

ECONOMIC RATIONALISM AND THE LAW[#]

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I INTRODUCTION

The decade and a half since the death of Lionel Murphy has witnessed the ascendancy of market ideology as a major determinant of public policy. It is not, I believe, an ascendancy with which Lionel, even as the instigator of the *Trade Practices Act 1974* (Cth), would have been comfortable.

This approach to public policy is generally referred to in Australia by the label 'economic rationalism'. This is not a fortunate choice of phrase – no one would wish to come forward as an advocate for 'economic irrationalism'. Donald Horne once advanced a preference for the term 'economic fundamentalism'. It never caught on. The terminology of 'economic rationalism' is, it appears, unique to Australia,¹ but we are stuck with it.

Over recent decades, commercial values have been applied to every sphere of conduct – to the extent that it sometimes appears that everything is for sale. This ascendancy is perhaps most dramatically manifest in the physical structure of our cities. Since time immemorial the dominant buildings in an urban area were public buildings: a parliament house, a town hall, a cathedral, a court. Today, all these buildings are dwarfed by commercial office blocks. Many public functions are now performed in buildings which are indistinguishable from commercial office blocks, like the Supreme Court of New South Wales.

I do not mean to suggest that economic criteria are not relevant and, indeed, central. However, they are not the only values which we profess as a society. For the legal system, the values of truth, justice and fairness demand primary consideration. Nevertheless, market ideology has had a substantial impact on the law. It is that continuing impact which I wish to explore to some degree in this lecture.

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1 Michael Schneider, "'Economic Rationalism'", *Economic Rationalists and Economists*, *Quadrant*, October 1998, 48.

II THE LAW AND MARKETS

There is a tendency amongst proponents of market ideology to treat 'the market' as some sort of force of nature, as if it were no more than an Oriental bazaar or a Mediterranean rialto. Although markets, in this face to face sense, exist under all systems of government and law, a market economy is in fact a rare phenomenon. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy. The peoples of the nations of the former Soviet Union realise every day that the benefits of a market economy do not arise simply from the absence of governmental restraint.

More than anything else, a successful market economy is the product of good government and of the law. In the Town Hall of Siena there are two wonderful frescoes by Lorenzetti: Allegories of Good and Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, would convince anyone that without law there can be no market system.²

This has long been acknowledged by proponents of a market economy, though not always in the policy descriptions which they draw from their ideology. Indeed, Adam Smith himself in the founding tract of the movement, *The Wealth of Nations*, said:

Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government.³

More recently, the late Mancur Olsen emphasised this point:

There is no private property without government – individuals may have possessions, the way a dog possesses a bone, but there is private property only if the society protects and defends a private right to that possession against other private parties and against the government as well. If a society has clear and secure individual rights, there are strong incentives to produce, invest, and engage in mutually advantageous trade and therefore at least some economic advance.⁴

Olsen emphasised the significance of the legal system:

To realise all the gains from trade, then, there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be. These arrangements must also be expected to last for some time.

2 See generally Quentin Skinner, 'Legal Symbolism in Early Renaissance Art: Ambrogio Lorenzetti's Frescoes in Siena' (1994) *The Cambrian Law Review* 9.

3 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Encyclopaedia Britannica ed, 1952) vol 5, 403.

4 Mancur Olsen, *Power and Prosperity* (2000) 196.

Without such institutions, a society will not be able to reap the full benefits of a market in insurance, to produce complex goods efficiently that require the cooperation of many people over an extended period of time, or to achieve the gains from other multiparty or multiperiod arrangements. Without the right institutional environment, a country will be restricted to trades that are self enforcing.⁵

Olsen is a practitioner of what is sometimes referred to as the 'new institutional economics'. Many of these economists use the word 'institution' in a special sense. The 'institutions' to which they refer are rules of the game, such as the law of contracts or moral standards. Other words, like 'organisations', are used to refer to aspects of the institutional structure, such as courts. The central thrust of the new institutional economics is to emphasise the significance of institutions, understood in the sense of rules of the game and, to some extent, institutions in the sense of organisations, to the operations of the market economy.

