The Hon Justice Murray Kellam AO

Chair

Welcome address: ADR in Government Forum

Members Dining Room 2, Old Parliament House

5.30 pm 4 June 2008

Attorney-General, Ladies and Gentlemen. On behalf of both the National Alternative Dispute Resolution Advisory Council and the Office of Legal Services Coordination I am very happy to welcome you all to this Forum. I am pleased to see so many senior representatives from government here and hope that you will all find it a worthwhile use of your time.

I would like to express a special welcome to the Australian Attorney-General, the Hon Robert McClelland who will be addressing you shortly.

I would also like to acknowledge the presence of the Secretary of the Attorney-General's Department, Mr Robert Cornall, and Dr James Popple the First Assistant Secretary, Legal Services and Personal Property Security Division in the Attorney-General's Department. As many of you will know Dr Popple has responsibility for the Office of Legal Services Coordination.

While many of you will already know about the National Alternative Dispute Resolution Advisory Council, or NADRAC as it is known, some of you may find it helpful for me to tell you about it and its particular interest in the area of government use of alternative dispute resolution or ADR.

NADRAC had its origins in the 1994 report of the Access to Justice Advisory Committee chaired by the Hon Justice Ronald Sackville titled 'Access to Justice – An Action Plan'. That report recommended the establishment of a national body to advise the Government and federal courts and tribunals on ADR issues with a view to achieving and maintaining a high quality, accessible, integrated Commonwealth ADR system.

The Government agreed and the Justice Statement it subsequently issued in May 1995 indicated that the Government would ‘establish a specialist Advisory Council to ensure high standards in ADR and develop informed policy advice for Government on unresolved issues about the use and regulation of alternative dispute resolution'.

NADRAC was established in October 1995. It is an independent, non-statutory advisory body. Its Charter gives it responsibility for providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision. An expansion to its Charter in 2006 gave it additional responsibilities for promoting the use and raising the profile of ADR.

NADRAC’s Charter has a strong emphasis on issues of standards and quality and NADRAC has been actively considering those issues since its inception.

One of NADRAC’s first initiatives was to develop some consistent descriptions of ADR processes to assist it in its work and which it hoped would be useful to ADR providers. However, NADRAC is aware that terms used to describe ADR processes are still used inconsistently by many providers, making it difficult for users of ADR services to evaluate the quality of service that they receive.

The term ‘mediation’, in particular, has been used to cover a range of different services. Mediation is a facilitative process but NADRAC is aware the some service providers are using it to refer to advisory processes which would be better referred to as ‘conciliation’. The imprecise use of terms such as ‘mediation’ can be confusing for the public and may lead to false assumptions about other ADR processes that are similarly titled.

The development of standards in the ADR sector has been challenging in view of the diversity of providers and the lack of any peak body.

In 2001 NADRAC released a report entitled ‘A Framework for ADR Standards’. At the launch of that report the then Attorney-General noted that ‘the quality of ADR services is a critical component in building community confidence in ADR’.

Since 2001, NADRAC has actively worked to encourage the mediation sector to develop a national industry accreditation scheme. That work bore fruit in January this year with the commencement of the sector's National Mediator Accreditation System.

NADRAC is continuing to work with a new industry body, the National Mediator Accreditation Committee, to fully implement the new System. In the future, it is hoped that similar national standards and accreditation systems will be developed for other ADR services.

In terms of today's Forum it is relevant that NADRAC's Charter specifically charges it with advising on 'the quality, effectiveness and accountability of Australian Government ADR programs' and assisting 'Government agencies to use ADR and to encourage them to make ADR a part of their funded programs'.

The Australian Government is one of the largest, many would argue *the largest*, litigator in the Australian court system. Yet a review of Commonwealth legal services undertaken for the Attorney-General's Department by Sue Tongue in 2003 found that few Commonwealth agencies reported using ADR.

NADRAC believes that Commonwealth agencies should adopt the most effective dispute resolution practices available both to prevent litigation in the first place and to better manage litigation once commenced. Greater use of ADR should help to reduce the level, cost and impact of Commonwealth litigation.

Overseas initiatives have promoted the use of ADR by government agencies. In the USA, the President issued a 1996 Executive Order directing agencies to employ ADR techniques and, in the UK the Lord Chancellor issued a Pledge to use ADR in all suitable cases in 2001. The UK Pledge resulted in a 1200% increase in the use of ADR in 2002-2003 with estimated savings of over six million pounds.

In Australia, amendments to the Legal Services Directions in 2005 added new requirements with respect to ADR. However, I don't think it is yet clear whether those changes have significantly increased the use of ADR by government agencies. If that is not the case, it raises important questions about why the amendments have not been effective.

As a judge of the Court of Appeal of the Supreme Court of Victoria, I often see matters to which the Commonwealth is party. From the perspective of a judge, without always knowing the full background to a case, it is often difficult to understand why the matter has proceeded as far as it has, particularly when the matter is then settled or mediated by the court in the last instance.

Before joining the bench, I was for many years a barrister in Victoria. In that role, I sometimes acted for the Commonwealth and sometimes against it particularly in social security matters.

It seemed to me that Commonwealth agencies were often inclined to take a very hard line. That seemed to be so even where it was clear that a person's actions had arisen not from any intention but from a lack of knowledge or from particularly difficult personal circumstances. The agency sometimes seemed to be more concerned with making an example of the person than in considering whether there was an alternative response that would ensure an acceptable outcome for the Commonwealth while demonstrating some compassion and understanding for the person's circumstances.

Now I realise that I am treading on fragile ground here and that the Government sometimes needs to set a consistent standard and cannot appear to be treating people differently without some good reasons. However, my personal experiences leads me to think that more could be done to resolve such disputes early with an emphasis on encouraging future compliance rather than just on penalising offenders. I believe that the outcome of such an approach would not only be better for government clients but would have a positive impact on the community as a whole.

That brings me to the purpose of this Forum, which is to highlight the benefits of ADR, encourage its greater use and to start a dialogue both within agencies and across agencies about how ADR processes and techniques can be used more effectively.

To that end, I would like to introduce our presenters for this evening. The Attorney-General, the Hon Robert McClelland, will be speaking to you next. I am sure many of you will have read the views expressed by the Attorney on first coming to Office about the need for greater innovation in the way government agencies resolve disputes, including the use of ADR processes like mediation. I look forward to hearing more from the Attorney on that issue.

I am sure you will already be familiar with our next speaker Mr Tom Howe QC, Chief Counsel Litigation with the Australian Government Solicitor. Tom has years of experience in Commonwealth litigation and believes that there is potential for greater use of ADR. He has kindly consented to join our panel today and to share his reasons for that view with you.

Finally, I would like to introduce you to Mr Fabian Dixon SC. Fabian is the Convenor of NADRAC's ADR in Government Committee. He has lengthy experience as a barrister in Tasmania and Victoria. Fabian is going to finish our presentations this evening by outlining some practical things that agencies can do to encourage earlier and better resolution of disputes and to avoid the need to litigate.

I hope you will find the presentations interesting and look forward to discussing the issues with some you over a drink at the conclusion of the presentations.

With that, I would like to again welcome the Attorney-General and invite him to deliver his address.