Submission

Access to Justice Arrangements

Response to Productivity Commission Draft Report

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I provided two earlier submissions to the Productivity Commission. I will not repeat what I said in those submissions but rather comment on the Draft Report.

I am happy to give evidence before the Commission if that is appropriate and of assistance to the Commission.

I give my consent for this submission to be published.

This submission deals mostly with Alternative Dispute Resolution. I also make some suggestions re legal costing from my 20 years of experience as a Costs Assessor appointed by the Chief Justice of NSW.

For ease of reference I refer to the paragraph and chapter numbers of recommendations and information requests.

Thank you for the opportunity to comment on the Draft Report. The Draft is very comprehensive and identifies, articulates and discusses the issues of Access to Justice in Australia with admirable clarity.

I particularly agree that Access to Justice cannot be seen as merely relating to access to the Courts and Tribunals to resolve conflict. Indeed most of those who have a dispute resolve it in another way and there does not need to be any more evidence for this other than the statistics of those Courts and Tribunals who publish them, along with the knowledge from other research that the Commission quotes which demonstrate that the vast majority of disputes do not result in a court filing.

In reading the Draft Report I was reminded (and think that the Draft sometime falls into the same error) that in our society (and especially the very influential legal profession and in the political arena) there is tendency to view access to justice issues from the perspective of the legal justice system, using language and making assumptions that suggest that the legal justice system (courts and tribunals, lawyers and the like) is the usual or default approach when people seek to resolve their disputes.

The Draft Report clearly demonstrates with its statistics and research that far from being the major provider of dispute resolution services, the Courts are in fact minor players when we examine the choices people make when faced with a dispute. This is a reality that must be emphasised clearly to politicians, policy makers, lawyers and the judiciary who stand from the reverse perspective.

The final report could be enhanced by placing more emphasis on this reality especially when it comes to talking about ADR. Even with limited statistics and data, it is very clear that the vast majority of cases that are filed in court are settled without a hearing AND that only a small percentage of disputes that arise result in a court filing. And yet the public financial contribution to the running of our court systems far outweigh the resources provided to the more usual methods of resolution such as direct negotiation, EDR (Ombudsman etc.) and ADR. The final report would make a more telling impact if it was framed from the perspective of the major part of the need - the persective of disputes that will never go to court.

It is easy to think of access to justice as meaning access to courts. This has the same fault of logic as thinking that access to health services meant access to hospitals. Hospitals and courts are to some extent the places people end up in when the health and justice "systems" fail. Our physical and social health is supported more by what happens to prevent us getting to these institutions than by what happens inside of them.

I applaud the approach to the issue articulated in **Chapter 1** of the Draft Report. In particular the potential gains from early and informal solutions identified on page 13 of the report offer many of the answers to the problems the report poses.

I also agree with the statements on **pages 14 and 15** of this chapter relating to ADR.

Chapter 8

Each of the **key points** identified by the Draft Report is supported by evidence and accord with my research and understanding.

A real barrier to greater uptake of ADR seems to be the focus in discussion on the Courts and the focus on spending on the Courts to the exclusion of less formal avenues as is discussed above. Court houses are the "biggest buildings in town". Lawyers and lately judges have a well-defined voice in the debate as do community justice systems and the pro-bono "lobby" that to date focusses mostly on the use of the law. Many politicians and other prominent commentators have a legal background.

In light of the submissions of the LCA to the Commission I must reluctantly identify that the obstruction and misinformation offered by some members of the legal profession is another impediment.

The suggestion that informal methods of dispute resolution (including ADR) are less favourable, less desirable or unsafe or in some way "second rate" to legal decision making is a nonsense that needs to be addressed.

Further the suggestion that proponents of the use of ADR and other informal justice mechanisms are motivated only by a desire to minimise the costs of the legal justice system or divert cases from court should also be debunked.

There is no evidence that fewer cases are tried because of ADR or negotiation. The benefits are many fold and identified in the Draft Report and my earlier submissions.

ADR "Success and Failure"

One aspect of the Draft Report and the discourse about ADR that needs addressing is the language that suggests that success in ADR equates to or is only indicated by a resolution of a dispute. This is a much repeated failure of language and in the discourse. ADR is about parties exploring if there is a better solution to their problems than either continuing to be in dispute or seeking a determination by some higher authority (such as the courts). Where parties are able to explore the possibilities to resolve their disputes in the most productive manner it is not a failure for them or the process if they decide that there is not a better solution and therefore ask someone else to decide.