In the words of the Nobel Prize winning economist, Douglass C North: 'History matters'.⁶ History is embedded in institutions which he defines as the 'rules of the game', which encompasses both formal rules and informal norms, together with the enforcement characteristics of both.⁷ He argues that such 'institutions' reduce uncertainty by providing a structure to everyday life.⁸ It is the overall complex of institutions, both formal and informal, that shapes and determines the cost of transacting in the economy. North concludes that it is the institutional framework that is the 'critical key to the relative success of economies'.⁹ He argues that economic welfare does not depend primarily on allocative efficiency, the traditional, comparative statics approach of neo-classical economics. Rather, economic welfare is determined by what he calls 'adaptive efficiency': the way an economy evolves through time.¹⁰ With respect to adaptive efficiency, the key role is played by the institutional structure, particularly so far as it encourages experiment and innovation. He concludes that institutions are in fact the 'underlying determinative of the long run performance of economies'.¹¹

North emphasises the significant role of historical continuity when he says:

Institutions provide the basic structure by which human beings throughout history have created order and attempted to reduce uncertainty in exchange. Together with the technology employed they determine transaction and transformation costs and hence the profitability and feasibility of engaging in economic activity. They connect the past with the present and the future, so that history is a largely incremental story of institutional evolution in which the historical performance of economies can only be understood as part of a sequential story.¹²

These are important insights, not always recognised in the public debate about the legal system. In an address earlier this year, Gleeson CJ expressed the

5 Ibid 185.

6 Douglass C North, *Institutions, Institutional Change and Economic Performance* (1990) vii.

7 Ibid 3.

8 Ibid 4.

9 Ibid 69.

10 Ibid 80.

11 Ibid 107.

12 Ibid 118.

opinion that the economic significance of the administration of justice is generally undervalued. His Honour added:

Economic rationalism should be comprehensively rational. If proper attention were given to the economic importance of the institutional framework within which commerce and industry function, then courts throughout Australia might compete for government funding on better terms.¹³

Suspicion of all governmental expenditure is a characteristic of market ideology. That suspicion has been applied to the administration of justice in budgetary decision-making processes. To the extent that such suspicion is a primary input to decisions about allocation of resources, then the fundamental functions performed by the legal system may be compromised. Taken too far, it will threaten the very market system in the name of which the process is instituted.

III THE COURTS AS A 'SERVICE'

There is a perspective, common amongst those influential in determining the allocation of governmental resources, which identifies citizens as consumers and treats governmental institutions as providers of services. A good example of this perspective is found in the creation of the Federal Magistrates Court. It is a court created under Chapter III of the *Australian Constitution*. However, by specific statutory provision, permission is given to all to refer to the court as the 'Federal Magistrates Service'. This is not a concept found in Chapter III.

In the budget allocation process the major pressure on the courts, like other parts of the public sector, is to increase throughput without increased resources. No doubt that can be achieved to some extent, without compromising the performance of the courts' functions, by setting qualitative, and not merely quantitative, standards. There are, however, limits which are difficult to define.

I am reminded, in this respect, of the microeconomic reformer who noted that a Mozart string quartet takes as long to perform in 2000 as it did in 1800. In short, in 200 years there has been no productivity improvement whatsoever. Plainly this can only be the result of a collusive arrangement amongst professional musicians. The matter needs to be investigated by the ACCC.

Some things take time; justice is one of them.

There are two fundamental errors in this approach to the administration of justice as a 'service'. First, litigants are not consumers. Human life cannot be characterised merely as a series of consumer choices. For many, litigation is not a choice. That includes plaintiffs. They do not choose to go to court in the same way as someone chooses between brands of toothpaste. Litigants have rights. They are there to assert their rights, not to exercise some form of consumer choice. In the criminal justice process, the community, represented by the

13 The Hon Murray Gleeson AC, 'Managing Justice in the Australian Context' (Paper presented at the Australian Law Reform Commission Conference, Sydney, 19 May 2000) 2.

Crown, asserts rights by way of protecting itself. Litigants are, and should be, treated in the courts as citizens, not consumers.

The second fundamental defect in this approach is that the courts do not deliver a 'service'. The courts administer justice in accordance with law. They no more deliver a 'service' in the form of judgments, than the Parliament delivers a 'service' in the form of statutes.

A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who was right and who was wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes – these are all public purposes served by the courts, even in the resolution of private disputes. They constitute, collectively, a core function of government.

I do not doubt that there are important areas of government activity in which market forces have been introduced with substantial benefits to the community as a whole. However, not all areas of government are capable of being moulded by analogy to the operation of a free market. The administration of justice is not an area in which such an analogy can contribute much that is useful. No one advocates that commercial corporations should conduct their affairs in public, or that they should publish reasons for their decisions, or observe any of the other principles of open justice. Nor should the operations of commercial corporations be seen as having any particular relevance for the administration of justice.

