

**TITLE: How our courts are pricing justice out of public reach**

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The court system in Australia is of little use to most Australians who might wish to resolve a commercial or civil dispute. While the courts provide a check on executive government and can, as was the case with the Mabo decision, deliver landmark rights to vulnerable groups, their cost makes first class flights to Europe seem cheap by comparison.

Rather than being an independent umpire that citizens can use to fairly settle disputes our taxpayer-funded courts are becoming a battleground for those with very deep pockets.

The big multinational tobacco companies recently tried to use the Australian courts to prevent the government from introducing plain packaging laws that the majority of Australians support. Such a case would have cost them millions of dollars. But, having lost, the tobacco companies are heading straight off to another court even further beyond the budget of citizens, the World Trade Organization. It must be nice to have that much money to throw around.

The Australian taxpayer funds the existence of an incredibly complex, and incredibly expensive, court system that individuals and companies can use to resolve their disputes. But rather than create a level playing field, we have created a system which looks more like a ski slope. Amateurs who can't afford lift tickets or instructors are of course free to flail around, but they have no chance against the well-funded and most experienced professionals.

It is not unusual for a Senior Counsel to charge \$10,000 per day, and that isn't just for the days you spend in court, that includes the time spent preparing. Most Senior Counsels wouldn't front up without a junior counsel, which would add another \$5,000 or so to your access to justice. Oh, and you might need some expert witnesses as well. As a rule, the good ones don't come cheap. And don't forget you will also need a solicitor.

Not only do individuals of modest means, small businesses or NGOs have virtually no chance of using the courts to address injustices they perceive, the mere threat of being

taken to a 'court of justice' by another is enough to break their hearts if not their bank balance.

The high cost of retaining lawyers and barristers virtually ensures that the court system will serve the interests of those with the strongest balance sheet rather than those with the strongest case. For example, few people would risk \$20,000 in court fees for an 80% chance of winning \$15,000 while anyone with deep pockets would risk \$20,000 for an 80% chance of winning \$1,500,000.

While there are small claims courts that are cheaper to use, many disputes that average Australians have with builders, employers and insurance companies are too big for small claims but too small to justify the day rate of a barrister.

A recent survey by The Australia Institute found that 1.6 million Australians believe that they have suffered a significant loss or damage in the past five years that they did not pursue in court because they could not afford it.

The most common kinds of injustice include being ripped off by a business such as a bank, phone company or builder (12%); a dispute with a landlord, tenant or neighbour (8%); a dispute with an employer (7%) or with a family member (5%). In such cases it would be nice to think the courts could help settle disputes fairly, but the price of entry means that only the wealthiest people, or those with some form of insurance, are likely to ever get their day in court.

While we provide legal aid to low income earners facing serious criminal prosecutions we provide no such aid to those who have been ripped off by big companies.

There are of course examples where David takes on Goliath and wins. The former National Director of GetUp! Simon Sheikh recently reflected on his decision to challenge the constitutionality of the Howard Government's decision to close the electoral roles immediately after an election was called.

He described the decision to risk the bankruptcy of GetUp! to mount a High Court challenge as the biggest, scariest and bravest decision of his time at the helm. GetUp!'s own costs ran into the hundreds of thousands of dollars but what would have crushed them would have been the need to pay the Commonwealth's costs if the case had been lost. In such circumstances, there is little reason for the Commonwealth to skimp on the number of Senior Counsel they retain.

But should testing whether a law is constitutional or not require a small NGO to risk bankruptcy? Should the logging giant Gunn's have been able to force 20 environmentalists, including former senator Bob Brown, to spend tens of thousands of dollars defending themselves against bizarre allegations? In some US states so-called SLAPP suits where corporations use the legal process to pressure citizens have been outlawed, but alas, such laws do not exist in Australia.

Democracy has never been a level playing field, and those with enormous wealth have always enjoyed advantages over those of modest means. At a time when politics and the media are becoming more overtly responsive to the intents of those with the most money, our courts need to be more responsive to those with the most need for justice.

Of course it is not the courts that are responsible for the paltry state of legal aid, the lack of funding for public interest constructional cases or, more significantly, the incredible gulf that has emerged between the haves and the have nots.

Luckily, it is within the power of our parliaments to address the underlying causes of the unequal access Australians have to "justice". Maybe we could introduce a levy on the large corporations that use our court system to build up a fund to help individuals and NGOs use the courts to fight public interest cases? But I wouldn't hold your breath.

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