MEDIATION & ARBITRATION CHAMBERS

Submissions on the

PRODUCTIVITY COMMISSION

Draft Report April 2014

ACCESS TO JUSTICE ARRANGEMENTS

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Mediation & Arbitration Chambers

Mediation & Arbitration Chambers[1] as the name describes, specialises in providing specialist mediation and arbitration (as well as negotiation and expert determination) services to Australian businesses, governments and individuals.

We provide our submissions on the Productivity Commissions Draft Report on Access to Justice Arrangements. We support the broad general thrust of the Draft Report and want to limit our observations to particular matters of which we have had experience over the past 20 years in our practice as barristers, mediators and arbitrators.

Our submissions are directed to the Commission's main proposals and primarily at the opportunity to use available Alternative Dispute Resolution (ADR) procedures. We have only provided comments where we feel our practical experience can enliven the proposal with greater insight into what is actually going on at the present time.

In our view, based on the matters referred to us for resolution, particularly when dealing with small business disputes, that legal costs bear no relationship to the matters in dispute. It is not unusual to find in contested matters where the claim is $50,000 the parties have together spent $200,000 in legal costs and are still facing a one-week trial in a Supreme Court, entailing further expense.

In a speech given in 2004 (over ten years ago) the then Chief Justice of the New South Wales Supreme Court, James Spigelman opined that:

> "In many areas of litigation, the costs incurred in the process bear no rational relationship, let alone a proportionate relationship, to what is at stake in the proceedings."

There are varied reasons for this situation, many of which have been identified by the Commission in its report.

We will highlight a few of the matters we think are of significance and advance some suggestions to improve access to justice that is quick, economical and inexpensive, by making better use of existing resources and processes.

We also believe that the future for Civil Justice in Australia is not just a matter of doing more of the same (with ever deceasing government funding) but rather taking the opportunity to use existing (underutilised) resources coupled with new technologies to deliver better and cheaper processes to users of these services.

[1] http://www.medarb.com

Submissions

1. Information Availability

The complexity of our modern life provides many more situations for people as consumers, employees, people involved in relationships or as small business owners to be involved in disputes. Although society requires training for people wanting to drive a car, people are not given any training about how to go about the resolution of a conflict in which they may become involved. For that reason the availability of skilled dispute resolvers who are available to assist with the strategic decision making on the best ways to resolve a conflict, is vital.

Lawyers are the primary professionals that people have turned to when they sought assistance with the resolution of disputes. But the last 20 years has seen the growth in popularity of ADR processes and people trained in applying these strategies. Many of these dispute resolvers have legal qualifications, because lawyers have been amongst the first to seek out better methods of assisting their clients, with alternatives to litigation. As an aside, it can be reliably estimated that over a quarter of all mediators accredited under the National Mediator Accreditation scheme (NMAS) are barristers. But how do consumers of dispute resolution services locate these individuals?

As an example, the Chief Justice of the Family Law Court, Diana Bryant, recently[2] took the unusual step of appearing on ABC Melbourne morning radio to discuss the critical issues facing the Family Law Court due to the lack of government funding for legal aid for unrepresented litigants. Pressed by the radio host for solutions, the one thing the Chief Justice failed to mention on that occasion was the availability of some 400 Family Dispute Resolution practitioners or FDRPs (the Family Law Act's description for mediators) that could assist with the resolution of these family law disputes. Not only were FDRPs not mentioned by the Chief Justice, you will not find any link to their existence on the Family Court's website, the very place where you would expect people involved in a family law dispute to be searching for them.

Since 2009, family dispute resolvers who have appropriate qualifications equivalent to a Vocational Graduate Diploma of Family Dispute Resolution and other qualities[3] have been accredited by the Federal Attorney-General's Department and provided with licence numbers to certify documents they provide to the Family Court. These dispute resolvers, many of whom are legally qualified and who are located in towns around Australia, represent a skilled resource that can be utilised to resolve family law disputes more cheaply and less emotionally.

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[2] A recording of that interview is available here: Court Crisis: Chief Justice of the Family Court Diana Bryant on Mornings with Jon Faine: https://soundcloud.com/774-abc-melbourne/court-crisis-chief-justice-of?utm_source=soundcloud&utm_campaign=share&utm_medium=twitter

[3] http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyDisputeResolution/Pages/Becomingafamilydisputeresolutionpractitioner.aspx

Back in 1996 when amendments were first brought into the Family Law Act permitting mediation, qualified practitioners were allowed to put a (small) sign, promoting their mediation practice, up on a notice board in the Family Law Court offices. Of course it was around the back of the Court were no one ever ventured. But the modern day equivalent would be to require the Family Law Court to put up a (prominent) webpage on its website where people with accreditation could place free advertisements for their service.

