

## **New South Wales Bar Association – ADR Workshop**

**28 August 2010 9.00am**

### **SPEECH NOTES**

#### **(Acknowledgement of Country)**

First, may I acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora Nation, and pay my respect to their elders, both past and present.

It is a pleasure to be here with you this morning to talk about some of the initiatives being taken by the NSW government to expand the use of ADR in the civil justice system; and to outline my vision and plans for ADR in NSW as set out in my *ADR Blueprint*.

#### **(Introduction )**

‘Alternative Dispute Resolution’ (or ‘ADR’) is defined by the National Alternative Dispute Resolution Advisory Committee (NADRAC) as “*an umbrella term for processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them.*”<sup>1</sup>

Despite ADR’s long and often celebrated history, dating back well beyond ancient Greece or ancient China, its modern take-up has been relatively slow. ADR remains, I believe, significantly under-utilised. There is still considerable scope for ADR to be used by

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<sup>1</sup> See [www.nadrac.gov.au](http://www.nadrac.gov.au) at ‘What is ADR’ tab

parties to settle disputes earlier, and to avoid the costs and uncertainties of commencing, and proceeding with, litigation.

As Attorney General of NSW, I am committed to encouraging the people and businesses in this State to resolve their disputes *without* recourse to litigation, wherever possible. We want to help people resolve their disputes quickly and affordably without compromising their interests.

Equally, it is important to ensure that once a matter is *before a court*, that the processes in that court facilitate the “just, quick and cheap resolution of the real issues in the proceedings”, and that there are sufficient opportunities for matters to be resolved using ADR at various points in the court process, where this is appropriate.

In NSW, the ‘overriding purpose’ provision in section 56 of the *Civil Procedure Act* is an important provision that has been a feature since the Act’s inception. It contains a powerful and succinct statement of the obligations of parties and their lawyers during civil proceedings. Their duty is to assist the court to further the overriding purpose of the “*just, quick and cheap resolution of the real issues in the proceedings*”. This is entirely consistent with the greater use of ADR.

Compared to other Australian jurisdictions (including the Commonwealth and Victoria) that are only now beginning to introduce ‘overriding purpose’ provisions into their legislation, New South Wales is significantly advanced in this area.

However there is still much more work to be done.

## **(ADR Blueprint)**

I will now turn to the ADR Blueprint ....

In May last year I released the *ADR Blueprint* for public consultation<sup>2</sup>. The *Blueprint* contains 19 proposals to increase and better integrate ADR across the NSW civil justice system. The release of the *ADR Blueprint* marked the beginning of an important reform project with significant implications for the way civil disputes are resolved.

The wide-ranging proposals in the *ADR Blueprint* included:

- changing court procedures to focus on resolving disputes rather than just on preparing for a hearing;
- introducing pre-action obligations;
- requiring government agencies to be more accountable in adhering to the Model Litigant Policy;
- progressing amendments to uniform commercial arbitration legislation;
- putting a much greater emphasis on ADR in legal education;
- improving consumer access to information about ADR; and

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<sup>2</sup> The *ADR Blueprint* is available on Lawlink at:  
[http://xac3mdw1/lawlink/ADR/II\\_adr.nsf/pages/adr\\_adr\\_publications](http://xac3mdw1/lawlink/ADR/II_adr.nsf/pages/adr_adr_publications)

- establishing an International Dispute Resolution Centre in Sydney.

To coincide with the release of the *ADR Blueprint*, and to demonstrate my commitment to ADR, I announced the establishment of an ADR Directorate in my Department. The ADR Directorate is a small but focussed policy unit tasked with coordinating, managing and driving ADR policy, strategy and growth in NSW; in collaboration with stakeholders such as the NSW Bar Association.

I also established an *ADR Blueprint Consultative Committee* in acknowledgment of the fact that putting the proposals into action would be a significant task requiring strong partnership between Government, the Courts and other key stakeholders. Angela Bowne SC is the Bar Association representative on that Committee, and the Honourable Justice Julie Ward represents the Supreme Court. I would like to thank them both for their contributions thus far.

