



Australian Government

Attorney-General's Department

Federal Government Commitment and Initiatives in ADR

Ian Govey
Deputy Secretary

'kon gres 2009'

11 September 2009

The Sebel in Albert Park, Melbourne

**Ms Ashe Bucco, Access to Justice Division,
contributed to the preparation of this paper.**

1. First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

Introduction

2. This conference is a wonderful opportunity to come together to discuss all things ADR, and I understand there have been a number of excellent sessions already.
3. My topic of ‘Federal Government Commitment and Initiatives in ADR’ is at the same time both challenging and easy. It is easy because there is so much happening that it is not at all difficult to find a variety of topics to discuss – but conversely it will be challenging to do them all justice in this short talk. I nevertheless want to attempt to give a brief overview of the various initiatives either now implemented or underway.
4. Since the Attorney-General came into office he has made very clear his support for ADR and his determination to ensure that Commonwealth legislation and policies reflect the priority he is giving to having disputes resolved in a timely manner out of court. His position is summarised very well by some comments he made at the 9th National Mediation Conference in September 2008:

“I want it to be clear that mediation and other ADR processes can provide efficient and enduring outcomes.

We need to encourage Australians to be alive to the benefits of these processes when disputes first arise.

Ultimately, I want mediation and other ADR processes to be seen as indispensable and practical ways for Australians to resolve conflicts.”

5. I think most people would agree that ADR is widely accepted and used in Australia and that overall it has evolved into a very effective method of resolving disputes. Equally, many would agree that there is room for improvement in relation to legislative frameworks, consistency in practice and terminology and in the prevailing culture.
6. One of the most interesting challenges for policy makers is the extent to which it is appropriate to encourage the use of ADR, as opposed to either mandating its use or imposing costs as an incentive to do so. The approach favoured by some is to rely only on education and encouragement and leave the choice to the parties – or in practice often their lawyers. I think everyone would agree with the desirability of education and

encouragement. The real issue is whether to combine this with a more directive approach, either by making ADR compulsory before filing in court or more subtly by imposing cost or fee advantages for those who use ADR

7. It is interesting that the overall trend is for more incentives and compulsion. It seems that this is regarded as legitimate, perhaps in part because if ADR is regarded as mainstream it is legitimate for parties who are recalcitrant to be forced to use ADR or at least to pay a price for not doing so.
8. Recent commercial cases, in particular the C7 litigation in the Federal Court and the Bell Group litigation in the Supreme Court of Western Australia, demonstrate the challenges large-scale litigation poses for government, the courts, the parties and the legal profession. These disputes tie up considerable capital and managerial time for the parties – time and money that no doubt could be better spent on more productive endeavours.
9. Perhaps even more importantly, large amounts of the courts' time and resources are spent on these matters, and this inevitably reduces other litigants' ability to access the courts. Furthermore, there is a question of priorities. In this regard the Attorney-General has noted that the government money spent in providing these court services "could have been better used in many other areas of the justice system, not least, of course, the crying need for better resourcing of legal aid and community legal centres". (Second Reading Speech - Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, 22 June 2009)
10. The focus on alternative dispute resolution in commercial matters responds to these concerns. There are other social costs which also drive the work to increase the use of ADR in some areas, in particular, in the family law area.
11. The Attorney-General has announced a range of reviews and legislative initiatives in almost every area of the civil justice system, and all of them have some impact on the use of ADR.

Access to Justice - taskforce

12. In January this year, the Access to Justice Taskforce was established in the Attorney-General's Department to examine access to justice issues in a holistic way. The Taskforce was asked to develop a more strategic approach and make recommendations on ways to improve the civil justice system – looking at all parts of the system and how they interact.

