

21 July 2009

Professor The Hon Justice Murray Kellam AO  
Chair, NADRAC  
3-5 National Circuit  
BARTON ACT 2600

email: nadrac@ag.gov.au

Dear Professor Kellam,

### **NADRAC'S Enquiry into ADR and Civil Proceedings**

Thank you for inviting Family Business Australia ('FBA') to provide input into the above enquiry.

FBA is Australia's peak body for family businesses, of all types and sizes. You may be aware that family businesses represent over two thirds of all registered businesses in our country; generating approximately 50% of GDP and employing almost 50% of the Australian workforce.

Because family businesses mix family and business issues, they have specific needs and influences beyond those that impact ordinary commercial entities.

#### **ADR issues directly relevant to family businesses**

We have limited our comments to provide a focused perspective on the impact of the legal process on family businesses. We have combined our observations with suggestions for changes that we believe would benefit the family business community.

#### **Assessment of the impact of the current justice system on family businesses**

##### **Issue #1 - Litigation**

Because family business disputes involve families, the last thing most of them desire is to cede control to an external, institutional, adversarial process that settles the specific claim according to generic principles of right and wrong, while ignoring underlying causes.

The family recognises that if the cause of conflict has not been addressed it is likely that other disputes will arise from the same cause in the future. The more significant issue is that the adversarial process often destroys the family, and most or all of its wealth – the worst form of Pyrrhic victory.

##### **Suggested Solution**

Every possible encouragement should be given to the members of any family in, or heading towards a dispute, to initiate a problem solving ADR process instead of an adversarial workout. In our experience, once a dispute is in the hands of legal representatives it is very difficult to change the parties' mindset from *battle* into *problem solving*.

If a dispute is referred to ADR, it should be handled by dispute resolvers who have expert knowledge of family business issues, in addition to their legal and dispute resolution competencies. This recognises the unique intertwining of commercial and relationship issues in the family business field.

More dispute resolvers and/or family business experts should be required to undergo special training, as already happens in Family Law and Industrial Relations.

## Issue #2 - Family Agreements

FBA promotes family business best practices to help families increase the success and sustainability of their businesses. Most family business people are independently-minded and are used to making their own decisions. However, when they decide to develop a 'Family Code of Conduct' otherwise known as a 'Family Constitution' whereby adult members of the family discuss, develop and adopt a comprehensive set of guidelines to regulate their family's interactions with the business, they are often told by their lawyers that the document is not legally binding and is therefore all but worthless.

The same applies in relation to pre and post nuptial agreements (binding financial arrangements) in the Family Law area. The lack of certainty about the effectiveness of such agreements, and the fear of the potential consequences of matrimonial breakdowns on the ongoing viability of the family business, creates endless problems in succession planning and business ownership transition. Many parents are very reluctant to pass ownership onto their adult children working in the business as a result of the horror stories they've heard about the effects of family fighting and matrimonial proceedings on family businesses.

Given the virtual tsunami of baby boomer retirements we will experience over the next 10 years, this is a major economic, commercial and social issue for Australia.

This paternalistic attitude acts as a major de-motivator to families who want to take (and teach) responsibility for managing their own affairs. It thereby contributes to a growing social malaise that seems to want to shift responsibility onto others to resolve all problems.

Family Constitutions are a core component of family business best practice. They're commonly used by families in business around the world. They are prepared by and for the family, following extensive discussions amongst key family members regarding how the family, and its individual members, wish to run the family and conduct themselves in relation to each other and the business.

Well-drafted Constitutions reflect current family business best practice and are quite comprehensive. In addition to describing the family's values, visions, goals and plans they deal with: employment and succession issues; essential structures and responsibilities - including the Family Council and the Board of Directors; family behaviour and performance expectations; parenting and education; philanthropy, protection and approved uses of family assets.

They also encourage, or mandate, specific legal agreements designed to help the family avoid future conflicts by anticipating possible problems, including: pre and post nuptial agreements; shareholder agreements; wills; business ownership and succession plans.

## Recommendation

We would like to see our judges and tribunal members, as thought leaders of the legal profession, willing to state their support for the "consenting adults principle" - whereby adults of normal contracting capacity are encouraged to develop and adopt written private agreements amongst family members designed to express their mutual intentions as clearly as possible.

We need overt, official confirmation that although some lay agreements may not pass strict legal tests for contractual enforceability, provided they are clearly consensual and comprehensible, they will at least be accorded substantial weight (on a *best evidence* basis) in any moderated or adjudicated dispute. This

would send a clear and positive message to the family business and legal communities that appropriate agreements, even when developed without legal assistance, can have substantial value and effect.

We believe this would encourage and empower many family business people who are currently uncomfortable about entering into formal legal undertakings with family members, to commence informal and voluntary discussions they can document and use as guidelines and objective reference points to aid future conduct.

We would like to see this extended to protection of property assets, with particular reference to matrimonial breakdowns that threaten the viability of the family business. Even if pre and post nuptial agreements fail to tick all the legislative boxes to qualify as binding financial arrangements, clearly expressed and reasonably stated intentions should be regarded as persuasive in courts of law, and in other tribunals.

We believe this would encourage families to take responsibility for making their own proper arrangements to avoid conflict. It may even be educative for the legal profession - lawyers willing to engage in pragmatic, rather than legalistic processes would become part of the solution, rather than part of the problem.

### **Conclusion**

We would be delighted to expand on this concept further. We believe that Australia, which has only recently begun taking its family business sector seriously, could exercise real thought and social leadership in this critical area of conflict management and dispute resolution.

Family businesses provide the economic and entrepreneurial foundations of our country. They are also the most active commercial entities supporting local communities and social cohesion. To link ADR best practices with family business best practices would be a world-leading initiative that we commend as being most worthy of your attention.

If we can provide any further information, or assist your Inquiry in any other way, we will be happy and willing to help.

This submission was prepared on FBA's behalf, by Jon Kenfield, an accredited FBA adviser and family business mediator and arbitrator for over 20 years.

Yours sincerely,



Philippa Taylor  
Chief Executive Officer  
Family Business Australia



National Office  
Suite 4 / Level 3  
450 St Kilda Road  
Melbourne VIC 3004

T 03 9867 5322  
F 03 9867 5344  
E [info@fambiz.com.au](mailto:info@fambiz.com.au)  
W [www.fambiz.org.au](http://www.fambiz.org.au)

"our families mean business"

A handwritten signature in black ink that reads 'Jon Kenfield'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Jon Kenfield  
The Solutionist Group

National Silver Sponsors