In response to the comments received on the *ADR Blueprint* proposals through the public consultation process, and the meeting of the *ADR Blueprint Consultative Committee* at Parliament House, the ADR Directorate produced two additional targeted ADR Blueprint Draft Recommendations Reports. The first one is on *Pre-Action Protocols* and the second one is on *ADR in Government*. A further public consultation process took place in relation to those two reports, and submissions were carefully reviewed and analysed.

Today I will detail the current status of the *ADR Blueprint* reforms, and talk about where we are headed.

### **(Pre-Action protocols)**

As we know, the overwhelming majority of matters in the civil jurisdiction of the court *do not proceed to hearing*. Figures vary but most quote a rate of 90 - 98 % of matters being settled before trial.

Understanding that judicial determination is actually the exceptional way to resolve disputes provides an important perspective for the future scope of ADR. As the Victorian Law Reform Commission rightly asserted in its *Civil Justice Review*:

*when every case is litigated under the presumption it is going to trial, valuable court time is tied up in the unnecessary adjudication of procedural issues that flow from litigation*<sup>3</sup>.

These sentiments were echoed by the Chief Justice of Western Australia, the Hon Wayne Martin, who observed:

*Given that the vast majority of civil cases in the superior courts of Australia are resolved by a means other than trial... it seems curious that we are wedded to a methodology which is calculated to*

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<sup>3</sup> Victorian Law Reform Commission, *Civil Justice Review: Report 14* (2008), p81

*exacerbate dispute and push the parties to that dispute further and further apart.*<sup>4</sup>

An important step then, in the implementation of the *ADR Blueprint*, is to encourage the greater use of ADR, including the use of ADR *before litigation is commenced*.

Informed by the views of stakeholders through the extensive *ADR Blueprint* public consultation process, I am accordingly committed to introducing *pre-litigation obligations* in civil disputes.

As foreshadowed in the *ADR Blueprint Draft Recommendations Report on Pre-Action Protocols*, I will be recommending that legislative amendments are made to provide that people in a civil dispute, (that is, prospective litigants), are to take *reasonable steps to resolve a dispute without litigation*. A court would be able to take into account the extent of the parties' compliance with this obligation when making orders in relation to case management, hearing and other fees, and costs, including the costs of compliance with the obligation.

What steps are '*reasonable*' would of course depend on the circumstances. Reasonable steps could include mediation, conciliation, early neutral evaluation, arbitration, external dispute resolution schemes, negotiation, and any other ADR processes.

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<sup>4</sup> The Hon Wayne Martin, Chief Justice of Western Australia, *Courts in 2020: Should they do things differently?* National Judicial College conference, Sydney, 25 October 2008.

However, the amendments will not make ADR compulsory. ADR will be one of a number of methods available to parties to demonstrate they have tried to resolve a matter or narrowed the issues in dispute.

Other methods could include:

- ⇒ Writing to the other side explaining the issues in dispute and suggesting how the dispute could be resolved;
- ⇒ Exchanging appropriate information and documents in a timely manner keeping costs proportionate to the dispute; and
- ⇒ Agreeing to participate in a discussion about the dispute.

A requirement for reasonableness would ensure that there may be some circumstances where it would not be practicable or appropriate for the parties to attempt to resolve the dispute without litigation.

The legislation could, for example, specify some of the matters that a court may take into account in determining whether particular steps were or would have been reasonable. These matters could include:

- ⇒ the importance and complexity of the dispute;
- ⇒ the capacity of parties to participate safely or effectively in any dispute resolution attempts;
- ⇒ the expected costs of any dispute resolution attempts; and
- ⇒ the expected costs (perhaps both to the parties and to the State) should the matter be determined by litigation.

The details of the proposed legislative amendments will of course, need to be the subject of close Cabinet consideration before being adopted.

The aim of such a proposal is to encourage parties to resolve their disputes early by giving them the opportunity to identify what issues are in dispute, to evaluate the strengths and weaknesses of their position, and to consider whether any or all of the issues can be resolved without resorting to litigation. If litigation is to be pursued, the goal is to facilitate the narrowing of the issues to be decided by the court.