The success or failure language is also inconsistent with the suggestion that legal decision making is superior to ADR (a proposition I must add that I do not support, they are different) as if ADR is a "failure" when people need to seek the determination of a court or tribunal. Does this not suggest that the result determined by a court is inferior to one that the parties themselves decide?

My fear in the continuing use of the "success or failure" language for discussing ADR is that it measures the effectiveness of mediators and ADR practitioners by reference ONLY to settlement rates. This has the risk (so far not a risk that has come to anything) that my colleagues will "talk people into bad settlements". The discussion around informal dispute resolution processes should focus on good decision making and not on whether it is *good or bad* to go to court. The Draft Report rightly identifies that there are a range of disputes where having an adjudicated outcome is better for the parties than reaching a consensual agreement.

One great benefit of ADR is that it filters out those cases that are better resolved by consensus or collaboration.

For this reason the default position for almost all cases in the civil dispute area, so long as people can be guaranteed safety, should be ADR first so that disputants can work out, together, whether a consensual agreement can be found that is better for both of them than "going to court".

It is for this reason that I suggest robust triage systems for potential disputants to have the widest choice of the processes by which they can answer that question.

In the same vein it is dangerous to suggest that cost and timeliness is always a benefit from ADR. It is in most cases and the savings are greatest the earlier it can take place fairly. Early intervention therefor offers the most productivity gain.

The evidence (as far as it goes) is well summarised in the report and I strongly agree that more needs to be done to gather data about the impact of ADR on civil justice, and disputants.

The courts and most tribunals, unfortunately, while expressing pride in their ADR programs, see ADR as "non-core" business as is indicated by their inability to collect meaningful statistics about the value of its use.

If Courts (and Tribunals) are to use public funds to conduct ADR programs then they should be accountable for the value of those programs and keep statistics and information that supports that value AND the cost of providing the service. How do we know (for instance) whether the best use of resources might be to have ADR as an outsourced service as opposed to it being provided by the institutions that see their primary role as providing determinative processes?

I agree that the non-monetary costs of disputing need to be considered when decisions are made about what processes to try. A manner of assessing this value should be sought out.

What this discussion demonstrates is that the default position when it comes to conflict (or decision making) in our society is far too often adversarial and yet a minuscule number of disputes are determined by adversarial methods. Any initiative to support a less adversarial culture among lawyers (who with respect to them are not taught other methods) must be of benefit to society generally.

Draft Recommendation 8.1

I embrace this finding and support the call for more data and research.

Information request 8.1[1]

I think that there is merit for Courts and Tribunals **making mediation mandatory *unless the parties can demonstrate risk of damage or undue cost***. If this were the default expectation then parties would consider the option earlier (as they have begun to do over the last 10 years) and would seek out the best and most cost effective ADR intervention for their case at the most appropriate time. This is more or less the approach of the AAT where registrars are responsible for assisting parties.

[1] The Law Society of NSW LinkedIn group hosted a discussion that I began about this issue. The comments of legal practitioners are Annexure 2 to this submission.

Such an approach would require more education of the legal profession and judicial officers (such as registrars).

The amount in dispute is an arbitrary and artificial indicator of suitability for ADR. Some low value cases are very complex, some high value cases very simple. The savings are more in more complex than less complex cases.

A better approach would be to have experts in ADR triage cases so as to maximise the chance of identifying the best ADR option. **This has been trialled by the Federal Circuit Court in Sydney with a settlement Registrar sitting one day per week.**

Other examples of targeted models are Farm Debt Mediation, Retail Leasing, Workers Compensation (in NSW at least). I can foresee such models being used in debt recovery generally especially when banks etc. seek to enforce securities, all small business disputes, partnership and shareholder suits, defamation, family provision and estate disputes, personal injury disputes (so long as there is appropriate pre-suit information exchange) and most business disputes.

Examples of "successful" targeted referral and alternative dispute resolution

I am aware of and have provided mediation services for the following schemes all of which report success;

- Workers Compensation Commission (NSW)
- Farm Debt Mediation programs in NSW and Victoria
- Small Business Commissioners in various states and Retail Tenancy Unit NSW
- Health Care Complaints Commission (NSW)

There is also a scheme in the Dust Diseases Tribunal in NSW, what used to be the Strata Division of the CTTT re strata disputes.

I understand that the Supreme Court of NSW regularly refers matters to mediation particularly Family Provisions cases.