One characteristic of our administration of justice is its inefficiency when compared with some other systems of decision-making. There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit *in camera*, dispense with the presumption of innocence, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, act on the basis that no one had any rights and not have to publish reasons for their decisions. Even greater 'efficiency' would be quickly apparent if judges had made up their minds before the cases began. There are places where such a mode of decision-making has been, and indeed is being, followed. We do not regard them as role models.

Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision-making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of governmental decision-making in order to ensure that governments act with the consent of the governed. The values that are served by our system of justice and by our parliamentary institutions should not be regarded as subordinate to, let alone some kind of manifestation of, the allegedly superior values of a market system.

IV HISTORY AND LEGITIMACY

I have on a number of occasions referred to the great significance of historical continuity in our governmental and legal institutions. The acceptance of the

legitimacy of those institutions – based to a significant extent on their longevity – is one of this nation's principal assets. It represents a deeply embedded form of social capital without which a market economy would be difficult, and perhaps impossible, to maintain. The more simplistic manifestations of market ideology – using the terminology of rationality but often displaying merely faith – may well threaten that social capital.

An approach which gives primacy to a system of exchange operates for the instant of the exchange. The tradition of neo-classic economics, unlike the new institutional economics, does not give proper value to history. As I said on the occasion of my swearing-in as Chief Justice, markets do not value tradition; a market wakes up every morning with a blank mind, like Noddy.¹⁴

In some respects my emphasis on the significance of historical continuity represents a conservative position. I do believe that this continuity is at the heart of the legitimacy of our legal system. The market ideology to which I have been referring represents a radical, anti-traditional force. The application of principles derived from that ideology to the legal system is capable of undermining the legitimacy of the system. That legitimacy depends, in large measure, on the perceived delivery of justice, understood as a system by which fair outcomes are arrived at by fair processes. I do not intend to suggest that considerations of efficiency, based on the salience of self-interest, are not important. However, their application must be tempered by an acknowledgment that there are other values to be served.

Other, also perhaps conservative, recent commentary has come to similar conclusions. In a recent article, Rabbi Jonathon Sacks, the Chief Rabbi of the British Commonwealth, argued that the kind of society that gives rise to and is able to sustain a market economy tends to be a society with a strong respect for certain kinds of tradition. He was concerned with religion, but his analysis applies to our mechanisms of governance. Rabbi Sacks expressed concern that traditions were being undermined by the power of the market. He identified the recent global triumph of the market as perhaps the market economy's own worst enemy. He said:

When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our work is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.

That, not the return of socialism, is the danger that advanced economies now face. And in these times, when markets seem to hold out the promise of uninterrupted growth in our satisfaction of desires, the voice of our great religious traditions needs to be heard, warning us of the gods that devour their own children, and of the temples that stand today as relics of civilisations which once seemed invincible. ...

The market, in my view, has already gone too far: not indeed as an economic system, but as a cast of thought governing relationships and the image we have of ourselves ... The idea that human happiness can be exhaustively accounted for in terms of things we can buy, exchange and replace is one of the great corrosive acids

14 See 'Swearing-In Ceremony of the Hon J J Spigelman QC as Chief Justice of the Supreme Court of New South Wales' (1998) 44 NSWLR xxvii, xxxi.

that eat away the foundations on which society rests; and by the time we have discovered this, it is already too late.

The market does not survive by market forces alone. It depends on respect for institutions, which are themselves expressions of our reverence for the human individual as the image and likeness of God.¹⁵

Neville Wran will correct me if I am wrong, but that may well be the first time that God has been invoked in a Lionel Murphy Memorial Lecture. Shorn of that reference, I do not think there is anything in Rabbi Sacks' remarks with which Lionel would have disagreed.

V LAW AND ECONOMICS

Market ideology, based on neo-classical economics, makes assumptions about individual behaviour – particularly the overwhelming centrality of self-interest as a motive of such behaviour. This intellectual toolkit has progressively been applied to other areas of social science. First, to the political sciences in the form of what became known as 'Public Choice theory'. Then it was applied to the law in what has become known as the 'Law and Economics' school. Although not dominant in Australian schools of jurisprudence, in the United States it has emerged over the last few decades as the most significant new movement in the teaching of law. It is present in all courses of jurisprudence and dominant in many. There are a number of specialist journals and the literature is now huge.