When working towards a trial both parties ordinarily prepare to present every issue for judicial determination, but if the real issues between the parties can be identified before litigation commences, this will ensure an efficient use of judicial resources as well as savings for the parties.

To supplement a general legislative requirement for parties to take 'reasonable steps' to resolve their dispute before commencing court proceedings, I am in favour of specific requirements for particular dispute types to be set out by the courts in Practice Notes and Directions. This goes to the 'bespoke' approach to pre-action requirements that I will now turn to ...

### **(Need for *bespoke* pre-action protocols)**

One of the more significant challenges associated with pre-litigation protocols is the need to formulate a bespoke approach rather than adopting a "one size fits all" model. This issue was identified in the *ADR Blueprint* and also through stakeholder submissions.

The UK experience has highlighted the importance of a bespoke approach to the success or failure of pre-action protocols. Lord Woolf in his Final Report on Access to Justice published in July 1996 stated that pre-action protocols should not cover all areas of litigation, but should deal with specific problems in specific areas, such as personal injury, medical negligence and housing<sup>5</sup>. Moreover, in his 2009 civil litigation costs review, Lord Jackson concluded that the general pre-action protocol for disputes should be abandoned, and only the specific protocols retained<sup>6</sup>.

### **(Possible pre-action pilot in defamation matters)**

In my view, judicial officers are extremely well-positioned to contribute to, and inform, the development of specific pre-action obligations. I have therefore consulted with the Heads of Jurisdiction on this issue. I have asked them to assist me by identifying dispute types which might be appropriate for tailored protocols, with a view to piloting the bespoke approach through Practice Notes and Directions.

As a result of this consultation, one area where we are currently exploring the potential for a pilot of pre-action requirements is in defamation matters. Defamation is an area which was identified by the Chief Judge of the District Court as potentially being suited to pre-

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<sup>5</sup> Cited in Legg, M. and Boniface, D. "Pre-action protocols in Australia" (2010) 20 *JJA* 39 at 49

<sup>6</sup> Cited in Legg and Boniface, *ibid*.

action requirements, such as mandatory ADR. This is because it is clear before litigation commences what the the plaintiff asserts.

A specific pre-action protocol for defamation matters already exists in the United Kingdom.

As this proposal is explored further, consultation will take place with the profession through both the *ADR Blueprint Consultative Committee* and the Bar Association.

**(Pre-action requirements already occur in family provision claims)**

Another area where pre-action requirements have recently been applied in NSW is in Family Provisions claims. In a number of judgments, the Supreme Court has commented that the legal costs incurred were excessive and out of any proportion to the size of the estate<sup>7</sup>.

Under changes that I brought forward to the *Succession Act* in 2008 with which Justice Bergin for one is only too familiar, it is now mandatory for Family Provision claims under that Act to be mediated unless *special reasons* dictate otherwise.

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<sup>7</sup> See *Tobin v Ezekiel – Ezekial Estate* [2008] NSWSC 1108 and *Mannix and Nudd v Mannix* [2008] NSWSC 1228

Similarly for estates still governed by the *Family Provisions Act*, a Supreme Court Practice Note<sup>8</sup> which came into effect on 1 June 2009, provides that unless ordered otherwise, all proceedings involving Family Provision claims must be mediated.

From the feedback I have received, these pre-action requirements seem to have been well-received by the profession, and I also acknowledge Justice Bergin's remarks at her address at the Supreme Court on 25 November last year that "*although it is very early days in this new regime I think it is fair to say that the scheme appears to be an appropriate response to the concerns that have been expressed.*"

### **(Promoting an ADR culture through education)**

In order to achieve lasting cultural change, however, we must adopt a multifaceted approach that goes beyond legislative amendments.

One of the issues highlighted in the *ADR Blueprint* is the importance of educating and training the legal profession in ADR. I believe that a greater emphasis on ADR training *throughout* the professional life of lawyers would help promote a stronger culture of non-litigious dispute resolution.

In pursuit of this goal, I recently wrote to the NSW Bar Association and the Law Society proposing that at least one unit of ADR training be completed by practitioners in each two to three year period as part of

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<sup>8</sup> *Practice Note SC Eq 7*

Continuing Professional Development requirements. I also understand that in December 2008 the ADR Committee of the Bar Association raised with the Bar Council the possibility of having a fifth CPD strand so that all barristers were required to obtain at least one point in ADR in each CPD year.

