

‘Alternative Dispute Resolution and Tribunal Justice’

Council of Australasian Tribunals, NSW Chapter

Menzies Hotel, Carrington Street, Sydney

9am, Friday 22 May 2009

[Acknowledgments]

First, may I acknowledge the traditional owners of the land on which we meet – and pay my respects to them.

[Other Acknowledgments]

- Judge Kevin O’Connor, President of the NSW Administrative Decisions Tribunal, and convenor of the New South Wales Chapter of the Council of Australasian Tribunals.
- Distinguished guests, ladies and gentlemen.

[Introduction]

Thank you to the New South Wales Chapter of the Council of Australasian Tribunals (COAT) for inviting me to address you briefly this morning, ahead of what I am sure will be an extremely worthwhile and informative Annual Conference.

The New South Wales chapter of COAT performs a very important role in providing a meeting forum for those involved in the operation of State and Commonwealth Tribunals in New South Wales, whether as heads of jurisdiction, as hearing members, or as registry officers.

The theme of your Annual Conference, *'Alternative Dispute Resolution and Tribunal Justice'*, is important, and particularly relevant to work that the NSW Government is currently undertaking.

It is encouraging to see so many different tribunals represented on the attendance list, and I have no doubt that some very useful ideas will be generated and exchanged throughout the day.

[Fair and Accessible Civil Justice System]

All of us share a commitment to improving our civil justice system so that it is as effective, fair, accessible, efficient and affordable as it possibly can be.

My Government is currently looking at ways in which our civil justice system can better resolve peoples' disputes, including the extent to which the earlier resolution of disputes can be achieved.

These objectives are not unfamiliar to any of you. It was in part a desire to resolve certain types of disputes in a more effective and timely way that led to the creation of the tribunals from which each of you come.

[ADR Blueprint]

Recently I announced the release of an important strategic document called the *NSW ADR Blueprint*.

The *ADR Blueprint* sets out a proposed future direction for the expansion, and better integration, of Alternative Dispute Resolution (ADR) across the NSW civil justice system.

My Department is in the process of receiving submissions on the proposals contained in the *ADR Blueprint*, and I would encourage those of you in the room with an interest to contribute to this process, as it will form the basis for future, and, I would expect, quite significant and far-reaching, reforms.

This morning I will outline some of the reform proposals contained in the *ADR Blueprint*, and also describe the opportunity that Tribunals have to play an influential role in the direction of these reforms.

[ADR in the Tribunal Context]

From the outset, however, I should say that there has been an acknowledged shift over time in the way in which ADR is dealt with in the tribunal, and to a lesser extent the court, context.

Whereas once all court and tribunal procedural rules were focused on preparation for formal hearing and judicial determination, this is no longer always the case. ADR processes have been adopted, to varying degrees and with varying success rates, in court and tribunal procedures.

Using an example from within my own portfolio, the NSW Administrative Decisions Tribunal (ADT):

Chapter 6 Part 4 of the *Administrative Decisions Tribunal Act*, entitled '*Alternative Dispute Resolution*', empowers the Tribunal to refer matters for mediation or neutral evaluation if the parties to the proceedings concerned have agreed to that course of action.

The ADT currently offers mediation in three of its six divisions: the Equal Opportunity Division, the Community Services Division and, to a much lesser extent, the General Division. Of the 107 original complaints finalised in the Equal Opportunity Division during the 2007/08 year, mediation was conducted in 55 matters. Of those 55 matters, 41 (75%) settled at or after mediation and 14 (25%) proceeded to a hearing.

In addition, the ADT uses other techniques to assist parties to resolve their disputes without the need for a formal hearing, including case conferences and planning meetings.

Each of your tribunals will have adopted ADR processes, and sometimes hybrid ADR processes, in some shape or form, depending on the mandate of the tribunal, its statutory basis, and its size and caseload.

Many of your tribunals have integrated ADR processes into your practices extremely successfully indeed.

