

Lyndon White
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19th February 2010

NADRAC Secretariat
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Attention: Mr Thomas John

Dear Sir,

Re: Reference Concerning the Integrity of ADR Processes

Further to your letter addressed to NADRAC stakeholders, dated 8th December 2009, please find attached my comments relating for your consideration.

I am confident that the most recent stimulus by Commonwealth and State Government Attorneys-General to shift the ADR movement into its rightful place as a primary means of conflict and dispute resolution will pay medium to long term dividends to those who rely on affordable, effective and realistic dispute resolution processes in social and commercial contracts.

As a practitioner, I am also convinced that the development, application and subsequent evolution of ADR within a statutory and common law framework by appropriately qualified, competent and experienced practitioners can only be beneficial to those who depend on determinative, evaluative or facilitative dispute resolution processes in their social and commercial dealings.

I trust that my comments will be useful in your review and submissions to the Attorney-General and should there be any other information that I can furnish, please contact me as above.

I look forward to hearing of the success of the anticipated legislative changes and the future elevation and evolution of ADR processes as primary dispute resolution mechanisms.

Yours faithfully



Lyndon White

Master of Applied Law
Qld BCIPA Adjudicator J1116024
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WA Construction Contracts Adjudicator 46
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1. Purpose of Dispute Resolution

Dispute resolution, whether primary or alternative in form or process, *'...is not required on every Occasion to take over the Management of every Playhouse and Brewhouse in the Kingdom...'*¹ Very broadly, the courts are reluctant to interfere with bargains between parties, particularly where an existing relationship has descended into conflict and dispute due to the fault of one or more of the same parties. Our legal system enables all reasonable efforts for parties to resolve a dispute prior² to judicial determination. The Commonwealth government is obliged to be a model litigant³ and in this respect the purpose and standard for dispute resolution is primarily about parties resolving their differences in a fair and reasonable manner.

2. Fairness and Reasonableness

Perhaps the most distinctive aspect of any dispute resolution process is the expectation by the disputing parties that the process will be consensually agreed to by the parties and conducted in a fair and reasonable manner.

*Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.*⁴

And what of reasonableness? Suffice to say that if fairness can be gauged by the lucid thoughts of a learned Lord of English law as above, then reasonableness can

¹ *Carlen v Drury* (1812) 1 Ves & B 154, 158

² *Supreme Court of Queensland Act 1991 Uniform Civil Procedure Rules* (Qld) at [s354]

³ *Judiciary Act 1903* (Cth) at [s55ZF]

⁴ *O'Neill & Another v Phillips and Others* [1999] 1 WLR 1092, 1098D-1099A

be adequately described and measured by the level of fairness afforded to a dispute resolution process. Notwithstanding this opinion, the definitions for natural justice⁵ and procedural fairness, project reasonableness in the context of alternative dispute resolution.

3. Confidentiality and Non-Admissibility

The concept of confidentiality is supported by public policy in the sense that *'[a] man is not to sell his own goods under the pretence that they are the goods of another man'*⁶ yet in Alternative Dispute Resolution (ADR) forums or processes, confidentiality is considered to be an opportunity to exercise a challenge without disclosure of the outcome in another forum.⁷

Unfortunately, after agreements are made in some ADR forums, the concept of confidentiality is agitated when a party considers that the validity of an agreement made using a confidential ADR process, is open to review in another forum.⁸ Even when parties have successfully concluded a dispute using a process such as facilitated negotiation, the terms of the confidential agreement have been exposed in case law when a party has attempted to recover entitlements.⁹

To this extent, confidentiality and non-admissibility in any conflict or dispute resolution forum can only be, as far as the law provides.¹⁰

⁵ Butterworths, *Butterworths Concise Australian Legal Dictionary*, 1998, 2nd Edition at [300]

⁶ *'A man is not to sell his own goods under the pretence that they are the goods of another man'*. J McKeough, K Bowrey, P Griffith, *Intellectual Property Commentary and Materials*, (2002, 3rd Edition) p461 para 3

⁷ *Buxton Construction Pty Ltd v Golf Australia Holdings* [2007] VSC 10

⁸ A court of competent jurisdiction

⁹ *Buxton Construction Pty Ltd v Golf Australia Holdings* [2007] VSC 10; *Golf Australia Holdings Ltd v Buxton Construction* [2007] VSCA 200

¹⁰ Notwithstanding that a breach of confidence may bring an action in tort, to date there is no statutory provision in Australia for breach of confidence in any setting; *Grosse v Purvis* [2003] QDC 151 at [442].