Of course more could be done, to promote this service but this simple and inexpensive solution would alone provide a benefit to both the people who have trained to acquire these skills as well as the Family Law clients who are looking for alternative and cheaper solutions.

We do not single out the Family Court alone, for all courts have made it more difficult than it needs to be, to find and obtain the services of qualified and trained dispute resolution practitioners. Some courts maintain lists of some practitioners on a bar association or law society panel others direct users to the "yellow pages". The Federal Circuit Court has a link on its dispute resolution page to the Federal Government's Family Relationship Centres initiative. But this very court, that was set up with a primary object of encouraging the use of a range of appropriate dispute resolution processes[4] such as counseling, mediation, arbitration, neutral evaluation, case appraisal or conciliation[5] does not appear to maintain panels of practitioners with these skills or promote their use. The Federal Circuit Court, which has the power to order matters out to qualified practitioners is currently dealing with some 92,000 matters a year (according to Commission figures) but makes little use of this power to better manage its allocation of resources.

Simply providing better sources of information to consumers of legal services would provide a better return than increasing Court fees. For example, considerable monies have been spent by the federal government and the practitioners who have sought accreditation as nationally accredited mediators. There are currently over 2,000 people, the majority of them lawyers, who have completed training to obtain this qualification. But in the six years since the scheme was launched, there has never been a single list of Nationally Accredited Mediators that can be searched to find the names and contact details of these trained and accredited mediators. Simply completing these linkages, making information available to the people who need to find these resources when they need them would provide a significant benefit to the consumers, the practitioners and the system as a whole.

To remedy this information vacuum we have supported the establishment in 2013, of the largest Internet based list of Australian Accredited Dispute Resolvers located at the website www.ADR.org.au[6].

[4] Federal Circuit Court of Australia Act 1999, s 3(2)(c)

[5] Federal Circuit Court of Australia Act 1999, s 21

[6] http://adr.org.au Note: Although the Mediator Standards Board has recently published a list, it does not provide contact details for the mediators.

2. The end of the quill pen?

As the Commission notes, "Technology is widely recognised as having the capacity to generate time and cost savings for the courts and their users."

This is an age where a person can purchase an airline seat on-line and turn up to board the flight with only an electronic ticket (stored on a mobile phone). By comparison the level of automation of simple matters like filing court documents (most of which have been electronically generated anyway) is woeful. In our experience, this is not simply a matter of investment but of ideas, of both the practitioners and court staff alike.

As the late Steve Jobs said on the launch of the Apple iPad, we do not need market research to tell us what consumers want, we are the experts in the technology and how it can be used. Similarly it is the practitioners who should be driving the systems to increase flexibility and options with government support, always with the eye on the consumer of the service and how to make the process simpler and easier for them. Would an airline have any customers if they made it difficult or less convenient to purchase a flight? If for example you were required to turn up at an airport in order to obtain a ticket? Yet that is what most court registries require people filing documents to do.

Where initiatives like the new Online Court system in NSW is put in place to free up the system, it is the practitioners who are taking a backward step. Only six months ago, in December 2013, the NSW Bar Association brought in new Bar Rules (which govern the conduct of NSW Barristers) to prevent barristers from filing documents on behalf of direct clients[7]. With a direct client a barrister will have already prepared the documents, so filing them electronically would be an easy step and one which prior to this rule change, they were able to do.

So as technology is being used to provide cheaper and easier methods of providing documents to court, in a change from previous Rules the NSW Bar Association, the largest assembly of barristers in Australia with the busiest courts dealing with civil matters, are preventing their barristers from using these new electronic services or requiring their clients to employ a solicitor at further expense or to file the documents themselves.

Eventually Australia needs to look to the country that gave us our legal system in the first place and evaluate the significant changes being introduced in to the UK legal marketplace. There instead of Barrister Rules proscribing what a legal practitioner must not do, they guide the practitioner to appropriate conduct. In the words of the English Bar Standards Board chair Baroness Ruth Deech:

> "*Superfluous rules have been stripped away and others modernised. The Handbook's approach is less prescriptive, with more focus and guidance on what the outcome of a rule should be, rather than attempting to define how a barrister should act in every situation. As well as offering greater clarity there are also new measures that will empower barristers to change their business models in line with consumer nee*d."

