarded costs and the loser has to pay the costs.

It is however rare for a party to ever receive full indemnity costs i.e. to recoup the entirety of the legal expenditure. There are court costing scales that can be invoked if there is a dispute as to costs and there is a court taxing system where the parties appear before a taxing master to assess the legal costs between 60 and 75% of costs incurred. There will therefore mostly be a discrepancy between costs incurred and cost

[24] Justice Bruce Lander, *Australian Financial Review,* 15 July 2011.
[25] *Ibid* at p.42.

recovery. It is not unknown for the costs of trial to exceed the amount in dispute and it is this very phenomenon that engenders the chagrin of users of the court system.

The real cost however is in the retention of the lawyers, the experts and in larger matters these costs can be exorbitant and moreover the expenditure can sometimes be far greater than negotiated outcomes. When a case degenerates into a litigation juggernaut the cost of legal advocacy can be “eye wateringly” expensive.

Depending upon the jurisdiction i.e. whether it is a court of higher or lower jurisdiction the fees that are charged will vary considerably. Most jurisdictions have court scales that can be accessed to asses legal fees although a great many litigants engage lawyers that insists upon hourly charge out rates as the mechanism for payment.

Lower jurisdictions such as the Magistrates and Local Courts

The courts of lower jurisdiction such as the Magistrates or Local Courts would typically operate within the below ranges.

Hourly charge out rates would range from between $100 to $300 per hour; the median would probably be about $200 per hour.

If a matter were to go to trial counsel would typically charge between $500 and $2000 a day.

One may well ask why the range? The answer is that as some of the lower courts have monetary jurisdictional limits of $100,000. There is a big difference between a $10,000 dispute and a $90,000 dispute. As a general rule the higher the quantum the greater the justification for higher charge out rates.

Intermediate Quantum Jurisdictions such as District and County Courts

The County and District Courts have a much larger monetary jurisdiction. In some jurisdictions the amount is capped and in others unlimited.

Charge out rates would between $250 and $500 an hour for solicitors and barristers, depending on the level of seniority and expertise. Barristers would charge anywhere between $1500 and $5,000 per day for trials.

In some cases barristers share the advocacy with junior counsel and ordinarily there would be an instructing solicitor. Daily trial costs would range
From between $2000.00 to $10,000.

Where expert witnesses are required to give evidence on discrete matters the cost of trial would have to be revised upwards. Expert witnesses charge anywhere between $180 and $400 per hour.

Higher Jurisdictions such as the Supreme Court or the High Court

If one is intent upon issuing proceedings in the Supreme Court regardless of whether the proceedings originate in this jurisdiction or are appeals from lower jurisdictions one has to "steel oneself" for significant legal expense.

It would be most unusual to find either solicitors or barristers charging less than $300 per hour. At the other end of the scale the most senior lawyers would charge upwards of $800 per hour and queens counsels would charge anywhere between $500 and $1,000 per hour.

The high hourly charge out rates is reflected in the daily hearing fees. Barristers would charge anywhere between $2,500 a day and at the high end $12,000 a day.

Junior barristers are more likely to be deployed as juniors to senior counsel in the Supreme Court in fact some barristers will decline to accept a brief if junior counsel is not forthcoming. If junior barristers are brought into the equation along with instructing solicitors the daily cost of trial could range room anywhere between $6000 and $20,000 a day.

Add to this the deployment of expert witnesses and the litigant will be confronted with very significant legal expenditure.

A final comment on the Cost of Courts

It is not the courts that are expensive; it is the litigation process that is expensive. The real cost that is identified in this book is the cost of advocacy and advocates are equally expensive in any dispute resolution theatre, regardless of whether it be a court, a tribunal, an arbitration or an adjudication. Cost of courts must not be confused with cost of litigation.

Time Impacts

When compared with mediated and negotiated outcomes courts tend to take a much longer time to generate an outcome. It must be noted however that this is not always the case and there are instances where the courts have been known to move with extraordinary alacrity. Once such case was a matter that the author had conducted of recently. It concerns a case that is discussed elsewhere in this book and the appealing of a decision that was made by a statutory board in NSW. The appeal documentation was filed on the Friday in August 2011 and on the following Monday, the matter was heard by a Supreme Court Judge who handed down a verbal decision within 2 hours. The written decision as published one week hence.

Another higher profile case concerned the refugee's intent on moving to Australian having to be processed in Malaysia. Again this case is discussed in the separation of

powers section of this chapter; but from filing of the court originating motion to a determination being handed down by the high court of Australia, the process took a mere nineteen days.

The above cases however are exceptional in terms of the alacrity that characterised the speed of process and are atypical yardsticks. One of our senior partners Justin Cotton, a litigator of many years experience says “big cases tend to run for a number of years when one looks at the cradle to grave interlocutory critical path.” The writer agrees. Long cases are exhausting, financially, emotionally and they will distract a client from core business.

Although in the case of appeals concerning decisions emanating from courts of lower jurisdictions or tribunals and Boards there are statutory guillotine periods of time for the lodging of appeals. But a failure on the part of a party to comply with an interlocutory deadline on time is rarely ever fatal unless there is a self executing order.

Say for instance a court order requires that one of the parties file a reply to a defence within 30 days. If this does not occur the courts do not usually award costs and it would be very rare for the matter to be struck out. This is problematic as matters can drag and can frustrate the other party.

Nevertheless the courts do have rules that require that some key interlocutory steps need to be complied with within the times specified in the court rules. Take the County Court of Victoria for instance a notice of appearance has to be lodged within 10 days of the filing of the statement of claim. Within the ensuing 21 days a statement of defence has to be lodged.

If a party fails to comply with these deadlines a judgment can be entered in full. This is called a judgment on account of interlocutory default. The judgment will stand unless the defaulting party can persuade a judge at a discrete hearing to set aside the judgement.

These regulated interlocutory time constraints are an aspect of the courts that are commendable. Reason being they are conducive to the expedition of matters. However time frames that are dictated by judges in compliance hearings or directions hearings rather than regulated time frames do not have particularly onerous interlocutory disincentives. If for instance one of the parties were to be late in filing an affidavit of documents or late in filing answers to further and better particulars the typical remedy would be a costs award.

Cost awards are very rarely ever full indemnity costs; rather they are costs that are calculated with reference to Court scales. These scales generally translate into somewhere between 40 and 75% of actual legal costs incurred.

Although it would be harsh to characterise such penalties as benign disputants who happen to discharge their interlocutory responsibilities on time become very disenchanted, if not jaundiced, when a non complying party is afforded lenience.

Commercial Impacts

When two businesses become embroiled in litigation they effectively go to war. In countries like Japan litigation is anathema as it destroys business relationships, it culminates in loss of face and leaves long term business scars. A negotiated outcome under any criteria generates more commercial mileage.