I have always regarded myself as someone sensitive to economic issues, not least because I hold university qualifications in economics. It is, I believe, important for judges to understand the economic implications of the decisions they take. Plainly there are significant areas in which economic analysis is of great significance, if not determinative. I have in mind, for example, the law of competition. The claims of the law and economics school go much beyond such matters. Its proponents purport to apply a market ideology to virtually any aspect of the law, to all legal institutions and to any participant in the legal process.

Although I cannot claim familiarity with the full range of law and economics literature, such occasions as I have had to refer to it have left me with an unrequited thirst for guidance. Generally, I have found the literature to consist of something like 90 per cent political ideology and 10 per cent jurisprudence. I have also found that the conclusions appear to be an ineluctable inference from the assumptions made about human behaviour, rather than a result of analysis. These qualifications apply to both aspects of 'law and economics': positive law and economics, which purports to describe how the law works and how legal actors behave, and normative law and economics, which prescribes what the law ought to be.

There are economists who question many of the fundamental assumptions of neo-classical economics on which the mainstream of law and economics is based. Of particular significance is what has been called 'experimental' or

15 Jonathon Sacks, 'Markets and Morals 2000' (2000) 105 *First Things* 23 (also at <<http://www.firstthings.com/ftissues/ft0008/articles/sacks.html>> at 30 June 2001).

'behavioural' economics, which identifies divergences from neo-classical assumptions about human behaviour that occur in systematic ways. People often act on the basis of motives other than self-interest, understood in a narrow sense. They act, in the words of Amartya Sen, the Nobel Prize winning economist, as 'rational fools'.¹⁶ In a legal process where people act on the basis that they have certain rights, narrow self-interest is not an explanation of probable behaviour.

For example, behavioural economists have devised an experiment known as the 'ultimatum game'.¹⁷ In the ultimatum game, one person is given a sum of money and is instructed to offer part of it to the second player. If the second player accepts the amount, then he or she can keep what is offered and the first player gets to keep the rest. If the second player rejects the offer neither player gets anything. No bargaining is allowed.

On the basis of traditional assumptions of rational behaviour and pursuit of self interest, a neo-classical economist would predict that the first player will offer a minimum amount and the second player will accept it. This is not what happens. Offers usually average between 30 and 40 per cent. Offers less than 20 per cent are usually rejected. The average minimum amount that respondents say they will accept is between 20 and 30 per cent.

Behaviour of this character is based on considerations of perceived fairness. An offeree feels mistreated in a contemptuous way by a minimal offer. The offeree would rather get nothing than be treated in this unfair way. Offerors expect and understand that this will happen. They make offers likely to be perceived to be fair.

Such considerations of fairness are central to the delivery of justice by the courts. They affect both the substantive rules of law and the procedures by which the law is administered. These are not matters on which neo-classical economics has anything that is useful or interesting to say. Indeed some law and economics analysts proclaim that considerations of fairness are incompatible with their standard of welfare, Pareto optimality.¹⁸ If that is so, then what must be questioned is the relevance of the standard, not the relevance of fairness.

16 Amartya Sen, 'Rational Fools: A Critique of the Behavioural Foundations of Economic Theory', first published in Henry Harris (ed), *Scientific Models and Man* (1979) 1, reprinted in Jane J Mansbridge (ed), *Beyond Self Interest* (1990) 25.

17 Cass R Sunstein, *Free Markets and Social Justice* (1997) 32; Christine Jolls, Cass R Sunstein and Richard H Thaler, 'A Behavioral Approach to Law and Economics' in Cass R Sunstein (ed), *Behavioral Law and Economics* (2000) 13, 21, 23.

18 See, eg, Louis Kaplow and Steven Shavell, 'The Conflict between Notions of Fairness and the Pareto Principle' (Working Paper No 2, Harvard Law School, Public Law and Legal Theory Working Paper Series, Fall 1999) (also at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=161269> at 30 June 2001); cf Howard Chang, 'A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle' (Working Paper No 272, University of Pennsylvania Law School, Institute for Law and Economics, December 1999) (also at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=173768> at 30 June 2001).

