

***'Setting an example: Alternative Dispute Resolution and
Government'***

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NSW Government Solicitors' Conference, Parliament House

Tuesday 15 September 2009

Acknowledgments

Thank you for inviting me to open this Conference. May I first acknowledge the traditional owners of the land on which we meet, the Gadigal People of the Eora Nation – and pay my respects to them.

Introduction

I am pleased to welcome you all to the Government Solicitors' Conference and to declare it open.

The diversity of topics and the calibre of the presenters will no doubt make this a very worthwhile conference. I'm sure it will give you some interesting ideas - as well as CLE points - to take back to your offices.

I will talk today about some important recent developments in Alternative Dispute Resolution (or `ADR'). My focus will be on the pivotal role that you as government lawyers have to play in setting an example by using ADR to resolve disputes.

ADR Blueprint

In May this year I announced the release of an important discussion paper called the *ADR Blueprint* for public consultation.¹ The *ADR Blueprint* contains 19 draft proposals to increase and better integrate ADR across the New South Wales civil justice system.

The wide-ranging proposals include:

- establishing the ADR Directorate in my Department;
- changing court procedures to focus on resolving disputes rather than just on preparing for a hearing;
- requiring government agencies to be more accountable in adhering to the Model Litigant Policy;
- improving consumer access to information about ADR; and
- establishing a Sydney International Arbitration Centre.

My Department has now reviewed and analysed all the stakeholder submissions made in response to the *ADR Blueprint*.

Two weeks ago, on the 2nd of September, a report called the *ADR Blueprint Draft Recommendations Report 1: Pre-Action Protocols and Standards* was released. That report is the first in a series of reports to be produced by my Department, refining the draft *ADR Blueprint* proposals to take into account stakeholder feedback. The first Draft Recommendations Report includes draft recommendations for:

¹ The *ADR Blueprint* is available on Lawlink, at: http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_lawlink_news_archive_2009 (7 May 2009).

- amending the *Civil Procedure Act* to require people in dispute to take reasonable steps to resolve their disputes without litigation;
- developing pre-action protocols for certain types of civil matters; and
- revising court and tribunal procedures to ensure that ADR is considered at the first opportunity.

The Report is available on the Department's Lawlink website.² Comments are requested by the end of this month.

`Draft Recommendations Report 2: ADR in Government'

At today's conference I am very pleased to announce the release of the second *ADR Blueprint* draft recommendations report – "*ADR in Government*".³ This Report is of direct relevance to the work of every government lawyer in NSW.

I understand that the Report will be included in your Conference papers, and I would encourage each of you to read it closely.

Model litigant policy

As you would be aware, the State and its agencies are required to comply with the *Model Litigant Policy for Civil Litigation*. I expect all agencies to do so.

² At:
http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_lawlink_news_archive_2009 (2 September 2009).

³ Available on Lawlink, at:
http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_lawlink_news_archive_2009 (15 September 2009).

One of the central recommendations of the report released today is that the Model Litigant Policy be amended to give greater prominence to the role of ADR in resolving civil claims and litigation.

The report also recommends that the Policy clarify that ADR should be used not merely to *avoid* litigation, but also to resolve disputes *once litigation has commenced*.

This is a convenient opportunity to remind you of some of the most important requirements of the Model Litigant Policy as it currently stands.

The Model Litigant Policy applies to “civil claims and civil litigation” involving the State and its agencies, including litigation before courts, tribunals, inquiries and in arbitration and other ADR processes.

It requires the State and its agencies to act with complete propriety, fairness and in accordance with the highest professional standards.

Agencies must deal with claims promptly and not cause unnecessary delay in handling claims and litigation. Agencies must pay legitimate claims without litigation – including making partial settlements or interim payments where it is clear that liability is at least as much as the amount to be paid.

The Model Litigant Policy requires that agencies must endeavour to *avoid litigation, wherever possible*.

My Department and NSW Treasury are currently conducting a review of government legal expenditure, as part of the *NSW Government Better Services and Value Taskforce*.

The Taskforce will examine the operation of the Model Litigant Policy. It will, in particular, look at whether any additional measures are needed to ensure the Policy is complied with.

Does government make the best use of ADR?

Such research as exists on the use of ADR by government and on compliance with model litigant policies focuses on the Commonwealth government.

Criticisms which have from time to time been made of Commonwealth agencies include:⁴

- a reluctance to settle matters, particularly at earlier stages;
- a reluctance to use ADR;
- agency representatives lack sufficient authority to settle a matter, causing delays in obtaining settlement instructions;
- ADR practitioners are engaged too late in the dispute; and
- there is a tendency to use only high profile and very expensive ADR practitioners.

Of course I make no comment on the validity of these criticisms to Commonwealth agencies. I would, however, encourage you all to engage in some self-examination and ask whether any of these criticisms apply to you or to your departments.

I have no doubt that there are many good examples of NSW government agencies using ADR to resolve legal proceedings and other civil disputes. The

⁴ *ADR Blueprint Draft Recommendations Report 2: ADR in Government* (see note 3) at p. 5.

role of the Crown Solicitor's Office in helping to reach agreements in a number of native title claims is one example I am aware of.

Reporting the use of ADR by government

It does seem, however, that few agencies report on the use of ADR in any systematic way. I would encourage you to think about how your agencies can better promote ADR successes – subject of course to confidentiality requirements.