13. An effective and accessible civil justice system is generally regarded as one where people are able to resolve their disputes quickly, effectively and fairly, using the most appropriate method for their particular circumstances.
14. To go back to basic principles, better access to information and increasing the opportunities to resolve disputes early, either in or outside court, are important drivers for improving access to justice.
15. Of course, while courts are an important part of the system, in many situations they are not the best place for people to get the outcome they are looking for to resolve their disputes.
16. The Taskforce looked at both the demand for, and supply of, the services provided in our justice system. The Taskforce's report is now being considered by Government, and I expect it will be publicly released reasonably soon. However, I can say the report will highlight some interesting issues for ADR, particularly in light of findings on how people recognised and responded to legal issues and what services they turned to (or didn't).
17. There are some major implications from the work to date that will be relevant going forward:
 - There is a need for a Strategic Framework for Access to Justice. The current approach is ad hoc and historical. There is no underlying principle which guides government decisions on the reform and resourcing of the justice system
 - Better information about the law is essential. Information failure is a significant barrier to justice – people do not understand legal events, what to do or where to seek assistance. People who mistakenly approach the 'wrong' service often feel they have been rejected by the justice system
 - There is a need to consider how, and at what cost to government, justice services are provided. Maintaining an effective justice system has both public and private benefits, so people should be encouraged to use the most efficient service. Price incentives deserve consideration because they can assist in directing people to the best service, preventing poor use of public resources, minimising legal costs and allowing the development of new and alternative services for dispute resolution.
 - As we know, most disputes are not resolved by judicial adjudication, so there is great scope for opportunities for industry based alternative dispute resolution schemes.

- Finally, government agencies need to do more to resolve disputes without the need for people to exercise formal appeal rights.
18. In parallel with this work, NADRAC has been working on a reference from the Attorney-General to look at strategies to encourage greater use of ADR in civil disputes. In particular, NADRAC has been asked to advise on:
- whether mandatory requirements to use ADR should be introduced
 - whether other changes to cost structures and civil procedures should be adopted to provide incentives to use ADR
 - what can be done to remove practical and cultural barriers to the use of ADR, and
 - whether there should be greater use of private and community based ADR services.
19. NADRAC has consulted widely with key stakeholders, and received over 60 detailed submissions in response to its comprehensive issues paper released in March 2009. NADRAC is due to provide its report to the Attorney-General by 30 September this year – just over 2 weeks away.
20. I can safely predict that NADRAC's report will include a number of very significant and useful recommendations to the Attorney General.
21. NADRAC has been considering strategies to encourage parties to make greater use of ADR by providing cost incentives without necessarily going as far as mandating it. However, we have been conscious of the need for these strategies to be carefully tailored so as not to pressure parties to use inappropriate ADR processes or prevent cases that need to go straight to court from doing so. We have also needed to take account of the fact that different types of cases have very different incentives and prospects when it comes to ADR. ADR might be very appropriate in many discrimination, workers compensation, family and commercial matters, but not so readily applicable to migration, bankruptcy or insolvency cases. So our recommendations will need to take account of the fact that 'one size' solutions will often be inappropriate. Even so, simple consistent approaches are clearly desirable wherever possible, and in line with submissions we received, NADRAC is looking at ways to encourage greater uniformity and consistency.

ADR Legislative Reforms

22. I would like to briefly mention two Bills currently before Parliament that contain significant ADR initiatives – the Native Title Amendment Bill and the Access to Justice (Civil Litigation Reforms) Amendment Bill.

(a) Native Title Bill

23. The Native Title Amendment Bill 2009 was introduced into the Parliament in March this year. One of the significant amendments in this Bill will give the Federal Court control of all claims, including deciding who will mediate a claim.

24. This change will draw on the Court's significant ADR experience, and strong results in mediating native title matters, and is designed to enable more negotiated outcomes to be achieved. Having one body actively control the direction of each case, with the assistance of case management powers, should enable opportunities for resolution to be more readily identified.

25. It will also enable parties who might behave other than in good faith in native title matters to be more forcefully pulled into line.

26. Where parties are deadlocked or unwilling to reach a common position, the Court can bring a discipline and focus through the use of its case management powers to ensure that matters are not unduly delayed. This change is consistent with stakeholder feedback. It is very much in line with the Government's preference to resolve native title through mediation and negotiation, rather than litigation.

(b) Civil Litigation Reforms Bill

27. The Access to Justice (Civil Litigation Reforms) Amendment Bill introduced into the House of Representatives in June this year seeks to bring about a cultural shift in the way disputes are resolved.

28. Parties to litigation in the Federal Court will need to focus on resolving the real issues in dispute. The Bill sends a clear message that the court, parties and their lawyers are expected to conduct litigation efficiently and cost-effectively. It introduces an overarching obligation on the parties to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible. Lawyers will need to assist their clients to comply with this duty.