VI PROFESSIONAL REGULATION

Market ideology has also been invoked with respect to the structure and functions of the legal profession. The regulation of the professions, including the legal profession, is now subject (to a substantial degree) to competition policy. This development is based on the assumption that the primary bond between a professional and his or her client is a commercial one. Hitherto, the primary aspect of the relationship between a professional and his or her client was a personal bond, created in a context of a high degree of personal responsibility.

There can be no doubt that competition operates in the public interest and that many past aspects of professional practice could not be justified as being in the public interest. Too much of professional self-regulation was exposed as merely protectionist, and much has since been changed in the legal profession. However, the pressures for change continue. In New South Wales, government policy will permit multi-disciplinary practices and corporatisation. To the extent that these emerge as a new organisational form for legal practice, new challenges will emerge for the maintenance of professional standards.

As Gleeson CJ has said, with respect to such new forms of practice:

The professional associations, if they are to preserve the characteristics of professionalism, will need to ensure that the standards of behaviour they seek to impose and enforce will include such matters as not encouraging fruitless or merely tactical litigation, however profitable it may be to the corporate employer, accepting an obligation to undertake a reasonable share of pro bono work, and insisting upon full observance of duties to the court, as well as to clients, in all aspects of the administration of justice. Of course, there are already lawyers whose observance of professional obligations of this kind, is, to say the least, imperfect, but that is a reason for emphasising the obligations, not for relaxing them.¹⁹

The traditional approach was eloquently enunciated by O'Connor J of the Supreme Court of the United States, when her Honour said:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be.²⁰

In one sense the debate is between two alternative ways of approaching professional organisation. The first is to regard professionalism as a means by which an occupation exercises a degree of control over the market for its

19 The Hon Murray Gleeson AC, 'The Changing Paradigm' (Address to the Women Lawyers' Association of New South Wales, 26 October 1999) 5-6. See generally his Honour's earlier address: The Hon Murray Gleeson AC, 'Are the Professions Worth Keeping?' (Address to the Greek-Australian International Legal and Medical Conference, 31 May 1999).

20 *Shapiro v Kentucky Bar Association* 486 US 466, 488-9 (1987).

services.²¹ The other approach is to identify the profession with the maintenance of professional standards of conduct and ethical obligations, irrespective of economic advantage.

The balance between these two approaches has shifted over recent years and the final balance in Australia is not yet clear. In the United States there are many commentators who have lamented the decline of the professions. Others have welcomed what they describe as the substitution of a 'business paradigm' of organisation of lawyers, for the former 'professional paradigm'.²² Whether such a shift occurs in Australia will depend in large measure on the behaviour of lawyers and their professional associations.

I do not mean to suggest that venality is unknown to legal practitioners. However, it has not in the past been the central organising principle of the profession. If commercial advantage, rather than a sense of service requiring honesty, fidelity and diligence, becomes clearly dominant, then the shift to a different paradigm for regulation will occur. The comparatively recent emergence of the tyranny of billable hours and the ubiquity of time-based charging – a system which rewards the least efficient – has created real difficulties for the maintenance of an ethic of service.

In the Australian context, at the heart of the traditional approach to professionalism is the close relationship between the profession and the court. Barristers and solicitors were, and are, officers of the court, admitted by the court to participate in the administration of justice. Through this relationship, legal practitioners assume obligations to the court which override obligations to a particular client. They also override considerations of self-interest. These include a duty not to mislead the court, a duty not to commence or pursue baseless proceedings, a duty not to assist any form of improper conduct, a duty to refrain from making allegations of impropriety without cause and a duty to conduct proceedings efficiently and expeditiously. Even Richard Posner, perhaps the foremost advocate of law and economics, acknowledges that competition principles will undermine the performance of such duties to the court and to third parties.²³

These duties to the court have recently been reinforced by amendments to the *Supreme Court Rules 1970* (NSW) and the adoption by the professional associations of new advocacy rules. These new ethical rules, which emerged in part from a dialogue between myself and the two associations, promulgate for the first time many of the duties to the court as professional obligations. They reinforce longstanding professional rules which are also inconsistent with the pursuit of commercial self-interest by lawyers, including the full range of fiduciary obligations and, particularly, the duty to avoid conflicts of interest.

