Supplementary Submission

Access to Justice Arrangements

Response to Productivity Commission Issues Paper

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In my earlier submission to this enquiry I predicted;

> ***1. Ill-informed criticism:***
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> *See comments regarding lack of data below.*
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> *Lawyers and judges in particular will say to the Productivity Commission that the "sky will fall in" if access to (legal or formal) judicial justice is in any way restricted. They have no evidence of the sky falling. Indeed every time that government makes a small step to change behaviour or for other reasons puts a small impediment in the path to the courts the results are positive.*

I have been surprised and disappointed that the ill information predicted has come from the Law Council of Australia (LCA) and take the unusual step of responding to that ill information, not just because I disagree with it but because of its emotive nature and the profound lack of evidence, quantitative or even anecdotal that the LCA offers in support of its criticism of Alternative Dispute Resolution. I have attempted to have the LCA correct its statements and so far it has not done so with a supplementary submission to the Productivity Commission. I attach to this submission the correspondence that I have had with the LCA and an "Op-Ed" piece that I posted on line that further explains my concerns and frustrations.

The passages of the LCA submission that must be addressed are the following;

> *336. The Law Council recognises that formal ADR is a very important tool in the dispute resolution armoury[1]. However, it may not be effective for all disputes[2] and there is serious potential for parties with fewer resources to suffer disadvantage[3]. There is also potential for more sophisticated parties to take advantage of another party's relative lack of knowledge about their legal rights and responsibilities[4]. Further, there is a danger that too frequent a reliance on ADR, the outcomes of which are generally confidential, will deny opportunities for courts and tribunals to provide*

[1] That there is such a thing as "formal ADR"
[2] Not effective for all disputes
[3] "Serious" potential for parties with lesser resources to suffer disadvantage
[4] Some sophisticated parties will take advantage of others lack of legal understanding

reasoned guidance and precedents to the legal profession, citizens and government agencies[5]*.*
337. The privacy of mediation, for example, immediately challenges one of the Victorian Law Reform Commission's (paragraph 102) fundamental tenets of justice, while its necessary secrecy defies another. Without openness, transparency and accountability mediation is hardly part of a system of justice[6]*.*
338. It has been said that "Mediation is not about just settlement[7]*, it is just about settlement*[8]*". No doubt it is good for parties to settle cases (and that is what for centuries their professional advisors have helped them to do) but settlement achieved through oppression is not so obviously a desirable end*[9]*. Then it is just the successful exercise of vulgar force*[10] *– the very thing that the system of justice was invented to defeat.*
339. There are real risks to the parties where the protections of litigation are not available. That is, where there is no guarantee of seeing the relevant documents, where the economic power or strength of character (or even sheer unreasonableness) of a party become the most powerful forces in the negotiation[11]*, and where the figure with apparent authority is focussed on achieving settlement, not on redressing the imbalance so as to enable justice to be done*[12]*.*
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342. Reliable, consistent, comparable court statistics about referral to and use of ADR and the outcome and impact of ADR are not readily available in all jurisdictions in Australia. The Productivity Commission Report on Government Services expressly does not include any data on ADR or arbitration/mediation as part of justice system statistics. While individual courts and tribunals may record some information, possibly available in an annual report or on a website, this information is not consistent or comparable across jurisdictions or over time. As a result of this lack of comparable data, Australian ADR and civil litigation reform policy does not have a strong evidence base, and it is difficult to construct criteria or benchmarks to initiate Law Council submission to Inquiry into Access to Justice Arrangements Page 86 or evaluate programs. NADRAC has repeatedly called for consistent data collection criteria, most recently in its 2009 report Resolve to Resolve[13]*.*

I will address very briefly the issues noted above.

1. **That there is such a thing as "formal ADR".**
    a. I am not sure what the LCA means by "formal ADR". Perhaps if it was explained the submission would make more sense. In using the military metaphor (armoury) perhaps the LCA provides a clue as to its perspective of

[5] Too much ADR will deprive the courts of opportunities to make precedent
[6] Privacy means that mediation is hardly part of the system of justice
[7] Settlements reached at mediation are not just
[8] Mediation is just about settlement
[9] Mediation achieves settlement through oppression
[10] Mediation achieve settlement through the successful exercise of vulgar force
[11] That if litigation is not available parties may make decisions without full information and therefore be open to being manipulated
[12] That mediators are authority figures and are only interested in settlement
[13] That there is a lack of data regarding mediation, its outcomes etc.

justice as only being provided if there is some sort of war. This fundamental misconception pervades the submission.

b. I am now informed that the use of the word "formal" is meant by the LCA to mean ADR processes that involve a neutral third party.