In response to my letter, I was advised that the Bar Council had resolved that the existing CPD arrangements should not change at this stage. I can well appreciate the Association's desire to keep any changes to a minimum in anticipation of the impending National Legal Profession regime. However, the question of ADR training for legal practitioners remains on my agenda and will be reviewed again in the not too distant future.

Another facet of my approach to cultural change was to write to the Deans of Australian law schools and to providers of practical legal training which operate in NSW, highlighting the significance of education in ADR and suggesting they consider further ways to increase their coverage of ADR. I was encouraged by the responses, which showed that, although ADR is primarily integrated in other subjects rather than offered as a stand alone subject, ADR is already taking a prominent place in legal education.

It therefore appears that the fresh faced lawyers coming through our universities will be well versed in ADR, and the foundation for developing an ADR culture rather than a litigious one is well on its way.

However lawyers are not the only ones to benefit from ADR training. Accordingly, in addition to the Deans of Law Schools, I recently wrote to the vice-chancellors of all universities operating in NSW highlighting the significance of education in ADR in *a variety of other disciplines*, including business, commerce, psychology, education, health and welfare.

Most promisingly, the Vice Chancellor and CEO of the University of New England, Professor Jim Barber, indicated that whilst its school of law offers an ADR unit, it is open to other students of the university as well. I hope this is something that will be picked up in more universities across the State.

### **(Government use of ADR)**

Another facet of the culture shift in the *ADR Blueprint* to which I am firmly committed to tackling is in relation to the use of ADR by Government.

Some of you may regularly advise and represent government. The rest of you may find yourselves acting against government, which when taken as a whole is one of the biggest litigators in NSW, so developments in this area should be of interest to you too.

As you may be aware, NSW government agencies are required to comply with the *Model Litigant Policy for Civil Litigation*. This policy

applies to “civil claims and civil litigation” involving the State or its agencies, including litigation before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes. It requires the State and its agencies to act as a model litigant by acting with complete propriety, fairness, and in accordance with the highest professional standards. For instance, the Model Litigant Policy provides that the State and its agencies:

- deal with claims promptly and not cause unnecessary delay in the handling of claims and litigation;
- pay legitimate claims without litigation where it is clear that liability is at least as much as the amount to be paid; and
- endeavour to avoid litigation wherever possible.

At present the only reference to the use of ADR is in the context of this last point, “*avoiding* litigation wherever possible”. The Policy does not expressly require agencies to use ADR to attempt to resolve disputes *once litigation has commenced*.

As indicated in the second *ADR Blueprint Draft Recommendations Report: ADR in Government*, which I launched on 15 September 2009, I have asked the ADR Directorate to prepare amendments to the Model Litigant Policy to give greater prominence to the role of ADR in resolving civil claims and litigation.

By setting an example in dealing with its own disputes and litigation, the State can contribute to the development of high standards of

practice by both the legal profession and ADR practitioners and organisations<sup>9</sup>.

Concerns have also been raised with me about how to enforce the Model Litigant Policy. Currently, the policy prescribes that issues relating to compliance or non-compliance are to be referred to the Chief Executive Officer of the agency concerned. There is no provision about what action the Chief Executive Officer can take to enforce the policy, although guidelines about the interpretation and implementation of the policy can be issued. In my view the process for complaining about any potential breach of the policy and the consequences of a breach need to be addressed. This is particularly of concern to me given the number of cases where a breach of the policy has led to costs orders being made against State agencies<sup>10</sup>.

A recent example of this is a decision of the Administrative Decisions Tribunal Appeal Panel in favour of the Appellant, B & L Linings Pty Ltd, in respect of a costs application<sup>11</sup>. On 6 April 2010 the Appeal Panel found that the unreasonable conduct of the Commissioner of State

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<sup>9</sup> National Alternative Dispute Resolution Advisory Committee *Submission on the Review of the Legal Services Directions*, 2004 (available online at [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_SubmissionontheLegalServicesDirectionsIssuesPaper\(April2004\)](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SubmissionontheLegalServicesDirectionsIssuesPaper(April2004))); p. 6.