29. As part of the new case management provisions introduced by the Bill, the Court will also need to consider whether a case should be referred to ADR. A party's failure to participate in ADR could be considered as failing to act in accordance with their obligation to resolve the dispute as quickly and inexpensively as possible. Most importantly, this failure could be taken into account when the court is making costs orders.
30. I think it's fair to say that these amendments represent significant change, but I'm confident there will be more to come – both from the Taskforce's report and NADRAC's.

ADR disputes involving Commonwealth agencies

31. The Attorney-General has made it clear that he is keen to see the Commonwealth and its agencies move to a culture of resolving disputes without resort to litigation.
32. The Attorney-General has outlined his approach to Commonwealth Agencies using ADR on several occasions. At the *ADR in Government Forum* held in Canberra on 4 June 2008. The Attorney-General stated:

“I want ADR to be seen as built into the fabric of our system of justice – not simply an add-on.

I think that there is a need to change what appears to be a fairly risk averse and, therefore, adversarial culture within government. I want to encourage government agencies to move to a 'resolution culture'.

I know that Government agencies face particular challenges. They are responsible for ensuring that Commonwealth resources are expended lawfully and are protected from unjustified claims.

However, I don't think that obligation precludes the early resolution of legitimate disputes through direct negotiation or ADR.”

33. In line with this approach the Attorney-General amended the Legal Services Directions last year (July 2008) to provide that:
- ‘[t]he Commonwealth or an agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).’
34. The Legal Services Directions are made by the Attorney-General under the *Judiciary Act 1903* and impose binding obligations on Commonwealth agencies in the conduct of their legal affairs.

35. The amendments require Commonwealth agencies, in fulfilling their obligation to act as a model litigant, to consider ADR prior to commencing litigation. Agencies involved in litigation are also required to continually consider opportunities to engage in ADR as the matters progress.
36. ADR is already very much part of the culture employed by the Administrative Appeals Tribunal in its jurisdiction. Approximately 80% of the applications lodged in the AAT are resolved through conciliation undertaken by conference Registrars.
37. There is also a considerable emphasis placed on not adopting a traditional adversarial approach in the way matters are conducted before the Tribunal. Amendments to the *Administrative Appeals Tribunal Act 1975* (section 33(1AA)), and the *Legal Services Directions* (paragraphs 4 and 5 of Appendix B) in 2005 specify that Commonwealth decision-makers have an obligation to use their best endeavours to assist the AAT in making its decision. Interestingly, these changes followed an ALRC recommendation in its 'Managing Justice' report that the Legal Services Directions should impose this obligation. The Government accepted this recommendation but went further and also included the obligation in the Administrative Appeals Tribunal Act itself – thus reinforcing the importance of agencies doing the right thing.
38. This obligation requires agencies to present evidence to the Tribunal that assists it in reaching the correct or preferable decision, and not evidence that merely supports or defends the decision under review.
39. Another element of this changed approach is the increased ability of the Commonwealth to settle matters. Paragraph 8.3 of the Legal Services Directions, added in 2005, provides Commonwealth agencies with the additional flexibility to settle matters, even where the applicable limitation period has expired, after obtaining legal advice recommending settlement as the preferable option.
40. The settlement of the HMAS Melbourne claims is a prime example of where a focus on ADR and the sensible approach to settlement can reach outcomes that were not achievable through litigation.
41. The collision between the HMAS Voyager and HMAS Melbourne in 1964 resulted in claims relating to those killed or injured on the Voyager and from a number of people who were on the Melbourne. The Voyager claims were settled some time ago. However, around 230 claims for damages for psychological injuries were brought in the last few

years by ex-crew-members of HMAS Melbourne. Quite apart from their sheer number, the claims raised complex legal and evidentiary issues.

42. In order to facilitate appropriate resolution of the ongoing litigation, the Government appointed Sydney barrister Mr Jeremy Gormly SC in July 2008 to review the mediation of the outstanding damages claims and assist in the ADR process. All but one of these claims were resolved through this process over a three month period. The last case resolved more recently, also following settlement negotiations. Our estimate is that settlement of the claims in this way saved months, if not years, of litigation and legal costs of millions of dollars. Very importantly, it brought closure for the claimants.
43. However, there is still more that can be done and the Attorney-General's Department is becoming more involved in the conduct of major litigation by other agencies with a view to assisting in settling matters wherever appropriate.

