WHAT I WROTE TO THE LAW COUNCIL OF AUSTRALIA AND THEIR RESPONSE

Dear Martyn

Please see the email exchange below.

I assume that Mary has responded on behalf of the LCA ADR subcommittee.

I wonder if you could get me a response to my email of 20th November on behalf of the LCA ASAP.

So that you are aware the passage that I quote (and other) have been the cause of much discussion among my legal and ADR colleagues over the last few days. I know that it will be raised at the LEADR AGM this afternoon AND at the DR Committee of the Law Society of NSW on Wednesday 11th December at 8.30 am. While I know you are busy, an urgent response may avoid much unnecessary debate about the words used in the LCA submission.

Steve Lancken
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61 418 272 449

From: Mary Walker [mailto:inbox@marywalker.com.au]
Sent: Friday, 22 November 2013 7:15 AM
To: Steve Lancken Negocio Resolutions; inbox@marywalker.com.au; ibloemendal@claytonutx.com; sellis@francisburt.com.au; g.golvan@vicbar.com.au; Kathy.mack@flinders.edu.au; padr@bigpond.com; Laurence Boulle; Warwick Soden; joanne.staugas@jws.com.au; Geri Ettinger; Tim McFarlane; cgale@resolveconflict.com.au
Subject: RE: Law Council Submission to the Productivity Commission

Dear Steven,

I refer to your email dated 20 November 2013 below. The submissions you refer to were prepared by a Law Council Working Group chaired by the President, Michael Colbran QC. I suggest that you refer this matter to Mr Martyn Hagan, Secretary-General, GPO Box 1989, Canberra ACT 2601, Australia, DX 5719 Canberra, telephone +61 2 6246 3788.

Regards

Mary Walker
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From: Steve Lancken Negocio Resolutions [mailto:steve@negocio.com.au]
Sent: Wednesday, 20 November 2013 5:36 PM
To: inbox@marywalker.com.au; ibloemendal@claytonutx.com; sellis@francisburt.com.au; g.golvan@vicbar.com.au; Kathy.mack@flinders.edu.au; padr@bigpond.com; Laurence Boulle; Warwick Soden; joanne.staugas@jws.com.au; Geri Ettinger; Tim McFarlane; cgale@resolveconflict.com.au
Subject: Law Council Submission to the Productivity Commission

Hello colleagues.

The LCA web site lists you as the DR committee of LCA and that is the reason I am writing to you.

I have been provided with a copy of the submission of the LCA to the Productivity Commission and to be honest was really shocked when I first read the following passages;

Effective use of ADR

336. The Law Council recognises that formal ADR is a very important tool in the dispute resolution armoury. However, it may not be effective for all disputes and there is serious potential for parties with fewer resources to suffer disadvantage. 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. 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 reasoned guidance and precedents to the legal profession, citizens and government agencies.137

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.

338. It has been said that "Mediation is not about just settlement, it is just about settlement". 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. Then it is just the successful exercise of vulgar force – 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, 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.

340. The Law Council submits that those participating in mediation require legal advice and, in many cases, representation. Without access to legal advice and representation prior to participation in mediation or other ADR, participants may not be in a position to fully appreciate their legal rights and options. Mediators are largely restricted from providing legal advice to participants in mediation. In these circumstances, legal representation is crucial for parties to understand their legal rights and obligations and which underlying facts are relevant to resolving the dispute.

Firstly I wondered why the Law Council would quote an unknown person. It is a "cute" saying (even if the LCA choses to quote an unnamed unidentified person which I find a little strange in a formal submission). I first thought the saying was a bit misleading until I realise that the LCA sees the term *justice* in "access to justice" as meaning *"legal avenues of justice"* not including informal justice processes as is discussed in the Federal AGDs access to justice portal http://www.accesstojustice.gov.au/Pages/default.aspx and their access to justice "Strategic Framework" http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf

While I think that it is a shame that the LCA considers the concept of justice so narrowly I can understand why lawyers see the world that way.

