

5 May 2009

Ms Serena Beresford-Wylie
Director
NADRAC Secretariat

Email: nadrac@ag.gov.au

Dear Ms Beresford-Wylie

NADRAC Issues Paper, March 2009 – Alternative Dispute Resolution in the Civil Justice System

The Law Society of Western Australia thanks you for the opportunity to comment on this Issues Paper.

It has not been feasible for the Society to address seriatim all the questions contained in the Issues Paper. Many of the questions are very general or require a sociological approach, which the Society is not in a position to provide. Addressed instead are some of the issues identified in the terms of reference from the Federal Attorney General, the Hon Robert McClelland.

- A. It is the Society's view that strategies that would remove barriers to the use of ADR and which would provide incentives to the greater use of alternative dispute resolution processes include:

- A1 Courts should adopt pre-action protocols imposing an obligation on the parties to confer about the use of ADR processes prior to commencing proceedings. This is a device which has been adopted in England and Wales. The obligation should not be an absolute one. Circumstances may exist where conferral is not feasible or is inappropriate.

If there has been a failure to confer, the courts or tribunals should be entitled to take this failure into account on the question of costs or,

alternatively, stay proceedings until ADR processes had been investigated. A similar approach has been adopted in the Supreme Court of Western Australia in respect of interlocutory applications. Practitioners are required to confer before making an interlocutory application. The pre-action protocol enables potential parties to adopt the full variety of ADR processes available, which is an advantage.

- A2 The Government should make specific legislative provision facilitating the enforcement of agreements to adopt ADR processes, particularly mediation agreements and agreements to negotiate in good faith to resolve a dispute. The enforceability of such clauses is often problematic. It appears to depend upon the personal predilections of the judicial officer before whom a clause comes. This is illustrated by *Laing O'Rourke v Transport Infrastructure* [2007] NSWSC 723 and *United Group Rail Services Ltd v Rail Corporation NSW* [2008] NSWSC 1364. Effectively the same good faith negotiation clause was considered in both cases, with differing views expressed about its enforceability.

Legislation could provide that:

- (a) a clause simply referring a matter to mediation would be enforceable; and
- (b) a clause requiring good faith negotiation to resolve a dispute would be contemplate negotiations in accordance with guidelines for good faith negotiations for a specified period of time, similar perhaps to those contained in section 228 of the *Fair Work Act 2009*; and
- (c) the parties may seek directions from a court in the event of a dispute about the specific process to be followed.

Legislating to facilitate the enforcement of ADR agreements would be far preferable to legislation implying an obligation to mediate in all contracts, as mooted in question 6.7 of the Issues Paper.

Implying a mediation clause into *all* agreements assumes that mediation is the most dispute resolution process for all disputes. This assumption is

not correct. Mediation works best where the parties have adopted it voluntarily. If mediation is implied by law, parties will be deprived of even the opportunity of agreeing to mediation voluntarily. Parties ought to be able to choose an ADR process other than mediation if they consider it more appropriate eg early neutral evaluation, senior executive minitrial or arbitration.

- A3 ADR and negotiation skills should be included as core elements of the practical training of lawyers.
- A4 Government should encourage adjudicative type processes similar to that adopted under the various security of payment schemes operating in the construction industry (of which the Western Australian *Construction Contracts Act 2004* is perhaps the finest example) and adopted by various industry based external dispute resolution schemes ("ERD Schemes") such as the Financial Ombudsman Scheme and the Superannuation Complaints Tribunal. There is significant variation in the details of these processes. However, principal features are that:
- (a) the process is a determinative one;
 - (b) the determination is made on the papers rather than after an oral hearing; and
 - (c) the determination is not finally binding on the parties. The parties remain free to litigate, or arbitrate if they chose. The process is similar to early neutral evaluation. The process is relatively inexpensive.

In the construction industry, at least in Western Australia, the parties appear willing to accept the rough and ready nature of the process because it is quick and does not finally prejudice their rights. It is the experience, in Western Australia at least, that it is rare for the parties to reargue matters dealt with by way of litigation or arbitration.

- A5 The Government should encourage changes to the legislation and practices governing both domestic and international arbitration in Australia

to facilitate the resolution of arbitrations short of a hearing. Steps which should be taken in this regard include:

- (a) Amendments to the Act to facilitate the use of arb-med and med-arb techniques. This may include amending s 27 of the Commercial Arbitration legislation to confer greater immunities on arbitrators who endeavour to resolve disputes by mediation or conciliation;
- (b) Including provision in the Commercial Arbitration legislation requiring the arbitrator and all parties to the arbitration to strive for the rapid, just and effective resolution of disputes;
- (c) An amendment of this nature might be enhanced by conferring greater powers on arbitrators to deal with default by parties.

Encourage arbitral institutions to develop and promulgate rules and procedures directed towards the resolution of disputes short of a full hearing, such as the CEDR Rules for the Facilitation of Settlement in International Arbitration, recently published in CEDR's Commission on Settlement in International Arbitration, Consultation Document – 2009¹.