2. **Not effective for all disputes.**
   a. The LCA leave this statement without qualification as if that category is not definable. I commend to the Productivity Commission the submissions of the former members of NADRAC, the Attorney Generals Department Access to Justice web site and the submissions of the Law Society of NSW Young Lawyers who address the characteristics of dispute that might make it unsuitable for some forms of ADR.
   b. That being said there is very little harm in parties trying to resolve their differences privately if that can be done without risk of more harm.
   c. Triage of disputes if very important to assist in identifying the best process.
3. **"Serious" potential for parties with lesser resources to suffer disadvantage.**
   a. The LCA offer no evidence of the serious potential.
   b. There is no evidence that I know of that supports the suggestion of a serious threat. We do not know whether the LCA think it is serious because of its imminent risk or the magnitude of the individual risk.
   c. There is a potential that when children go to the park that they fall and hurt themselves. That does not make the risk serious when taken in the context of the benefits.
   d. There is more evidence available of litigants being damaged by dishonest lawyers (one example is the former partners of Keddies in NSW) than there is of the risk that the LCA suggest.
   e. See below re mediator training in dealing with unequal bargaining power etc.
4. **Some sophisticated parties will take advantage of others lack of legal understanding.**
   a. Again no evidence is proffered.
   b. Is this not a risk to parties when in litigation particularly is it not a risk to the unrepresented.
   c. The risk exists (if there is one) in direct negotiation without the assistance of a trained mediator or ADR provider. I would have thought that such processes offer the disadvantaged a much better and fairer justice than direct negotiations without a witness or process manager.
   d. The LCA does not make the same criticism of the court and tribunal system of legal justice.
5. **Too much ADR will deprive the courts of opportunities to make precedent.**
   a. ADR has been integral to the justice system for 20 years and there is no evidence, anywhere, of this fear eventuating. Evidence is not offered by the LCA.

b. We are not seeing less cases going to trial.
c. No jurisdiction that I know of can provide evidence of this risk eventuating.
d. The High Court seems to be very busy as it always has and always will be.
e. Is the Law Council suggesting that parties should be prevented from settling their cases for the benefit of society?
f. The submission misunderstands mediation and the role of the mediator as I discuss below.

6. **Privacy means that mediation is hardly part of the system of justice.**
    a. Courts and the law have always championed the privacy of negotiations. Lawyers call this "without prejudice privilege". It is a valuable protection for those entering into negotiations.
    b. Are the LCA supporting the abolition of "without prejudice privilege"? I do not think so. And I hope not.
    c. Privacy has always been part of the justice system and those who wish to have their disputes settled out of the public gaze must be entitled to do so whether they do so face to face, in mediation or in arbitration.
    d. The public scrutiny of the Courts is necessary because they are exercising the coercive power of government and that scrutiny should remain.
    e. There are, however, enough examples to prove the damage that can be caused by such public scrutiny[14] for our society to recognise that everyone should have the choice as to whether they want to air their dispute in public and risk that damage.
    f. The LCA submission is dripping with emotion about an issue (the privacy of negotiation discussions) which the LCA must accept and embrace unless it is to argue against without prejudice privilege.
    g. See my comments above about the value of the ADR practitioner as witness.
    h. Inclusive access to justice requires both public and private dispute resolution processes to cater for all needs and interests in our society.

7. **Settlements reached at mediation are not just.**
    a. Again no evidence is proffered to support this argument or that any of the millions of mediated outcomes that have occurred in the last 20 years is unjust.
    b. At best the LCA might point to an occasional case (and there are some) where a disputant after a mediation decides not to embrace the resolution reached. Examples however are very few, probably because in mediation conducted by trained and accredited mediators no party is or ever will be forced to settle a dispute. Disputes in mediation are only ever settled if all parties agree to the settlement.

[14] Cases such as Slipper and Ashby, the David- Jones and Fraser Kirk case come to mind.

c. What do the LCA mean by "just"? If they are arguing that the only just solution is one imposed by a Court or Tribunal that will mean that one half (at least) of every disputing couple (the loser) will consider an outcome unjust.
d. The LCA submission fails to recognise that the legal justice system provides just process, not necessarily just outcome.
e. For centuries most people have resolved their cases without seeking judicial determination, even when they have legal advice and a capacity to have a court decide.
f. The concept that only justice delivered by a court is true justice does not reflect the reality of our society and the way that it does business.

8. Mediation is just about settlement.

a. This suggestion offensive to mediators who work very hard to offer a service to disputants that offers at least the following benefits, as well as the chance if they chose to resolve their dispute;
    i. in mediation you get to tell your story, if you chose, in your own words, without interruption or cross examination, and
    ii. you get to clarify misunderstandings, and
    iii. mend relationships, and
    iv. listen and exchange perspectives and stories, and
    v. to understand more deeply, and
    vi. to vent productively, and
    vii. to reality test alternatives, and
    viii. to brainstorm creative options for resolution, and
    ix. to negotiate directly with or without assistance, and
    x. to narrow issues that are not in dispute, and
    xi. to appoint a neutral person to decide on technical issues, and
    xii. to do so in a dignified and private environment.
b. Only after all these benefits have been realised does one chose in mediation whether or not to settle.
c. The LCA relies on a glib statement without attribution. I have asked them to withdraw it.
d. Court determinations do not offer all of the same benefits and when choosing how to resolve disputes parties do consider the relative merits of different processes.