The question I challenge and encourage you to explore further today, however, is:

- *Are ADR processes being used to greatest possible effect in your tribunal?*

And if that answer to that question is “no”, then the next question should be:

- *What can be done to adopt more fully, where appropriate, within your tribunal’s processes, the full range of ADR tools that will enable people’s disputes to be resolved more quickly, fairly and affordably?*

[Cultural Change Needed]

As you know, what is prescribed in legislation is not always what happens in practice.

This was illustrated very clearly recently in Justice Wood's *Special Commission of Inquiry into Child Protection Services in NSW*.

Justice Wood wrote in his report that, *"Notwithstanding that the Children and Young Person's Care and Protection Act specifically provides for ADR, the Inquiry has been consistently informed that in practice, there is no real form of ADR operating in the care jurisdiction."*¹

The Attorney-General's Department is currently leading some work on what can be done to remedy the disjunction between the legislation and the practice. With assistance from practitioners in the child protection area, the Children's Court, the Department of Community Services, and experts from the ADR industry, they will be making concrete recommendations to integrate ADR better into NSW care matters by the end of the year.

Turning back to the Tribunal context...

¹ James Wood (2008), *Report of the Special Commission of Inquiry into Child protection Services in New South Wales*, page 467, paragraph 12.10.

If one picks up a copy of the NSW *Administrative Decisions Tribunal Act*, one could be forgiven for thinking that neutral evaluation and assessors are used as a standard part of the Tribunal's processes, or that mediation is used in all of the Tribunal's Divisions. Despite legislative provision for these services however, the ADT has *never* used neutral evaluation, nor has it used assessors. It uses mediation in only three of its six Divisions.

There are, of course, explanations for this, which I will touch upon later.

The point I am making though, is that if we are truly to provide the most streamlined, proportionate, fair and affordable dispute resolution service possible to the citizens of NSW:

- First, the enabling legislation needs to make appropriate provision for appropriate ADR processes, and
- Secondly, the legislation needs to be bolstered by real cultural and operational change.

[ADR Blueprint – Proposal 13 - Cultural Change]

Proposal 13 of the NSW *ADR Blueprint* Discussion Paper goes to the heart of the cultural change needed.

That proposal emphasises the merit in fundamentally refocusing the way that civil matters are dealt with by courts. Rather than requiring each party to prepare each issue for a trial that is unlikely to eventuate, the focus should be on identifying as quickly as possible, through joint conferences and dispute resolution plans, the real issues in dispute.

This will require a significant cultural shift, especially among courts and the legal profession.

In my view, Tribunals have an opportunity to show real leadership in relation to this proposal.

Compared with courts, tribunals are generally more accessible, less formal, more user-friendly, cost-effective and faster. Tribunals are forums where parties may avail themselves of a number of ADR processes within the Tribunal setting to achieve earlier resolution of their dispute, without the need for a formal determination. A range of ADR processes are provided, encouraged, and have been proven to succeed.

The ADT and the Consumer, Trader and Tenancy Tribunal, are examples of what can be, and what has been, achieved.

In these efforts it is important to garner your support and assistance.

[Proposal 19 – National Mediator Accreditation Standards]

Proposal 19 in the *ADR Blueprint* is that all mediators on the District and Supreme Court mediators' panels, and all court officers carrying out court-annexed mediations, should meet the National Mediator Accreditation System standards. It has been suggested that this proposal also be extended to apply to mediators in NSW Tribunals.

There is obvious value in having nationally consistent mediation standards, and in ensuring our NSW court and tribunal annexed mediators comply with these standards.

Tribunal members, unlike judges, are often required to have skills, training and even qualifications in ADR. I would encourage you to review the National Mediator Accreditation System standards on the National Alternative Dispute Resolution Council website, and to make submissions through the *ADR Blueprint* consultation process on the extent to which the mediators attached to your Tribunals may already be in compliance with those standards, or what they would need to do to reach them.