<sup>10</sup> See *Director-General, Ageing v Lambert* [2009] NSWCA 102  
*Mahenthirarasa v State Rail Authority of NSW (No 2)* [2008] NSWCA 201  
*Parkebourne-Mummel Landscape Guardians Inc v Minister for Planning and Ors* [2009] NSWLEC 155 (24 September 2009)  
It was also a factor in the decision to make a costs order in *Sheppard v Commissioner for Fair Trading, NSW Office of Fair Trading* [2010] NSWADT 192 (29 July 2010).  
It was a factor in *Cunliffe v Darkinjung Local Aboriginal Land Council (No 2)* [2010] NSWADT 185 (27 July 2010), although it was decided not to make a costs order  
*AT v Commissioner of Police, NSW* [2010] NSWCA 131

<sup>11</sup> *B & L Linings Pty Ltd v Chief Commissioner of State Revenue (No 5) (RD)* [2010] NSWADT 21

Revenue, both before and during the proceedings, enlarged their scale and duration significantly beyond what should have been necessary. The conduct was such that it amounted to a breach of the Model Litigant Policy which, when coupled with other factors, warranted an award of costs in favour of the Appellant. I am advised that policies and procedures have now been implemented by the Office of State Revenue to ensure the situation is avoided in the future and, although I trust other departments will learn from this experience, I believe more is needed.

Accordingly, in preparing the amendments to the Model Litigant Policy, I have asked the ADR Directorate to incorporate robust mechanisms for the effective enforcement of the Policy.

### **(Local Councils)**

Another area of the *ADR Blueprint* where I am working to achieve traction is in relation to Local Councils, to whom the Model Litigant Policy *does not* currently apply.

The Honorable Justice Preston, Chief Judge of the Land and Environment Court, highlighted in his submission on the *ADR Blueprint* that councils appear generally reluctant to delegate authority to negotiate and settle disputes in an ADR process. Many settlement options have to be referred back to the council for consideration, adding to cost and delay.

To this end, I have recently written to my colleague, the Minister for Local Government, to explore the best way to achieve compliance by local councils with the Model Litigant Policy. I am confident that we will be able to find a way of effectively dealing with this issue.

### **(ADR in the Children's Court)**

I will now discuss some important and interesting ADR issues arising in the care and protection jurisdiction...

In 2007 the Government commissioned the Honourable James Wood, AO, QC to conduct a special commission of inquiry into child protection services in New South Wales, and the historic reforms he recommended in his report in 2008 have been supported by the Government and formed the basis for its Action Plan, *Keep Them Safe*.

An important recommendation of the report was that more use be made of ADR both prior to, and during, care proceedings.

In order to implement this recommendation, I established an ADR Expert Working Party to advise Government on *how* ADR could be used more, and on *what sort* of ADR models might be suitable for introduction in the care and protection system, including in the Children's Court.

The ADR Expert Working Party was chaired by the Director of ADR in my Department and included the President of the Children's Court, senior representatives from Community Services, Legal Aid, the Law Society and the Bar Association, as well as leading practitioners and academics in the fields of ADR and care and protection.

In December 2009 the working party made extensive recommendations on increasing ADR in children's care and protection matters. These recommendations were approved by Government, and are currently in the process of being implemented.

The first of the new initiatives is the pilot of **Family Group Conferencing** to be conducted by Community Services and run by an independent facilitator. This initiative will enable families, extended relatives and community elders to come together and plan for children if there are child protection concerns before a case is even considered for court.

The second is the initiation of **Dispute Resolution Conferences** by specially trained Children's Registrars for matters that have gone to the Children's Court. The Conferences will be run as a conciliation by Children's Registrars trained in ADR. They will provide parties with an opportunity to agree on the action that should be taken in the best interests of the child and allow for the direct participation of the child's family and others concerned for the safety, welfare and wellbeing of the child in the decision-making process.