There are some interesting overseas examples of governments reporting ADR. The Ministry of Justice in the United Kingdom produces an annual report monitoring the effectiveness of the government's commitment to using ADR. The report includes details of the number of cases in which ADR is used, of the estimated savings due to ADR, and case studies of matters successfully resolved by ADR.⁵

In the United States in 2007 the Attorney General prepared a very detailed report on the use of ADR by the Executive Branch of the Federal Government. The report's findings included that the Department of Justice estimated that over two years mediation saved almost \$18 million in litigation and discovery costs, and almost 67,000 hours of attorneys' and other staff's time.⁶

The *ADR Blueprint* Report released today recommends that government agencies be required to respond to an annual survey of their use of ADR to

⁵ The 2007/2008 report is available at:
<http://www.justice.gov.uk/publications/alternative-dispute-resolution-2007-08.htm>.

⁶ *Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government*, at p. 98; available at:
http://www.adr.gov/president_reports.html.

resolve legal proceedings and other disputes. The results of the survey will be made publicly available.

The use by government agencies of ADR in legal proceedings will also be examined by the review of government legal expenditure I referred to earlier. I expect that the Review may lead to further recommendations for reform.

Cultural barriers to the use of ADR

I would next like to discuss some of the factors that may cause lawyers to think in terms of litigation rather than of ADR.

Mr Tom Howe QC made some observations at a forum on the use of ADR in government last year⁷ that I think are worthy of careful consideration. He suggested that part of the answer to the question why Commonwealth agencies didn't have greater participation in ADR may be due to various habits of thought held – consciously or subconsciously – by government lawyers and their clients.

The first point made by Mr Howe QC was that lawyers may not be asking the right question. Instead of asking whether there is any reason why a case *is* suitable for ADR, it may be better to ask whether there is any reason why the case ought to proceed to a litigated outcome *without* having attempted ADR.

Other habits of thought identified by Mr Howe as a barrier to the use of ADR include:

- The allure of the 'win/lose' paradigm, including:
 - getting distracted by certain weaknesses in an opponent's case;
 - and

⁷ Tom Howe QC, *Why isn't there more alternative dispute resolution by Commonwealth departments and agencies?*, ADR in Government Forum, 4 August 2008; available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Home_NewsArchive.

- too quickly regarding claimants as completely undeserving because they in some respects overreach or are unreliable;
- A concern that ADR will be seen as `going soft', or signal a lack of commitment or confidence in the strength of the case;
- An uncritical assumption that ADR is inappropriate in particular fields;
- A belief that, because attempts at direct negotiation with the other party have been unsuccessful, there is no role for ADR; and
- Being more comfortable with litigation because lawyers know more about litigation than they know about ADR.

I would encourage you to reflect on whether these habits of thought may be causing you to overlook the full potential for the use of ADR in your matters.

I have some additional comments on two of the habits of thought identified by Mr Howe. The two are related. The first is the assumption that – because unsuccessful attempts at direct negotiation have been made – there is no role for further attempts at settlement by ADR. The second is that lawyers may be more comfortable with litigation because they know more about it than they do about ADR.

If lawyers make these assumptions it may be because they fail to appreciate fully the various reasons why ADR is likely to be more successful in reaching agreement than direct negotiation between parties or their lawyers.

It may be that lawyers underestimate the ability of a skilful ADR practitioner to encourage creative discussion of a broader range of agreed outcomes, including non-financial and other outcomes which could not be imposed by a court. It may be that lawyers underestimate the benefits that direct and frank communication between a complainant and the government agency representative can bring.

A personal apology, or even merely an acknowledgment of the pain or suffering experienced by the complainant, may prove highly effective in encouraging a resolution. I am encouraged to see that the Deputy Ombudsman will be addressing these issues during this Conference.

Managing disputes and litigation by in-house lawyers

It is important for you to bear in mind that engaging the Crown Solicitor's Office or external lawyers does not diminish your responsibility to manage and attempt to resolve the dispute.

If the external lawyer does not continue to provide you with advice about the prospects of settlement and options for the use of ADR throughout the course of the matter, you should ask why.

I am sure that these issues will be considered in the panel discussion on managing external lawyers during this Conference.

It is also vital that an agency learns from any mistakes or deficiencies that may have contributed to litigation being brought against it.

This is true whether or not the agency was successful in defending the claim. Even where, for example, the complainant did not have a good legal cause of action, the agency should consider whether the original complaint could have been handled better.

One of the most important ways in which an agency can reduce the risk of litigation is to improve the effectiveness of its complaint handling systems.

It is essential that there be close cooperation and communication between front-line or complaint handling units of a department, and legal or other units which manage disputes when they escalate to litigation.

An inter-agency Dispute Resolution Working Group

In order to assist Government in managing disputes and using ADR, the Report released today recommends that an inter-agency Dispute Resolution Working Group be established. The Working Group should provide a forum to share ideas on dispute management and avoidance, and to promote the development of ADR across the NSW Government.

I also envisage that the Working Group would develop best practice guidelines and other resources to assist agencies in using ADR, and encourage and promote high quality ADR programs within government agencies.

The Report also suggests, as an alternative, that the Legal Managers Forum pursue these objectives.

Conclusion

I believe that there is enormous untapped potential for the use of ADR in the NSW civil justice system.

When government agencies are participants in that system, they should lead by example. All of you have an important role to play in ensuring that occurs, and I look forward in future to hearing more about your contributions.

I also look forward to hearing about the outcome of this Conference.

Thank you.