



**The Law Society  
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Your Ref: S. Beresford-Wylie

25 May 2009

Ms. S. Beresford-Wylie  
Director  
NADRAC Secretariat  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600

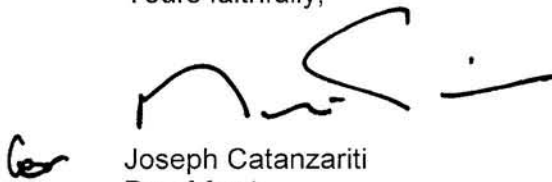
Dear Ms. Beresford-Wylie,

**Re: NADRAC Enquiry into Alternative Dispute Resolution and Civil Proceedings**

The Dispute Resolution Committee of the Law Society of New South Wales welcomes the opportunity to provide comments on NADRAC's Issues Paper, *Alternative Dispute Resolution in the Civil Justice System*.

Please find attached the Law Society of New South Wales submissions on the "strategies to remove barriers to the use of Alternative Dispute Resolution and to provide incentives to ensure its greater use, in federal disputes" proposed by the Issues Paper.

Yours faithfully,



Joseph Catanzariti  
**President**

Encl: Submissions



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The Law Society of  
New South Wales is a  
constituent body of the  
Law Council  
of Australia



The Secretary,  
National Alternative Dispute Resolution Advisory Council ("NADRAC");

**RE: ISSUES PAPER**

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This email is forwarded by the Dispute Resolution Committee of the NSW Law Society. We have reviewed the Issues Paper provided. We consider that it is a comprehensive paper and comment both generally and particularly on it as follows:-

1.

There is a role for mandatory mediation in select matters, for example, when proportionality of costs to claim is an issue; when there is no issue as to liability; when the preservation of a relationship by the parties is a significant consideration; and when the cost of litigating a matter would be a significant barrier to accessible justice. For other matters a requirement to expressly consider participation in mediation or other ADR process prior to or as a condition of continuing a court action may be sufficient.

2. There is a role for mediation by court registrars. Some parties have a reluctance to become involved in engaging a practising solicitor or barrister or retired judge as a mediator because of the cost structure of these practitioners. The cost of mediation by the court will have to be considered and a suitable fee may have to be levied in the filing fee. A mediation qualified registrar with ADR experience may bring the parties face to face with an independent person and this may increase the prospect of settlement.

3. Judges should not be involved in the mediation process. Their role should remain to ensure appropriate case management of proceedings before the court and deliver judgment, for which they are specially trained. All judges should be available for hearing of matters. A Judge who was involved as a mediator would otherwise be precluded from hearing that case.

4. There are difficulties if a party to a mandatory mediation does not participate bona fide. However, in the context of mediation, bona fide participation may be difficult to determine. For example, bona fide participation should not require the making of an offer of settlement. There could be a requirement for a report back to the court from the mediator for failure of bona fide participation, however, such reporting will have a significant impact on the role and the perceived function of the mediator by the parties. There would then probably need to be a Show Cause Notice issued to that party as to why they should not have some cost penalty or a pleading struck out. This would add to the time and cost of the interlocutory process and would jeopardise the value of mediation.

5. There is a view that parties should not be required to participate in ADR before they can commence all court or tribunal proceedings. Effective pre-litigation ADR is dependent on appropriate exchange of information and any such requirement must be accompanied by detailed guidelines in relation to that exchange of information. It is only if and when a party has commenced proceedings that they and the other party should then fall under the court or tribunal rules and orders for certain matters.
6. There is a view that most lawyers are becoming familiar with ADR. Courts regularly recommend to parties that they consider mediation and in some instances order that the parties participate in mediation. In certain tribunals there is a requirement for parties to attempt to resolve the matter as a condition of it proceeding further. However, there is a wide range of practitioner experience and expertise in the conduct of ADR processes that may require remediation if a mandatory system was instituted.
7. Advising clients about the range of ADR processes that may be suitable for a client's matter should be a requirement of practice standards. Failure to adequately advise a client as to the available process options could be a matter of professional incompetence given the process plurality that now exists.
8. Generally we consider that the Paper deals with matters in a detailed and fair manner.