And finally there will also be a **Legal Aid Mediation Pilot** for care matters in the Bidura Children's Court. The pilot will offer external mediation through a skilled, neutral mediator facilitating a discussion over child protection issues between Community Services, parents or guardians, lawyers and other interested parties.

The NSW Government believes that ADR has the potential to improve the NSW child protection system by including and empowering children and their families in decision-making; by producing child protection decisions that are better informed and more responsive; by fostering collaborative, rather than adversarial, relationships; and by leading to outcomes that are accepted by all parties and therefore more likely to be implemented. It also has the potential to help resolve child protection disputes faster, which is in the interests of all parties, in particular children.

### **(Uniform Commercial Arbitration Act)**

I now turn to the *ADR Blueprint* reforms that I have pursued in the area of arbitration ....

In May 2010 the Standing Committee of Attorneys General agreed to implement a model *Commercial Arbitration Bill 2010*, based on the UNCITRAL Model Law. The UNCITRAL Model Law reflects the accepted world standard for arbitrating commercial disputes.

New South Wales took the lead in developing this model Bill and was the first jurisdiction to introduce legislation based on the model Bill. I did this on 12 May this year.

Then on 28 June this year the *NSW Commercial Arbitration Act 2010* was assented to, providing businesses with up to date domestic arbitration laws. These new laws will ensure arbitration delivers on its promise to be a quicker, cost effective and less formal option for resolving disputes than litigation. They also ensure the arbitration laws in NSW align with the Commonwealth's international arbitration laws, and accepted international practice in this area.

Following the introduction of the NSW Bill, some stakeholders and the Opposition raised concerns with the formulation of section 27D of the Bill, which is the 'med-arb' provision.

Section 27D provides that an arbitrator can act as a mediator, conciliator or other non-arbitral intermediary, if the parties so agree, to provide further flexibility for parties to agree on how their disputes are to be determined. However, if a mediation or conciliation is not successful, an arbitrator is prevented from resuming as an arbitrator without the written consent of all parties.

This subsection was formulated to address concerns raised by stakeholders during consultation on the draft model Bill about possible procedural fairness and bias issues relating to an arbitrator resuming an arbitration after conducting mediation.

In parliamentary debate on the issue, I noted that professional opinions on how best to regulate these processes vary. However, I advised that, in order to work through the issues properly, I would take the concerns about section 27D back to SCAG and in addition parties will have the opportunity to make submissions.

As part of this process a consultation letter seeking the Bar Association's view on section 27D will be sent shortly.

### **(International Dispute Resolution Centre)**

In a related development, at the beginning of this month I officially opened the International Dispute Resolution Centre with the Commonwealth Attorney General. The centre is in the heart of Sydney's legal and financial services district at 1 Castlereagh street. That same week Ms Michelle Sindler was appointed as the Chief Executive Officer of the Centre. She is an expert in international arbitration and ADR with more than 20 years' experience.

The facility itself features ten custom built rooms, including a large 27-person hearing room, and is equipped with state-of-the-art video conferencing technology and access to translation and transcription services.

The President of the Australian Centre for International Commercial Arbitration and partner of Clayton Utz, Professor Doug Jones, has

expressed confidence that the International Dispute Resolution Centre can lure work from rival facilities in Hong Kong and Singapore because Australia offers a stable and supportive legal system<sup>12</sup>.

I agree wholeheartedly that we are well placed to capitalise on the booming global market for cross border dispute resolution because we enjoy very close ties to Asia and Europe, we have stable economic, political and legal systems and we boast some of the best legal practitioners in the world.

### **(Conclusion)**

As a Hong Kong barrister, Bobby Wong, has stated *“[i]f there are too many unsettled disputes, people cannot have good relations with one another and the tranquility of society is threatened.”*<sup>13</sup>

In my estimation, the reforms I have outlined for you today as part of the *ADR Blueprint* will, assist people to resolve a wide range of disputes; will free up the resources of the courts to more efficiently, effectively and justly decide those disputes that are litigated; and will result in a change in culture that will ultimately create a more harmonious NSW.

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<sup>12</sup> Cited in Harrison, V. 2010 “City open for arbitration” *The Australian* 30 July p 33.

<sup>13</sup> Wong, *ibid*, at p 304.