A6 The Federal government should encourage the use of ADR in government disputes by:

- (a) Engaging settlement counsel in appropriate cases

The Appendix to the Legal Services Direction 2005 should provide, perhaps at clause 5.3, for the Government to retain settlement counsel in appropriate cases. Settlement counsel are generally counsel retained specifically for the purpose of negotiating settlement of disputes but who have no part in the preparation of proceedings for trial or the trial itself.

¹ http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf

They are engaged for the sole purpose of facilitating settlement. Of course, not all cases in which the Government was involved would warrant this additional expense.

(b) Establishing a list of ADR practitioners

The Federal government currently has a list of counsel which it will retain. It should also establish a list of ADR practitioners.

B. Strategies which are mooted in the Issues Paper but which should *not*, in the Society's opinion, be adopted include:

B1 The mediation of disputes by judges².

There are two ways in which the use of judges as mediators is problematic:

(a) Judges are not generally particularly well suited to mediation. The skill set, personal characteristics and experience of judges should be directed towards the adjudication of disputes by court hearing. This involves experience in and great knowledge of the law, particularly the law of evidence and procedure, generally gained through long experience in court litigation either as an advocate or a solicitor. A good judge will cut to the chase, rapidly evaluate the evidence and arguments and make rapid decisions. These are not core qualities for a good mediator, whose attention should be directed more towards exploration of the interests of the parties which lie behind the parties formal positions.

It is not apposite to say that judges can pick up the skills necessary to carry out effective facilitative mediation. All too often, mediators with a legal background, such as senior silks, find it impossible to resist the lure of considering the merits of any matter, which lead them to conduct conciliations.

² It is assumed that the Paper uses the expression "mediation" to refer to facilitative mediation.

This approach also suggests that mediation skills can somehow be picked up and do not require significant skill experience and commitment to mastery on the part of the practitioner.

- (b) The suggestion that judges should mediate also blurs the roles of determination (according to law) and more general dispute resolution. If the advantage of judicial mediation is that the judge is seen as having more "clout" than a non-judicial mediator, then this is probably because it is anticipated that the judge will somehow suggest an appropriate resolution of the dispute or express views about the merits of the dispute. The judge is not then mediating in a facilitative fashion. This is fundamentally inappropriate. Any views expressed by judges about merits should be expressed in open court as part of the litigation process.

This is not to suggest that court annexed mediations do not play a valuable and effective role. Clearly they do. The experience in Western Australia of mediations carried out by court officers, generally described as registrars, is very favourable. The point is that persons who are to conduct mediations within a court context should be specifically selected for their ability to conduct mediations and their experience at doing so, rather than because they are judicial officers. This principle applies whether the court annexed mediator is called a judge or a registrar.

- B2 Paragraph 8.16 of the Issues Paper suggests a greater use of "case appraisal". It is not appropriate to introduce another form of interlocutory process.

Order 20 of the Federal Court Rules enables judgment to be entered summarily in cases where there is no reasonable defence to a claim. The application can be made at the initial direction hearing³.

³ It is noted that the initial return date or directions hearing is frequently used for an informal case appraisal

This is a form of case appraisal or case evaluation. It has the advantage that the parties are not put to the expense of the process unless the applicant considers that there is no defence to the claim. This process could be enhanced.

The Federal Court Rules should be amended to enable a respondent to make a similar application in respect of unmeritorious claims. Greater flexibility could be conferred on the court in the orders that may be made on the application, including orders as to costs. Judges could perhaps be more robust. However, another mandatory process such as case appraisal would only add to the expenses of the litigation process, with little gain.

B3 Inquisitorial role for judges

There are difficulties with the precise nature and extent of any contemplated inquisitorial role for judges. It is assumed that it is not contemplated that judges would have primary responsibility for investigating factual and legal issues. It is assumed that the parties would continue to have this role, with judges playing a somewhat more active role in the process. The degree of intervention which is appropriate is a matter of fine judgment. It depends on the circumstances of particular cases and should involve recognition that the parties will generally know more about the case than a judge. This is not, however, a matter for legislative change.

B4 A specific topic for inquiry is whether a mandatory ADR requirement should be introduced

The practice in Western Australian courts is that a matter will not generally be entered for hearing unless the parties have attended mediation. This is also the practice in the Western Australian registries of the Federal courts.

Introducing a formal requirement for mediation would not alter the existing practice and would probably detract from the flexibility of the courts. A specific mandatory ADR requirement is not necessary.

It should be recognised that the prompt prosecution of litigation is all too often the most effective means by which any form of resolution will be reached. In ADR parlance, a possible court determination provides the "best alternative to a negotiated agreement" or the "worst alternative to a negotiated agreement", which drives negotiations forward. For this reason, it is important that ADR processes do not themselves be so involved and protracted as to themselves act as barriers to justice.

Yours sincerely

A handwritten signature in black ink, appearing to read "Dudley Stow". The signature is written in a cursive, flowing style.

Dudley Stow
President