[7] http://www.nswbar.asn.au/docs/webdocs/rules2.pdf Rule 17(f)

3. Use of Mediation

Mediation has a justifiably deserved reputation as a successful process for resolving many different types of disputes, to the satisfaction of the parties. It is understandable that the focus of both the ADR industry and government is on mediation as a preferred dispute resolution process. However, this focus on mediation processes has caused the neglect of other "traditional" alternative dispute resolution techniques, like arbitration, that can be of great utility, particularly to small businesses in their disputes with larger organisations.

The history of dispute resolution, particularly mediation in the Franchising industry provides an instructive example of the efficacy of these processes in resolving small business disputes. For example, the level of litigation in Franchising (a $130 billion Australian industry) and the Telecommunications industry has continued unabated despite government funded and mandated mediation processes.

The 2008 Federal Parliamentary Joint Committee investigation into the Franchising Industry reported significant dissatisfaction with mediation as a process in resolving franchising disputes despite the existence of a federally funded service and a mandatory Code of Conduct enforceable under section 51AD of the (then) Trade Practices Act, which came into effect on 1 July 1998, and that had been in force for over ten years.

The review of the Franchising Code of Conduct by the Parliamentary Joint Committee on Corporations and Financial Services identified in its report[8] the problems with the current mediation only model employed by the Office of the Franchising Mediation Adviser (OFMA).

The committee noted that:

> "7.29 Views put to the committee on the utility of the current mediation arrangements under the Code were polarised. For instance, the Franchise Council of Australia (FCA) stated:
>
> > The mediation based dispute resolution process is highly effective and considered world's best practice. It is quick, low cost and effective in over 81% of cases, which is a phenomenal result.
>
> 7.30 In stark contrast to this statement, many submissions to the committee revealed substantial dissatisfaction amongst franchisees, and also some franchisors, regarding the current operation of the mediation provisions."

The Committee also noted at 7.48 that:

> "In light of these comments, the relatively high settlement rate cited for the OMA mediations is potentially misleading. The blunt settlement figure provides no indication either about the relative satisfaction of the parties

[8] "Opportunity not opportunism: improving conduct in Australian franchising" (December 2008)

> with the mediation outcome, or whether the mediation outcome subsequently occurs."

The committee recorded at 7.57, that:

> "Having regard to both the limitations of mediation as it currently exists and the high, often prohibitive, costs of litigation, many submitters and witnesses asked the committee to consider the introduction of alternative dispute resolution mechanisms in franchising. Suggestions put forward included an increased focus on pre-mediation strategies; the creation of a tribunal to make determinations; or the introduction of a franchising ombudsman."

The same situation applies to the other "Codes of Conduct" set up by the Federal Government. Industry codes that regulate the relationships between businesses in a particular industry seem like a good idea. But the industry codes introduced under the previous federal Trade Practices Act, being the Franchising Code, Horticulture Code, Produce and Grocery Industry Code and OilCode, have proved to be disappointing in their effect. Despite the government (and industry) expense of adopting and educating people about these Codes and engaging private dispute resolvers to manage the processes, the industry impact (as opposed to the settlement rates for particular disputes) has been negligible. Industry observers will tell you, that this is not because of the lack of disputation in those industries, rather small businesses when faced with a dispute resolution process that pits them against large businesses where there is no opportunity for an adjudicator to hear their grievances or make a binding decision, vote with their feet and stay away.

The real disputes are not brought forward because industry players know that at mediation the dominant party will not agree to make a change that affects only one complainant (because the rest are too scared to complain). And there is no way of getting a determinative result without the significant expense of court proceedings where the small party can be financially crippled by ongoing interlocutory applications and delays.

Industry codes may have the potential to encourage behavioural change but they do not work unless they are backed up with an inexpensive dispute resolution regime that provides a determinative result by an expert tribunal. Despite the deserved popularity of mediation, when it comes to commercial transactions many business people require matters to be finally and bindingly determined.

4. Use of Arbitration

Arbitration is the only determinative ADR process that offers an alternative pathway to litigation in the courts. Arbitration is also the only determinative ADR process that has legislative support pursuant to the State based Commercial Arbitration Acts (CAA). As well, in many states the Courts can utilise existing

state based legislation (in NSW, the *Civil Procedure Act 2005*) to refer matters to arbitration with private arbitrators.