What shocked me the most is the suggestion (as I read it) in the highlighted text that mediation achieves settlement through "oppression" and then that mediation achieves settlement by the "successful exercise of vulgar force". Again I was amused by the highly emotive use of language and that may have distracted me.

I realise however that the LCA did not mean to and would never impute such things about mediation. I think perhaps that the author was expressing a fear about the inappropriate use of power. I have that fear also, but am comforted by the facts (as you all know) that there is absolutely NO evidence that power is being used inappropriately in mediation, and if it was I am sure someone would have litigated. Indeed there is far more evidence that people are at risk of being ripped off by their litigation lawyers (Keddies is but one that comes to mind) than being subject to the "successful exercise of vulgar power" in mediation.

What I am really worried about is that others (in particular the people at the Productivity Commission) may read the document the way that I first read it. My worry is so profound that I thought I would write to you all to suggest that the impression that I have be corrected as soon as possible. Perhaps the author could explain to the Productivity Commission that the LCA has a fear that someone in a mediation may

inappropriately exercise power but that to date there is no evidence of that fear eventuating.

I have restrained myself from writing to the author of the submission and the president in the hope that your committee when they re-read the words share my view and can prevail upon the LCA to publish to the Productivity Commission some sort of explanation that avoids the misinterpretation of the words in a way that I am sure was not intended.

There other things that I disagree with in the submission (such as that lawyers need always be in mediation to guard against the risk, or that "too much mediation will rob the courts of work", an idea I have heard occasionally but never seen supported by any real qualitative evidence) but I respect the LCAs right to express a view on behalf of its lawyer "constituents".

The practice of ADR has come a long way since the days that lawyers were suspicious and downright hostile to mediation and other forms of interest based dispute resolution. I know that you agree with me that we do not want to return to those days (or even the suggestion of that disagreement) with the use of (perhaps) ill-considered and certainly highly emotive language.

Thanks so much for considering my thoughts. I am happy to discuss them with any of you or to read your thoughts and views. I would have called you all but for a complete lack of the key that lets you into the room with the 48 hour days.

All the best.

Steve Lancken

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COMMUNICATE INNOVATE COLLABORATE FACILITATE NEGOTIATE MEDIATE EDUCATE

Law Council
OF AUSTRALIA

9 December 2013

Mr Steven Lancken
Negocio Resolutions

By email: steve@negocio.com.au

Dear Steven

Productivity Commission Inquiry Issues Paper

Thank you for thoughts on the Law Council's submission to the Productivity Commission Inquiry Issues Paper, particularly Chapter Nine, which deals with Informal Justice Mechanisms. Your comments were considered by the Working Group at its recent meeting.

In its submission, the Working Group sought to assert that mediation is one of the tools that can be used to resolve disputes, and that it is a widely used and important one but the submission also recognised, as any impartial submission must, that it is not the only tool. Further, it is an undeniable fact that the necessary secrecy of mediation can mean that where there are power imbalances between the parties, it may not be the most appropriate way to resolve disputes, particularly if the parties are without legal assistance or representation. The issues of potential unfairness have been the subject of many studies including reports by the former NADRAC, of which I understand you were a member.

As discussed, the submission also sought to explain that mediation is a well established part of the dispute resolution process but should not be seen by the Productivity Commission as a 'magic bullet' to solve all the issues that will be raised about civil dispute resolution.

Read in this context, I trust you can see that it was not the intention of the Law Council to suggest that mediation should not be used to resolve civil disputes, but that it is one of the tools that can be deployed where appropriate. You have suggested that the submission is capable of being misread to suggest that mediators engage in overbearing tactics. The risks to which the submission drew attention are real but there was no suggestion that mediators as a group are not careful to use the power that their position gives in an unfair manner. This latter point will be noted in any future discussions or submissions to the Productivity Commission on mediation.

Yours faithfully

MARTYN HAGAN
SECRETARY-GENERAL

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