The Family Dispute Resolution program has I believe been very successful.

Draft Recommendation 8.2

I support this recommendation. I commend to the Commission the work of NADRAC and am saddened by the results of the investigations of the Commission that identify only a handful of agencies at the Federal Level have designed Dispute Management Plans.

The amendment of legal services directions and model litigant rules to provide that ALL government agencies including local government must justify commencing or defending court proceedings without first recourse to ADR would strengthen the resolve of Government to embrace ADR.

Similar policies have been adopted by corporate entities[2].

The present requirement that agencies "consider" ADR is of no impact. Agencies should report not just their use of ADR but the reasons why in any case it is not used. This is consistent with model litigant rules.

Just because an agency must attempt ADR does not mean that it must settle! ADR can be used to limit the scope of dispute and sometimes identify unmeritorious claims or defences. The exchange of information possible in well facilitated ADR is valuable in its own right.

Draft Recommendation 8.3

I support this recommendation.

Education is an essential requirement to facilitate the more widespread use of ADR. NADRACs Guide to Dispute Resolution is a model.

Draft Recommendation 8.4

I support this recommendation.

See above. Before such a recommendation is adopted the personnel in organisations should be trained as should judicial and quasi-judicial officers. A facilitated and collaborative approach to the process of dispute resolution can have enormous benefits as is the experience of the AAT. See above.

I am attaching two examples of triage systems in ACCC mandated ADR programs[3] - one used by the Australian Energy Regulator and a draft dispute resolution process designed by Resolve Advisors, who were engaged by APRA.

Draft Recommendations 8.5

I support these recommendations.

I am teaching Dispute Resolution to students studying advanced degrees in public administration and the learning about ADR is highly valued.

Courses need to be practical (with minimum theoretical focus) and include experiences that allow students to understand practically how processes work.

Education of the legal profession, judges and consumers is essential to support a greater use of ADR. The Priestley 11 should be revisited.[4]

I also suggest that within (say) the next 5 years lawyers should not be allowed to practice contentious law in courts and tribunals without ADR training and understanding.

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[2] For instance NCR Corporation

[3] Annexure 1a and 1b to this submission

[4] An article that appeared in Lawyers Weekly in August 2012 is Annexure 3 to this submission.

Draft Recommendation 8.6

I support these recommendations.

The Mediator Standards Board http://www.msb.org.au/ is progressing the accreditation of mediators. Strengthening the understanding of the benefits of high standards is an urgent imperative but so far funded only by the profession. This recommendation could be enhanced by also suggesting the benefits of government providing funding to strengthen the accreditation regime (including audit of practitioners) extending it to conciliation, arbitration and other processes, ensuring its independence and market the choice of accredited practitioners to end users and industry.

Consideration should be given to the prevention of marketing of ADR services (advertising and the like) by non-accredited ADR practitioners.

Courts and tribunals and all government users of ADR services should be prevented from choosing ADR practitioners unless accredited.

Building the Evidence Base

The present reluctance of the Courts and Tribunals to report on resolution processes is alarming. Real measurement of the efficiency of the various sectors of the civil justice system cannot be made unless there is measurement of these matters and periodic research of such qualitative indicators as satisfaction rates, levels of non-monetary cost (stress, health and business disruption for example).

The debate about the relative effectiveness of determinative and collaborative approaches to resolution of dispute cannot be progressed until those who are holding the most resources (courts and tribunals) expose themselves to this level of scrutiny.

Other issues

I would like to comment on a number the other draft recommendations and information requests.

Information Request 5.1

Those civil justice providers such as CLCs and Legal Aid officers that engage in outreach, and agencies that address social needs in areas such as housing and health would be best placed to comment on this question. I know that Legal Aid NSW has at least one clinic in a Centrelink office and this would be an interesting case study.

Salvos legal has outreach programs that could also assist as well as an innovative funding model.

http://www.salvoslegal.com.au/

Chapter 6

I am also a Costs Assessor appointed by the Chief Justice of NSW. I counsel caution in relation to the drive to rely on disclosure as a method of protecting consumers. Present systems in NSW are so complex and burdensome that even experienced practitioners have difficulty complying and the disclosure documents are so long and burdensome that consumers give up trying to understand.

Even with complete disclosure consumers are confused. This is one area where better skills by lawyers and an early intervention using ADR skills could create great benefit.

Most legal bills in Australia (I would think more than 99%) are paid without dispute.

