



THE LAW SOCIETY  
OF NEW SOUTH WALES

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12 March 2009

Mr Thomas John  
Assistant Director  
NADRAC Secretariat  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600

Dear Mr John,

**Re: NADRAC Reference concerning the integrity of ADR processes**

The Law Society of New South Wales welcomes the opportunity to provide comments on the NADRAC Reference concerning the integrity of ADR processes.

Please find attached the Law Society of New South Wales Dispute Resolution Committee's submissions on the this reference.

Yours sincerely,

  
Mary Macken  
President

Encl: Submissions

# **Submission by the Dispute Resolution Committee of the Law Society of New South Wales in response to the NADRAC Reference concerning the integrity of ADR processes**

## **Preliminary**

The Dispute Resolution Committee is of the view that "default" rules for mediation should be entrenched in statute to promote participant confidence in mediation by flagging a "norm". Contracting out should be permitted (except for non-compellability and non-admissibility).

## **1. Confidentiality**

The Dispute Resolution Committee agrees that confidentiality is an integral element of ADR processes, essential in the promotion of interest-based communications and negotiations and to protect the interests of all participants. However the extent of confidentiality sought may vary between commercial disputes and personal or community based disputes.

In the context of this position, the Dispute Resolution Committee responds as follows to the questions posed on page 3 of the 8 December 2009 letter from NADRAC:

1. The rationale for confidentiality will differ depending on the nature of the dispute and the parties must agree from the outset what is to remain confidential.
2. Statutory "default" rules would provide guidance on which ADR processes should be subject to confidentiality requirements and provide potential for opting or contracting out of such obligations.
3. Exceptions may include conflicting statutory obligations (eg. criminal law, antiterrorism legislation, professional conduct obligations etc) and exception by agreement between the parties.
4. The extent to which parties to the mediation (including the ADR practitioner, legal representatives, experts and the parties in dispute) are able to waive confidentiality should be agreed in writing by the parties from the outset.

## **2. Non-admissibility**

The Dispute Resolution Committee agrees that non-admissibility provisions promote full and frank discussions in the course of ADR proceedings. The committee agrees that there are instances where other laws (eg. criminal law, anti-terrorism legislation and professional conduct rules) require the use of some information from the ADR proceedings to be adduced in evidence in subsequent court or other proceedings. However the committee does not consider that the parties should be able to negotiate to further reduce the extent of the nonadmissibility provisions.

The Dispute Resolution Committee responds as follows to the questions posed on page 4 of the 8 December 2009 letter from NADRAC:

1. A non-compellability requirement would enhance the protections afforded by the current non-admissibility provisions.
2. All ADR processes should be subject to non-admissibility.
3. See answer to 2. above.
4. Parties should not be permitted to enter *into* negotiations in *relation* to information adduced in the course of ADR Proceedings.
5. See answer to 4. above.
6. All ADR processes should be subject to non-admissibility and the ADR practitioner should not be compelled to give evidence.

## **3. Conduct Obligations**

The Dispute Resolution Committee notes that NADRAC's report raises the issue of conduct obligations including "good faith" and "genuine efforts". These are complex issues and rely on the subjective opinions of practitioners as well as parties. The committee considers that it would be a useful process to construct a table setting out the benchmarks for obligations such as "good faith" and "genuine efforts" which are currently prescribed for particular ADR processes to help determine whether there should be a rule of more general application.

The Dispute Resolution Committee responds as follows to the questions posed on page 4 of the 8 December 2009 letter from NADRAC:

1. All participants to a mediation (including the ADR practitioner, experts and support persons) should be subject to conduct obligations.
2. The ambit of current conduct obligations should be determined by the benchmarking exercise described above.
3. Conduct obligations should be determined by a benchmarking process and framed accordingly.
4. The framing may differ according to ADR process, but the minimum standard should be a "good faith" commitment to the ADR process.
5. Conduct obligations are appropriate in all ADR processes.
6. Conduct obligations may apply by statute and/or private agreement depending on the nature of the dispute.
7. Conduct obligations should apply from the commencement of the ADR process.