It is strange then, that arbitration has received no support from the federal government as a process to assist with the resolution, particularly of small business claims. In its review of the Franchising Code of Conduct, the Parliamentary Joint Committee on Corporations and Financial Services considered various suggestions for improved processes of dispute resolution. Apart from a pre-mediation strategy, the other suggestions all related to the need for a determinative processes. It is our experience, that many businesses that are in dispute (particularly with a larger organisation) and where negotiation or mediation have failed to deliver a complete solution, want an inexpensive determination of the dispute by an "expert" with knowledge of the industry or the particular process or product involved. It should also be remembered that the dispute resolution processes most often employed in all of Australia's administrative tribunals, is arbitration by expert members, not litigation.

One suggestion that was not discussed at any length in the Franchising industry review, was the opportunity, when mediation failed, to use arbitration processes, to provide a determinative solution, at lower cost than litigating in a Court. Since the time of the Parliamentary Joint Committee report, the CAA, has been completely revised and updated (in line with an amended *International Arbitration Act)* based on the UNCITRAL Model Law and is being adopted nationally as a "uniform act" in the various States.

A strategy to use binding arbitration and existing arbitrators would provide an alternative, lower cost strategy for obtaining resolution of disputes that do not completely resolve at mediation. It would also avoid the need for small business to entertain actions in Court where the expense can be prohibitive and where the decision maker may have no expertise in the commercial nature of the transaction. There are hundreds of trained and experienced private arbitrators (most of them with legal qualifications as it is the state law societies and bar associations that have kept the process alive) in Australia and professional associations that train and maintain their standards. Arbitrators are empowered under many NSW legislative schemes to act as experts and conduct the resolution of the dispute first by attempting conciliation and then if that fails, determining the matter as an "expert". That is, the arbitrator is empowered to conduct an "inquisitorial process" to use their business and technical expertise and call for evidence in order to adequately determine a matter.

While in Australia the federal government has avoided arbitration as a dispute resolution mechanism for these processes, in the UK they have adopted it. The UK Competition Commission's Groceries Supply Code of Practice requires the parties to a dispute, which is not resolved by them within 21 days to submit to binding arbitration. There is no doubt that were such a system to be adopted or included with mediation in the comparable Australian Codes, it would assist small business to achieve the result they need. A quick decision by an experienced industry "expert", using a flexible dispute resolution process that can deliver a binding decision at much less cost than attempting to conduct litigation in a Federal Court.

5. Dispute Management Plans

The preponderance of large dominant organisations in each industry sector with many smaller business organisations reliant on them, is a developing feature of Australia's commercial culture. However, in our experience, whether the dispute is between large or small organisations there is a great need for dispute management processes to be employed. These can usefully be contained in an organisation or individual Dispute Management Plan.

A Dispute Management Plan[9] describes ways of managing conflicts to avoid matters escalating unnecessarily into formal legal disputes. The Plan presents a recommended approach to dispute management that incorporates these steps:

1. Identify and manage complaints early
2. Review the dispute resolution processes that might be employed
3. Assess the relative strategic advantages of utilising any process against the principle of achieving a quick, economical and fair outcome
4. Manage the resources and people needed to properly engage in the chosen dispute resolution processes
5. Record and use information about disputes in an appropriate and meaningful way

Such a process is best employed by having an external dispute resolution advisor engaged to develop and manage the plan on behalf of an organisation. At the present time those individuals tend to be the client's lawyers whose particular focus, tends to be solely on litigation, because of their training.

Already some courts are recognising that the road to the resolution of a dispute is not simply a matter of filing a complaint and waiting for the matter to be set down for hearing before a judge. The NSW Land & Environment Court have graphically exposed their view of the way the Court will utilise dispute resolution processes in conjunction with its determinative powers[10]. What is of particular interest is the Court's realisation that parties may well have to go back to some processes (like mediation) for a second (and maybe a third) time before their matter is ready to be set down before and adjudicator for a final determination.

Utilising discrete dispute resolution "steps" rather than full blown processes, is in our view the future of Civil dispute resolution. For example, rather than setting down a matter for a one-day mediation, it is better to have a one-hour telephone conference to sort out both parties requirements for information, financials, and support. When the parties do meet, possibly by video conference, they can limit their focus for efficient interactions, to just one element of the dispute. Some of these principles are already employed in court case management processes. In arbitration, the arbitrator will often, with the agreement of the parties, elect to not follow the usual court process of hearing all the evidence of one party, then all of the evidence of the other party, on all topics. Instead they will manage the process to limit time and maximise efficiency.

[9] Such a system was introduced by the Federal Attorney-General's Department in February 2013

[10] http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m420301l716860/jigsaw.jpg