4. Conduct Obligations

The conduct of any party in any conflict or dispute resolution forum, or indeed any circumstance or activity leading to the engagement of such a forum, can be measured by the boundaries of what we consider to be rational.

...[o]ur rationality is not directly proportional to the number of beliefs we have...[b]ut there is a further point of major importance. There is a sense in which rational beliefs must cohere with experience'.¹¹

Interpretively, rationality is aligned with understanding of human nature and to this extent:

...the doctrine called Philosophical Necessity is simply this...if we knew the person thoroughly and knew all the influences which are acting upon him, we could foretell his conduct with as much certainty as we can predict any physical event...¹²

Many parties that utilise ADR process to resolve conflict or dispute are rational to the extent that they have a position that is dependent upon needs and wants. The needs and wants that create such a position may be founded on nature, nurture or both and it is the confluence of nature and nurture that not only causes but also enables the recognition, resolution, avoidance, management, prevention, protraction or proliferation of conflict or dispute.

You can't expect a boy to be vicious till he's been to a good school...Manners Makyth Man...the same good school has a postern gate which used to be the discreet exit for boys expelled...Naturam expellas furca, usque recurret – you can drive nature out with a pitchfork but she will be back.¹³

¹¹ Mele A, Rawling P, *The Oxford Handbook of Rationality*, 2004 at [32]

¹² Hollis M, *Models of Man – Philosophical thoughts on social action*, 1977 at [25]

¹³ Searle JR, *Rationality in Action : The Jean Nicod Lectures*, 2001 at [23]

Certainly, human conduct is driven by needs and wants and it is conduct that operates in concert with activity and inactivity and while a commitment may be made by one disputing party to another to conduct or not conduct themselves in a particular manner, there is always some opportunity for reflection after commitment which can lead to departure, deviation or even reversal from such a commitment.

To impose or impart an obligation in relation to conduct in an ADR forum, it would therefore be essential, if not vital, for an ADR practitioner to know the parties better than the current expectation of impartiality¹⁴ which supports any determinative, evaluative or facilitative dispute resolution forum.

With the lessening or total loss of impartiality, the effectiveness of forums which enable effective conflict or dispute resolution is at risk as well as any legislative structure or common law precedent which supports the need for impartiality.

Conclusively, the conduct of any disputing parties must surely be at their own discretion as to interfere or otherwise affect the conduct of any party in an ADR forum would be a breach of the very foundations on which impartiality is laid.

5. Immunity of ADR Practitioners

The immunity of ADR practitioners is, understandably, contentious. Why should (or would) any ADR practitioner be afforded some statutory or common law immunity where the principles of natural justice and the preferences of the disputing parties are offended or breached?

The recent case of *Legal Practice Board -V- Giraudo* [2010] WASC 4 illustrates the seriousness of non-certified practitioners constructing documentation and conducting themselves in a manner similar to a certified legal practitioner. The case also demonstrates the importance of the manner in which parties conduct themselves in a

¹⁴ National Alternative Dispute Resolution Advisory Council, *Glossary- Dispute Resolution Practitioners*,

http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRGlossary_of_ADR_Terms#DD

dispute and the reliance that parties have on seemingly 'learned' operators to give or impart advice or supporting conduct in forums where dispute is the subject.

Since the administration of law includes representing another before the courts and giving legal advice in regard to the preparation of legal instruments, I am satisfied beyond reasonable doubt that Mr Giraudo performed work in connection with the administration of law and is therefore in breach of s 77 of the Act¹⁵... Mr Giraudo drew and prepared writings in the form of letters (and)... evidently required the use of the intellect to compose them. They could not reasonably be described as letters dictated...¹⁶

Significantly, the abovementioned case demonstrates that non-certified legal practitioners are bound by the precedents of common law which evidently state that unless a person is appropriately and contemporaneously certified to practice in the field of documentation construction and publication with respect to dispute resolution that punitive action will result.