9. Mediation achieves settlement through oppression.

a. No evidence is offered for such a serious allegation.
b. The suggestion is offensive to the many hundreds of members of the LCA constituent bodies and other mediators who every day offer a valuable service when mediating in accordance with the NMAS standards.

10. **Mediation achieves settlement through the successful exercise of vulgar force.**
    a. See paragraph 10 above. The overwhelming emotive plea of this suggestion is not supported by any evidence.
    b. The suggestion is frankly offensive and wrong.
    c. The courts must be available to right the wrong of the exercise of force unlawfully. The fact is that they are available, subject to cost barriers that this submission does not address.
    d. I have never seen forces successfully applied to achieve a "settlement" in mediation.
    e. ADR in fact assists parties to find their own power to prevent the very abuses that the LCA identifies. Those abuses are unlikely to occur in ADR where there is a witness, and at the least much less likely to occur than in unsupervised negotiations.
    f. The suggested abuses are impossible when parties are free to leave the mediation at any time.
11. **That if litigation is not available parties may make decisions without full information and therefore be open to being manipulated.**
    a. Firstly I have not seen any submission that suggests that litigation should not be available to any citizen. Mediation does not and will not replace litigation.
    b. I do suggest that through triage and intake there be an attempt to filter cases to ensure that only those that need or would benefit from a judicial determination reach the courts. To me this is common sense as courts are expensive resources and the blunt instrument of dispute determination.
    c. However, if after they have considered other ways of resolving their dispute, parties wish to litigate they must be free to do so. No one suggests otherwise.
    d. The LCA would be better off focusing on how access to legal advice becomes available more readily than in the present market system than making suggestions that are not correct by suggesting that somehow litigation is not available to parties who chose to mediate.
    e. The need for legal advice is accepted. The suggestion that in some way ADR prevents people from getting legal advice is unsubstantiated and absurd.
    f. The majority of people (especially the wealthy and powerful) settle their disputes without the need for legal advice or the assistance of any litigation. That is not because they are deprived of legal advice.
    g. Parties make decisions without full information every day. It is their right. Sometimes they make bad decisions. Sometimes the decision to litigate is a bad one, even against advices. Everyone has the right to make a bad decision if it does not damage another person. Mediation is a process that supports good decision making.

h. I support the right of everyone to make decisions with or without legal advice, if they wish.
i. I also support the right of everyone to obtain advice. Creating productive access to justice involves ensuring that the resources available to give advice are properly distributed.
j. The submission is patronising of the vast majority of our society who regularly settle their differences without the need of a lawyer and without recourse to litigation.

12. That mediators are authority figures and are *only interested in settlement.*

a. See my comments above.
b. There is no evidence that this is the mindset of mediators and those who I have spoken to reject the notion that settlement of the case drives their conduct.
c. Mediation and negotiation is about making good decisions, including a good decision as to whether to litigate or not.
d. Every day mediators assist parties and their lawyers grapple with and make those difficult decisions.
e. I accept that mediators do bring some authority to a meeting. I reject the notion that such authority is being used to manipulate or create unwelcome resolution. If there is evidence then the LCA should refer to it before it maligns many of the members of its constituent bodies who mediate almost every day.
f. NMAS standards and professionalism of mediators is nowhere addressed in this suggestion.

13. That there is a lack of data regarding mediation, its outcomes etc.

a. Agreed, as there is a lack of evidence about settlements achieved without ADR.
b. The lack of evidence does not prevent to the LCA from making judgements, using emotive language about risk and suggesting that *the sky will fall in* when the truth is that if such risks were eventuating there would be litigation to prove it. There is not. This is a case where the absence of evidence is indeed evidence of absence.
c. I would support resource being allocated to test the propositions of the LCA.
d. Where evidence has so far been gathered, in Ontario for instance, in Farm Debt mediation and Retail Leases areas, the evidence is to the contrary of the LCA submission.
e. I call on the LCA to provide any evidence that it has to support its claims.
f. Professor Tanis Sourdin's resear4ch about pre action ADR and protocols is a valuable resource about the impact of pre-action requirements whether they be to mediate or to address some other settlement option. http://www.civiljustice.info/access/26/

I commend to the Productivity Commission the fine work of NADRAC and the Young Lawyers of NSW and many others who have offered reasoned and evidence based submissions to the Commission. I have tried to offer examples from my work and would be delighted to assist further when the need arises.

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