

National Commission of Audit

Submission by The Hon N A Brown QC

PROPOSAL

The Commonwealth should direct that the mediation of disputes before Federal tribunals should not be conducted by Commonwealth public servants, but should be conducted wherever possible by qualified mediators in the private sector.

THE ARGUMENTS IN FAVOUR OF THE PROPOSAL

- **The proposal will reduce spending.** At present, for instance in the Federal Court, the applicant (i.e. the Plaintiff who has brought the proceedings) pays a set fee for the mediation and the fee is paid to the Court. If the mediation were conducted by a private sector mediator, the cost to the applicant might well be the same, but the saving is that the Court and hence the Commonwealth would not have to incur the cost presently incurred by employing and supporting staff who work on mediations. It is not suggested that anyone would be terminated, but rather that they would henceforth be employed on their principal work which is the administration of the Court.
- The proposal is consistent with achieving several of the Commission's Term of Reference, e.g. that "*government should do for people what they cannot do, or cannot do efficiently, for themselves, but no more; ...*" and it is a move towards "*increasing contestability of services.*"
- Mediations can and are regularly conducted just as effectively by the private sector as by Commonwealth public servants. Private mediation is well established, used extensively and supported by professional mediation organisations that perform training, accreditation and professional development.
- Release of officials from the mediation work they presently perform will enable them to do other work and hence reduce pressure for employing more staff.
- The additional work thus available to private sector mediators will encourage the use of mediation in other areas.
- The fees earned by private sector mediators will generate other commercial activity.

The proposal would be a concrete and positive step towards reducing government involvement in this field, which is presently a virtual monopoly.

RELEVANCE TO THE TERMS OF REFERENCE

The proposal comes within several of the Commission's Terms of Reference, which are to the effect that the Commission should aim:

- to: ...
 - *eliminate wasteful spending; ...*
 - improve the overall *efficiency and effectiveness* with which government services... are delivered.
 - ...
- examine the scope for *efficiency and productivity improvements* across all areas of Commonwealth expenditure,...
- be guided in its work by the principles that: ...
 - *government should do for people what they cannot do, or cannot do efficiently, for themselves, but no more; ...*
- ...
- to identify:
 - whether the activity could be undertaken *more efficiently by the private sector...*
 - ...
 - to report on *efficiencies and savings* to improve the effectiveness of, and value-for-money from, all Commonwealth expenditure across the forward estimates and in the medium term, including:
 - options for greater efficiencies in the Australian Government, such as:
 - *increasing contestability of services;*
 -
- to review and report on:

... *other savings* or matters that the Commission considers should be brought to the Government's attention.

MEDIATION IN FEDERAL TRIBUNALS

Mediation is widely recognised by all Federal tribunals as having a part to play in settling disputes that come before those tribunals. Mediation avoids a contested fight and allows the parties to come to a voluntary settlement of the case. This saves money, is a faster way of resolving the dispute, is more civilised than sometimes difficult court proceedings and enables the parties to build on any settlement reached to keep doing business together in the future.

Thus:

FEDERAL COURT OF AUSTRALIA

1. The *Federal Court of Australia Act* Section 53 A provides that the Court may refer proceedings to an arbitrator or mediator. But the use of the word “may” makes it discretionary.
2. In the Federal Court, mediations are usually performed by **court registrars**, not by private mediators. The Court itself says and seems to assert that this is so and almost that it is desirable. Thus its Annual Report for 2011 says: “*The vast majority of mediations recorded during the reporting period were conducted by registrars of the Court.*” The Court also states that “All registrar mediators are accredited under the Australian National Mediator Accreditation System.”
3. The statistics show how embedded is the notion that mediations are conducted by registrars. Details are set out in the 2012-2013 Annual Report of the Court, 33 *et seq.*; the statistics do not include mediations conducted by private mediators; the salient points emerging are:
 - (a) This year there were 5802 filings in the Federal Court but only 602, or 10 %, were referred to mediation¹; even referrals to mediation as a % of filings in areas more suitable for mediation seems low : 26 %².
 - (b) “The vast majority of mediations recorded during the reporting period were conducted by registrars of the Court. “ In fact, of the 602 referrals to mediation, 557 or 24% were mediated by internal mediators and only 45 or 2 % had external mediators. It is submitted that 2% is far too

¹ Annual Report of the Federal Court of Australia, 2012-2013, p.36

² *ibid*

low and that a higher percentage would encourage more settlements and would free up court resources.

(c) More strikingly, there were 155 industrial relations mediations, of which only 1 had a private sector mediator; there were 22 tax cases of which none were mediated by an external mediator. This use of private sector mediators is far too low.

(d) The parties pay the Court for a mediation ; rates are now:

Publicly listed corporation :\$2460

Company : \$1640

Other : \$700

(for each attendance *of 3 hours*).

These fees are paid by the Applicant or party who has initiated the court proceedings.

(e)The Court claims that, on average, 61 % of mediations conducted by court registrars are settled in full or in part.

(f) But there are big disparities between States; in Qld it is a 45% success rate and in the ACT 22%.

(g) The same scheme applies to Circuit Court of Australia (formerly the Federal Magistrates' Court). When a judge orders parties involved in a dispute to attend mediation, it is usually conducted by a registrar of the Federal Court. In some cases, however, it is conducted by a private mediator.

ADMINISTRATIVE APPEALS TRIBUNAL

Its Act has provisions for ADR under Sections 34-38. The President may direct ADR to an ADR process or a conference. The provisions also apply to the Small Taxation Claims Tribunal.

Section 34 H gives power to the Registrar to appoint qualified and suitable persons to conduct ADR under the Act.

FAMILY COURT OF AUSTRALIA

In family law matters mediation of some sort is compulsory and court orders are made to implement it. In fact this court was at the forefront of pre-trial mediation. It seems that private mediators can be and are engaged.

AN ANALOGY OR PRECEDENT TO FOLLOW

Under the then new GST regime, known as A New Tax System, private arbitrators were the means established by the government to resolve disputes about long term non-reviewable contracts. The system was implemented under the Tax Laws Amendment (Long-Term Non-renewable Contracts) Act 2005.

CONCLUSION

There is a case or establishing that, *prima facie*, private mediators should conduct mediations in Federal tribunals or that, alternatively, they should be given equal opportunity with court officials to offer those services.

As to how such a system could be administered, there are many providers of arbitration and mediation services who are used to offering the work to professional on their panels and requiring them to commit very promptly to undertake the particular assignment. Sometimes, the provider has a revolving panel so that everyone on the panel is given an equal opportunity to obtain assignments. The writer has had experience of these systems and can say that they work and that he would be happy to draft a regime under which the system proposed in this submission could be implemented.

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