A methodology needs to be found for simple and effective disclosure. Such things as the right to negotiate, interest and many other issues could be standardised or avoided altogether. Ongoing requirements to disclose should be simplified and made mandatory on a regular basis, either monthly or quarterly. This will only be effective if the disclosure requirement is kept simple something like;

- This is what you have spent so far
- This is what it is likely to cost to finish this off
- This is what you might have to pay to the other side if you lose.

Chapter 7 A responsive legal profession

Recommendation 7.1

I support this recommendation. Refer to my comments for Recommendation 8.5; the previous work of NADRAC; and the previous Federal Attorney-General's Department.

Chapter 9 Ombudsman and other complaint mechanisms

It is obvious given the number of complaints handled that these services are useful and delivering benefits and I support all of the recommendations in this paragraph.

Chapter 11 Court processes

Recommendations 11.1 to 11.4 make sense but will require a significant re-education of the judiciary.

The concept of non-adversarial or collaborative methods of case management is worthy of investigation.

Chapter 12

Recommendation 12.1

ADR practitioners should be engaged in this task as they are experts at narrowing issues and identifying opportunities for ADR. Judges are not as they have usually not practiced in this area for many years and by definition do not get involved in cases pre action. Mediators do (for instance about 20% of my work involved disputes that have never been the subject of a court or tribunal filing). Judges, lawyers and ADR practitioners should work collaboratively together to explore appropriate pre action protocols.

It is clear that specific pre action protocols are needed for particular types of cases and a one size fits all model will neither be useful or acceptable to the legal profession or judiciary.

Once again triage systems are needed to identify the correct pre action protocol.

Recommendation 12.2

As stated above;

> **The amendment of legal services directions and model litigant rules to provide that ALL government agencies including local government should justify commencing or defending court proceedings without first recourse to ADR would strengthen the resolve of Government to embrace ADR.**
>
> The present requirement that agencies "consider" ADR is of no impact. Agencies should report not just their use of ADR but the reasons why in any case it is not used. This is consistent with model litigant rules. Just because an agency must attempt ADR does not mean that it must settle!

I see no reason why Local Government should be subjected to a lower standard of behaviour when using public money to pursue or defend claims than other levels of government. This will require more robust and effective decision making skills, authority guidelines and training of local government officers. The insurers and other representatives of such government agencies including their lawyers should be bound to the same standard and trained in its implementation.

I see no reason why publicly listed corporations should be subjected to a lower standard of behaviour than government when using shareholder funds to pursue or defend claims. This will require more robust and effective decision making, authority guidelines and training of officers.

Chapter 13 Costs Awards

Anything that encourages early settlement or early triage or management of disputes should be supported of a less adversarial approach to dispute resolution in the outcome.

I agree with **Recommendation 13.1**

Anyone who funds an action on behalf of another (including lawyers on a no-win no fee basis or contingency fee) should be responsible for an adverse costs order so that the interests of the litigant and funder are aligned.

Chapter 16 Court fees

Court fees should be structured so as to provide maximum incentive for early resolution.

I favour full cost recovery from the losing party (or parties who do not better their settlement offers where made) for all cases that go to hearing. This may require security be provided by some parties, particularly insurers, financial institutions and government agencies that are regular users of court and tribunal services. Plaintiffs should have the proceeds of any judgement charged for such costs if they do not get close to their best offer.

The use of the court system is a right. **That right comes with an obligation to ensure it is effectively and productively used by all litigants and lawyers**.

Funders of litigation (including lawyers working on a no win no fee or contingency basis) should be burdened with the same obligation to pay court costs. This will minimise unnecessary litigation.

There needs to be full reimbursement of tribunal fees for parties who act unreasonably in relation to resolution.

Such proposals need more thought and attention to ensure that access to justice is not denied to those in need.

If there is to be lending for access to justice (a "HECs like scheme") it could be for ADR or informal settlement options with a rebate if settlement is reached and only on certification by the Court of need for litigation.

No funding should be offered to litigants who do not undertake appropriate ADR and informal resolution processes.

Chapter 18 private funding for litigation

Anyone who funds an action on behalf of another (including lawyers on a no-win no fee basis or contingency fee) should be responsible for an adverse costs order so that the interests of the litigant and funder are aligned.

Chapter 23 Pro bono services

These can and should be supported by pro bono ADR programs.

Chapter 24 Data and Evidence

As above I fully support the recommendations in this chapter.

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