As an accredited,¹⁷ registered,¹⁸ non-certified¹⁹ practitioner who is consistently and constantly involved with various government and non-government clients in the selection, process, performance and utilisation of ADR and its outcomes, the lack of immunity is of concern and particularly when the majority of ADR users have little understanding²⁰ of the function of an ADR practitioner.

6. Summary

In any event, as an ADR practitioner with a background in construction contract conflict and dispute escalation and resolution I recognise that ADR is more than a

¹⁵ *Legal Practitioners Act 1893 (WA)*,

¹⁶ *Legal Practice Board v Giraudo* [2010] WASC 4 at [50-51]

¹⁷ Nationally Accredited Mediator with IAMA

¹⁸ BCIPA Queensland Adjudicator J1116024, NT Justice Department Adjudicator 21, WA Government Adjudicator 46

¹⁹ Pursuant to the various state legal practitioner certification legislation

²⁰ In many instances, my clients consider that a mediator is employed by disputing parties for the purposes of deciding a matter in a manner similar to 'private judging'

single faceted tool for the appropriate recognition, management, resolution and prevention of dispute.

The evolution of ADR in Australia commenced²¹ in a wave of expectation that litigation was a secondary form of dispute resolution²² after negotiation as a primary form of dispute resolution which led many ADR advocates to present ADR and its processes²³ as ‘...*seductively simple... (to) reduce the quantity of litigation by employing ADR techniques.*’²⁴ The ADR movement at that time contended that ‘...*ADR can “dispense better justice” than ordinary litigation and that ADR is qualitatively superior to conventional case processing.*’²⁵

While I agree that the ADR movement in Australia has progressed significantly since the initial wave of hopeful enthusiasm reached its peak, it is timely to reflect that the recent economic and commercial crises²⁶ have created new and interesting opportunities for ADR to be re-inserted into conflict and dispute resolution activities as a primary forum which is both desirable and necessary in advance of any secondary forum, such as litigation in a court of competent jurisdiction. *Reformers alternate between building institutions and taking them apart*²⁷ and many opponents of ADR have preferred to describe the litigation process using the latin ‘*Nunc terminus Britanniae patet, atque omne ignotum pro magnifico est*’²⁸ which demonstrates the preference for some to rely on developments in law by statutory and judicial means only. This is arguably a characteristic of us all being

²¹ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, New York

²² Galanter M, *Reading the Landscape on Disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society*, 1983, 31 UCLA L Rev Vol 31:4 at [9-11]

²³ Arbitration, Conciliation, Mediation, Negotiation

²⁴ Brunet E, *Questioning the Quality of Alternate Dispute Resolution*, November 1987, Vol 62 No. 1 Tulane Law Review at [page 2]

²⁵ Ibid

²⁶ The commencement of the sub-prime loan crisis in the USA, which preceded the term known as the global financial crisis, is thought to be February 2007

²⁷ *Dispute Resolution*, 1979, Vol 88(5) Yale LJ at [907]

²⁸ If in doubt don't touch it

'...unpredictable...' ²⁹ humans as the belief of today can be changed by the circumstances of tomorrow. ³⁰

To the contrary, ADR proponents, although historically focussed and feverishly supportive of non-official legal systems for dispute resolution, have tempered their emotion and now promote ADR in a much more balanced and practical manner ³¹ that supports the users and the judicial determination system with which it also competes.

Summarily, ADR '*...constitutes a theoretical-philosophical explanation not of the 'instituted knowledge' but rather a journey in science 'in the making.'*' ³²

²⁹ Fisher R, Ury W, *Getting to Yes*, 1992, 2nd edition at [19]

³⁰ The Australian, *Privacy tort a blow to free speech*, 29 May 2008
www.theaustralian.news.com.au/story/0,25197,23774694-17044,00.html 29 May 2008

³¹ Mediation is simply negotiation with knobs on, The (London) Independent, Donaldson L, *Sometimes it's good to talk*, 29 November 1995,

http://findarticles.com/p/articles/mi_qn4158/is_19951129/ai_n14020803/print?tag=artBody;col1 5 October 2008

³² Bevilaqua Martins N, *ADR in the Age of Contemporaneity: Complexity, Chaos and Pedagogy*, (Thesis submitted for the award of Doctorate of Philosophy within the T.C. Beirne School of Law, The University of Queensland, 29th August 2003) at [iv]