[Proposal 8 – Government adherence to model litigant policy]

Proposal 8 of the *ADR Blueprint* is also likely to be of significant interest to those of you in the audience today.

It is my aim to see government agencies make more of an attempt to resolve matters as early as possible and before proceedings are commenced.

Proposal 8 would require government agencies to be more accountable with respect to their adherence to the Government's Model Litigant Policy.² I am looking at putting in place appropriate performance measures to monitor compliance with the Policy, and also at using auditing measures.

For many of you, once a dispute reaches your doors, it has usually gone through an external complaints or dispute resolution process. Indeed a portion of the disputes that have the potential to go before your tribunal never make it there – as they are in fact resolved prior to reaching you.

I would like to see that portion increase, and for a culture of early dispute resolution to be more fully embedded into the culture of NSW government agencies.

[Public Law / Private Law Divide]

This leads me back to my earlier comments regarding the NSW ADT offering mediation in only three of its six Divisions, despite its

² This policy was approved for adoption by all government agencies on 8 July 2008. It is available at: [http://www.lawlink.nsw.gov.au/lawlink/lms/lms.nsf/vwFiles/CabinetApp-MLP.pdf/\\$file/CabinetApp-MLP.pdf](http://www.lawlink.nsw.gov.au/lawlink/lms/lms.nsf/vwFiles/CabinetApp-MLP.pdf/$file/CabinetApp-MLP.pdf) (accessed 27.5.2009).

enabling legislation permitting referrals to mediation in all six Divisions.

The President, Judge O'Connor, has on several occasions expressed the view that ADR techniques are highly appropriate for dealing with civil disputes, however may be less suited to areas where there is a strong and prevailing public interest.

The ADT does not actively promote ADR or use mediation in its occupational licensing, professional discipline and State tax appeals jurisdictions, on the grounds that the public interest is usually better served by a public hearing and adjudication.

American scholar Peter Murray, argues in his article "The privatization of civil justice" that the private mediation and arbitration of disputes without the benefit of creating legal precedent and judicial principles, runs the risk of eroding public justice.³

Of course the public performance by courts and tribunals of enforcing legal rights is, and will remain, an essential aspect of the administration of justice. It may well be argued that cases with a public interest element and strong precedential value are, from the perspective of the public interest, best determined in a public forum.

³ Murray, Peter L 2008, "The privatization of civil justice" *Judicature*, volume 91 , issue 6 , p. 272-275, at 275.

In all of this, however, we can't forget the perspective of the individual disputant who, arguably, may not want to expend significant resources to fight a dispute, perhaps all the way to the High Court (with the risk of losing), purely because the outcome may be of public value. That individual may prefer to attempt to negotiate or mediate in the early stages of the dispute, to resolve it as quickly, painlessly and affordably as possible. Arguably the State should not deny a private citizen the right to do so.

This is just *one* of the complex issues we face in all of this, and one on which I am very keen to hear your views.

[Conclusion]

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

While not a panacea, ADR has the potential to deliver real benefits in terms of making our system more effective, fair, accessible, efficient and affordable, and by assisting people to resolve their disputes earlier. ADR can deliver more flexible remedies than judicial determination and focus on the real issues in dispute, rather than the strict legal rights and obligations of the parties.

Tribunals occupy an important role in the civil justice system, and are well placed to provide leadership in this process of reform.

Admittedly, some quite different considerations apply to ADR in the tribunal context than apply in the court context. This is because of the prevalence in tribunals of unrepresented litigants, of tribunal member involvement in ADR processes, and the widely diverse and hybrid ADR processes that tribunals use.

Further, what works for one tribunal may not work for another tribunal.

I would encourage you to share your experiences by contributing to the *ADR Blueprint* consultation process.

As I mentioned earlier, I believe that today's Annual Conference is an important forum in which to examine your processes and practices to ensure that ADR is being used to the greatest effect at your tribunals.

I wish today's conference every success. Your theme is a very important one.

Thank you.

Speech delivered by the NSW Attorney General, John Hatzistergos.