If the professional paradigm for the organisation of legal practitioners is to survive the pressures of competition policy and the introduction of multi-

21 See, eg, Richard Abel, 'The Decline of Professionalism' (1986) 49 *Modern Law Review* 1.

22 Russell G Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology will Improve the Conduct and Reputation of the Bar' (1995) 70 *New York University Law Review* 1229. See also Deborah L Rhode, 'The Professionalism Problem' (1998) 39 *William & Mary Law Review* 283.

23 Richard Posner, *Overcoming Law* (1995) 93.

disciplinary practices and corporatisation, the enforcement of these traditional professional obligations – both ethical duties and duties to the court – must be, and be seen to be, at the heart of legal practice. For the tradition of professional ethics to simply become some form of sub-category of business ethics would not, in my view, constitute progress.

A particular difficulty with the application of a purely market driven approach to the legal profession arises from the specialised knowledge that lawyers acquire about substantive law and about legal procedure. Justice O'Connor, in the same judgment from which I quoted earlier, said:

Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand their clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subject to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialised knowledge that these professionals possess.²⁴

I believe that economists refer to such issues as raising a problem of 'asymmetric information': ie, the consumers and the providers of services know different things. Economists will instinctively approach a claim for self-regulation based on superior knowledge as a form of rent-seeking behaviour designed to cheat the consumer. On the other hand, there is a degree of naivety in the assumption that increasing information flow, and other forms of competition, will overcome this basic asymmetry in the real world, as distinct from the world assumed in microeconomics textbooks.

No doubt there are some consumers of legal services who are capable of acquiring the kind of information which would enable them to assess the quality and the need for the type and quantity of legal services they are receiving. These however would only be corporations or large organisations. I am very sceptical that the usual forms of information delivery in a market context can, as a practical matter, perform the function effectively in the case of legal services in general. To some degree, case management by the courts can be seen as a form of regulation which compensates for this market failure.²⁵

More significantly however, I am concerned that the regulation of professionals on the primary basis of competition policy will have a self-fulfilling quality. If lawyers are treated as if they are only conducting a business, then they will behave accordingly – to an even greater degree than is currently the case. The internalised self-restraint of professional values will then be lost, yet the alternative of restraint by a market may not prove as effective.

24 *Shapiro v Kentucky Bar Association* 486 US 466 489-90 (1987).

25 See The Hon James J Spigelman AC, 'The Qualitative Dimension of Judicial Administration' (1999) 4 *The Judicial Review* 179, 186-7.

VII COMPETITION BETWEEN COURTS

The debate about the applicability of market ideology to areas of public administration is a continuing one. At least one significant area of the administration of justice has, in part, been privatised. I refer to the emergence of privately owned prisons. Advocates of market ideology assert that this approach can and should be applied in many other areas. Sometimes they do so with a conviction that they are saying something new, radical, and different, propounding something that has never been tried before. In most cases, a century and more ago, things were organised much as they now advocate.

There was a time in the late 18th and early 19th centuries when even the criminal law of England was privatised. The police force and the prosecution service operated primarily on the basis of what was then called 'rewards', and would now be called market incentives. A private prosecutor was paid if he achieved a conviction. Forty pounds – a very substantial sum in the 18th century – was the reward for convicting someone of a highway offence. This created a system – of great relief to the limited body of taxpayers – where private individuals went out, caught criminals and prosecuted them. The only thing that mattered was the conviction. Personal rights in the course of investigation, arrest and trial, were decidedly secondary considerations.

In this context emerged Jonathon Wilde, who was, in effect, the Chief of Police and the Director of Public Prosecutions. He gave himself the title 'Chief Thief Taker of England', and so he proved to be. However, he also became the leading figure in organised crime for the whole of London.²⁶ His role in the administration of criminal justice merged into his management of a protection racket and an organised system for the receiving of stolen goods. To give one example of his conduct, he once put an advertisement in the press saying 'one wallet with name – lost in such and such a street'. The street, as everybody in London knew, was the location of a famous brothel. The advertisement indicated that the person who had lost the wallet could claim it and pay a certain amount of money. The implication was that if he did not do so, his name would become public.

Whilst running these sorts of rackets, Jonathon Wilde as a prosecutor used the facilities of the courts to put every other gang in London out of business. For some considerable time this occurred with the acclamation of all 'right thinking' citizens. It was a very effective form of privatisation. Such arrangements between organised crime and the police tend to ensure a quiet life for all concerned. In our own State of New South Wales, there have in the past been people who appreciated the efficiency of such a system.

