



Australian Government

Australian Law Reform Commission

Professor David Weisbrot
President

LAUNCH NOTES – 31 Aug 2004, 6.30 pm
UNSWLJ FORUM:
‘Stopping the Clock: The Future of the Billable Hour’

(THANK YOU Leon)

- I have launched BOOKS
- I have launched JOURNALS
- First time I’ve been asked to launch a *portion* (pp 198-249) of a journal

(→ on this trajectory, my next gig → launch the “Notes for Contributors”)

Nevertheless, delighted/honoured to accept:

1. **Adam D’Andretti** – was ALRC intern on CSSI
2. **Flattery** – invitation letter suggested that this Forum was ‘inspired’ by CJ Spigelman’s oft-quoted speech about the tyranny of the billable hour and by ALRC 89, *Managing Justice* (some people ...)
3. **Ron Sackville** – author in the other section; was the UNSW Dean that brought me to Australia, and my Chair in the AJAC (1994)
4. Very recently made an **Honorary Professor at UNSW** (thank you Leon Trakman!)
[this follows a period as Dean of Sydney Law School – which at least has given me empathy for those being held in Guantanamo Bay]
5. **MAINLY**, because I commend the UNSWLJ on moving to the **Forum format**, which provides an excellent **vehicle** for more

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extended discussions on important issues of law and policy — something we desperately need much more of in Australia.

I thought I would do **something a bit different** in preparing for this Launch – and **so I actually read all of the papers.**

- Easy, given the eminence of the authors.

NSW AG Bob Debus

- Need for a consumer focus on the provision of legal services, and esp re costs disputes
- OLSA gets c3000 complaints pa; 1/3 → specifically about costs; but est'd 80% include some grievance about costs

Deborah Vine Hall – costs consultant – including to the ALRC

- Old **taxation** system → objective, consistent outcomes; but perceived to be costly, staffing issues etc
- Now **assessment** → more expensive, less predictable outcomes, less transparent
- Reco? → involve courts more, as in NZ; parties provide E of costs to J who makes lump sum order as part of judgment

Bret Walker SC – as LCA President worked on its sub to MJ

- Proportionality (following from Woolf et al) → bill based on **% of the stake** [as with architects, merchant bankers &c]

Steve Mark (OLSC)

- Developing ideas re '**value based billing** and alternative billing structures' (→ DP for the Legal Fees Review Panel)

[parenthetically, this is the sort of policy work the NSWLRC envisaged when it recommended establishment of the OLSA – not merely complaints handling, but learning from that experience and translating it into]

Dr Ann Eyland (statistician with JRC)

[genuine empirical work, social science – cf empiricism – also desperately needed in Australia]

- case mgt in Victoria → contain costs

- case mgt in NSW → increase costs
- [ALRC 89 → case mgt in the Federal Courts – in Vic and NSW! –
→ contain costs]

DW OBSERVATIONS

ALRC89 Managing Justice → 6 broad themes:

(1) No crisis in federal civil justice system – but the (nearly universal) problems of costs, delays, access, uneven standards

(2) No quick or permanent fixes

- not codification or Plain English
- not more legal aid
- not tribunalisation
- not ADR
- not getting rid of lawyers
- not radical transplants (civil inquisition, or the Soviet Procuracy)
indeed, international experience → CONVERGENCE

(3) complex systems need continuous monitoring (and good info mgt systems) and adaptability

(4) true/effective reform requires a holistic/collaborative approach
(Courts, the profession, professional associations, governments, law reform agencies, law schools)

(5) effective case management → (a) continuous oversight
(b) by a person with clout
(c) customisation (of each case)

(6) important to get the right structures, practices and procedures, BUT
...**essential** to develop a ‘healthy legal culture’. Attributes →

- open, honest and self-critical

- real communication among stakeholders
- willingness to experiment and adapt
- lifelong commitment to learning
- deep ethical sense of professional responsibility

If you HAVE that healthy culture, then can overcome procedural/structural shortcomings; if you DON'T, then the best structures and procedures can be quickly subverted

eg Family Court's 'culture of non-compliance'

Ch 4 COSTS

(1) → develop a real market for legal services

(2) → establish rules – ethical and court – requiring (a) full disclosure; and (b) early and on-going estimates; and concept of 'reasonable fees'

(3) did NOT → deny tax deductibility; [similar outcome as AJAC] – cf Cameron Murphy

(4) → EVENT BASED SCALES

- **discourage** 'billable hours' approach
 - mercantile – and unprofessional – mentality
 - no subsidy for inefficiency, inexperience or over-servicing

Legendary UCLA basketball coach John Wooden:

'never confuse activity with achievement'

- **encourage** more predictability
 - **likely to contain fees, BUT ALSO**
 - empower clients to make strategic decisions
 - permit (actuaries →) LEI
 - more transparent, accountable → >trust

Williams Report → event based; Dr Tim Fry (Monash econometrician)

Recent dynamic changes → We're in a strange place at the moment

- competition
- competition policy
- globalisation
- L's → more business-like

Big Clients have more power: bargain, demand, tender, specs;

For ordinary people? ... recently → ban advertising? (limit competition);
move away from 'no win , no fee' etc

→ Fight for the soul of the profession??

- uphold the service ideal – and take a commitment to justice and professionalism seriously
- or, descend into mercantile hell

What distinguishes law firms from other types of 'knowledge corporations' (or 'EBS' – expert business services)?

Law firms – as such — have no **right** to exist.

If you don't believe me: ask some of your friends and neighbours who are attorneys, proctors and scriveners

I COMMEND THE EDITORS OF THE JOURNAL AND THE AUTHORS