#### **4. Immunity of ADR Practitioners**

This is an example of language which is often used by ADR practitioners in their mediation agreements, and which is part of the Law Society's model mediation agreement:

##### **Exclusion of liability and indemnity**

1. Except in the case of fraud by the Mediator, the Mediator is not liable to a Party for any act or omission (including any negligent act or omission) in the performance or purported performance of, or alleged failure to perform, any obligation under this agreement or otherwise.
2. The Parties jointly and severally indemnify the Mediator against all claims arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of obligations under this agreement, except in the case of fraud by the Mediator.
3. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator during the Mediation may be tendered in evidence or relied upon to found or maintain any action for defamation, libel, slander or any related complaint against a Party or the Mediator and this agreement may be pleaded in bar to any such action.

The majority of mediators do feel the need for such a provision and none of our committee members have found resistance to the language in any of their mediations. Nevertheless, the entrenchment of that kind of protection in a statutory form would improve the position by cloaking the principle with parliamentary endorsement - a not insignificant signal when mediators seek to operate by way of gentle persuasion.

The benefits of mediation include speed and efficiency. One of the ways this is achieved is by minimising the amount of documentation and effort required by the parties to participate in the process. One consequence of this pragmatic approach is that at the start of mediation the mediator usually has only the barest conception of the nature of the dispute and its dimensions. In addition it is the role of a mediator to generate options the parties may not have considered and to gently move the parties toward each other by separate sessions.

This kind of approach is undertaken by the mediator in good faith but carries with it the danger that it is based on imperfect or incomplete background information. This may sometimes give rise to stressful reactions on the part of some participants.

The need to encourage uninhibited exchanges also gives rise to the possibility in plenary sessions of things being said that may be inappropriate in terms of libel or in terms of disclosure of confidential information, especially in mediations involving employer and employee unfair dismissal.

If a mediator, or indeed any of the participants, has to be cautious about the potential for

anything that occurs to be the subject of suit, this can only have a chilling effect on the process, which would be counterproductive.

Against this background, the Dispute Resolution Committee responds as follows to the eight questions posed on page 5 of the 8 December 2009 letter from NADRAC:

1. Immunity of the kind envisaged by the sample contractual language excerpted above would not protect a Mediator in the case of fraud. It would protect a mediator from suit for negligence or incompetence.
2. Broad immunity from suit is necessary to ensure a free and uninhibited exchange of ideas and aspirations during the mediation, both in plenary session and in private sessions. The sometimes cathartic nature of the statements made in a mediation is an important part of the process that needs to be protected. This requires immunity for both the mediator and the participants.
3. Where an ADR practitioner is acting in a facilitative role, whether it be as a mediator, arbitrator, or conciliator, the committee considers that there is no reason in principle to depart from the views expressed above in relation to mediation. The committee considers that public policy requires the conferring of immunity on ADR participants in precisely the same way, for precisely the same reasons and to precisely the same extent as is conferred on participants in court proceedings.
4. See answer to 3.
5. The premium paid for indemnity insurance is commensurate with the risk. If it were to become the norm that ADR participants could be sued, the premiums for indemnity insurance would rise, thus forcing up the cost of mediation - an outcome that is plainly not in the public interest.
6. The non-admissibility provisions complement the immunity principle espoused by the committee. However, to leave open a cause of action leaves the likelihood of a suit real, despite the practical impediments that might lie in the path of an applicant for relief. It is little consolation to a mediator who is sued, and it would be trite to observe that few mediators would await trial smugly confident that the applicant may be unable to prove its case. Often the damage to a mediator's reputation will be done by the filing of the suit. Non-admissibility provisions alone do not address concerns about mediator's immunity any more than they would address the concerns of a judicial officer, who did not have the benefit of immunity from suit in the conduct of a trial.
7. Accreditation of ADR practitioners to the National Mediation Standards is now becoming a commonplace requirement. Provided those standards are applied conscientiously by those vested with the authority to accredit, there is little scope for incompetent ADR practitioners to become accredited. Nevertheless, there may be scope for the Judicial Commission to have an expanded role in relation to complaints against ADR practitioners. Alternatively, the accrediting authority could be required to administer an analogous complaints and disciplinary regime. Certainly there is no wish to prevent complaints being made about the incompetence or misconduct of an ADR practitioner, but a complaint and disciplinary regime needs to be quite distinct from conventional legal liability. Again, the Judicial Commission analogue holds good.
8. See answer to 7.