The significance of competition as a model for the organisation of institutions that serve the public may also attract some attention from microeconomic reformers in the case of the courts. For many centuries, the courts of England competed with each other. There were four major courts: the Chancery and the

²⁶ And provided the basis for the character of Peacham in John Gay's *The Beggar's Opera*. See John Brewer, *Pleasures of the Imagination: English Culture in the Eighteenth Century* (1997) 431-2.

three common law courts – the Court of Common Pleas, the King’s Bench and the Exchequer. The judges and the court officials kept the fees. This was how they were paid. Offices in the court, such as that of the Master, were of such value that they were openly bought and sold for substantial capital sums. Judges and court officers became very wealthy. In some respects, the model is not wholly without merit.

Each of the courts attracted separate bars. Interest groups developed, each of which had a commercial interest in the work-flow to a particular court. The Court of Common Pleas was supposed to hear all matters between individual subjects; the Exchequer was concerned with matters of revenue; and the King’s Bench handled all matters involving the King and the King’s peace, including all crime and other breaches of the peace, like trespass. It had jurisdiction over anybody in a prison.

Competition between the courts had major effects on the substantive law. Significant sections of procedural and substantive law were created by judges in order to attract work and so maximise their status and income. For example, the judges of the King’s Bench had a vested interest in getting litigants into one of His or Her Majesty’s prisons. The court did so by creating a fiction. It pretended that a person had committed a trespass, under what was called the *Bill of Middlesex*. The beauty of this allegation was that the Court of King’s Bench simply refused to allow anyone to deny it. Once in prison, the court had jurisdiction over any aspect of that person’s affairs.

The Court of the Exchequer acted in a similar way. Although it was concerned only with protection of the revenue, it allowed civil actions to be brought before it on the basis that whenever a person was owed money by another, that person was less able to pay taxes. Again, the judges who sat – and the barristers who practised – in the Exchequer increased their income.

In Adam Smith’s *The Wealth of Nations*, there is a section in which he refers to the historical development of causes of action like trespass, as arising from this competition amongst courts. It is clear he regarded it as a good thing.²⁷ The spur of competition, driven by the judges’ venality, meant that they created law which would best serve the interests of parties.

Adam Smith accepted the system under which the fees of court should be paid to the court and distributed to judges, but he added two qualifications. First, they should not be paid immediately but, as an incentive, only when the judge delivered the judgment in a case. Secondly, because it was desirable to have a judiciary which was not open to corruption, distribution of court fees to judges should occur ‘in certain known proportions’.²⁸ As I have said, this system is not without its attractions. Nothing in the recent history of privatisation of government functions should leave us sanguine that the deliberate creation of competition between courts, or between rival forums for dispute resolution, is merely a historical curiosity.

27 Smith, above n 3, vol 5, especially 313-14.

28 Ibid 313.

I would assume, without knowing, that the virtues of competition between courts identified by Adam Smith have been taken up somewhere in the 'law and economics' literature. In the future, it will no doubt be used to justify the overlapping jurisdictions of the State Supreme Courts and the Federal Court in Australia.

The history of the English courts in this respect affirms one basic insight: institutional structures, including the structures of competition, have consequences. It should be recognised that the parties to litigation do not jointly choose the court that will hear their matter: the plaintiff alone does. Accordingly, the way for one court to attract business from other courts is to develop the procedural and substantive law in a manner favourable to plaintiffs. There are many who would regard that as a good thing. However, it should be understood that the application of market ideology to create competition between courts would not be neutral in its effects.

VIII CONCLUSION

I do not mean to suggest that the application of market ideology has not made a significant positive contribution to our welfare. In many areas of public discourse this approach has been implemented with great success. Such success has also occurred in the application to some areas of the law. My intention is simply to indicate that there are areas to which the approach should not be applied.

Some of the analysis put forward about the general applicability of market ideology has a touch of monomania about it. Legal systems have seen off other bursts of monomania. They have in the past tended to come in the form of religion. Once they came in the form of the divine right of kings. They now come in the form of the divine right of markets.

The claim for universality which is made in the name of the market is not compatible with the pursuit of truth, justice and fairness. These are fundamental values of the legal system.

A diversity of organising principles is as important for the health of our society as biodiversity is for our environment. A monoculture is inherently unstable. There is reason to resist the attempt to determine all aspects of public policy on the assumption that there is a single model of human behaviour that is universally applicable to all areas of discourse.