Arbitration

44. Another area where major changes are in prospect is domestic commercial arbitration legislation. In April this year, the Standing Committee of Attorneys-General agreed to reinvigorate its efforts to reform Australia's domestic commercial arbitration legislation. A new uniform domestic Act is being developed, which is to be based on the UNCITRAL Model Law. The model law is already incorporated in the *International Arbitration Act 1974* to govern international arbitrations. This change for domestic arbitration is intended to improve the current legal framework and thus provide an efficient mechanism for this form of dispute resolution.
45. A clear and comprehensive regulatory framework will also help in promoting Australia's international arbitration services. As many of you would be aware, the Attorney-General is conducting a review of the International Arbitration Act. Key objectives of the review are to ensure that international arbitration remains an effective form of dispute resolution for Australian businesses trading internationally, and to further develop Australia as an international commercial dispute resolution centre.
46. Last November, the Attorney-General released an issues paper on a wide range of proposals for amending this Act. The paper included discussion on changes to the Act necessary to incorporate the latest changes to the UNCITRAL Model Law and other changes to update the Act. Legislation is now being prepared in light of the submissions

we received and the Attorney-General expects to announce the details of the reforms in the near future.

National Standards for Mediators

47. Another important aspect of increasing the use of ADR is ensuring that ADR providers meet appropriate standards. With the support of the Government, NADRAC has been instrumental in encouraging the mediation sector in Australia to develop the voluntary industry National Mediator Accreditation System. It was pleasing to see the system commence operation on 1 January last year.
48. This System provides overarching minimum standards regime for all mediators, irrespective of their field of practice. It is a foundation on which more extensive, specialist accreditation regimes could be developed for other advisory ADR processes, such as conciliation.
49. The National Mediator Accreditation Committee is charged with implementing the new System— including establishing a permanent national Mediator Standards Body in 2010. The Attorney-General recently approved a funding application of around \$113,000 to assist with the establishment of the Mediator Standards Body.
50. The new accreditation system will enhance the quality of mediation services and improve the coherence and credibility of ADR generally. Further, it will facilitate a greater appreciation and understanding of ADR in the wider community and, very importantly, help to build consumer confidence in mediation.
51. So, on behalf of the Attorney, I strongly encourage all Australian mediators to ensure they are either accredited under the National Mediator Accreditation System or a national specialist scheme such as that for family dispute resolution practitioners.

Family Dispute Resolution

52. One of the key areas in which ADR is well accepted is family law. Family dispute resolution is supported by clear legislative mandates in the Family Law Act. The Act requires separating families to make a genuine effort to resolve parenting disputes through a family dispute resolution process. The Government provides around \$86 million to

Family Relationship Centres, family dispute resolution services and legal aid commissions to deliver a range of dispute resolution services.

53. To ensure that families receive assistance from qualified and experienced professionals, dispute resolution practitioners must meet a set of accreditation standards and be registered Federal Dispute Resolution practitioners. The accreditation standards require practitioners to be able to respond to family violence, and create a supportive and safe environment for vulnerable parties.
54. Generally, family dispute resolution takes less time than a case proceeding to a full hearing in the family courts. It empowers the parties involved and, most importantly, helps them reach agreement in the best interests of their children. It is also cost effective.
55. A recent evaluation concluded that for every dollar spent on family dispute resolution in legal aid commissions, \$1.48 is saved in court costs. (KPMG report Family Dispute Resolution Services in Legal Aid Commissions. Final evaluation report. Pg 76). However, it is acknowledged that dispute resolution is not appropriate for all families and its suitability needs to be assessed on a case by case basis. This includes screening for family violence and child abuse, as well as assessing the capacity of parties to negotiate effectively and on equal terms.
56. On 30 June this year, the Attorney also announced additional one off funding to assist the development of pilot programs to build better partnerships and greater collaboration between all Family Relationship Centres and nearby Community Legal Centres.
57. I would not want to leave the impression that ADR in the family law area is incapable of improvement. The Attorney-General and the Department are continuing to look for ways in which current services can be improved, in particular, by focussing on strategies for the earliest possible intervention to resolve disputes and by looking at the most appropriate way to do so.

Conclusion

58. As I have indicated, improving the use of ADR is a key part of the Attorney-General's agenda for improving access to justice. It is an exciting time to be able to contribute. I am very conscious that many people here have contributed their ideas and practical

suggestions, whether through membership of bodies such as NADRAC or through meetings and written submissions.

59. The Attorney-General would want me to acknowledge this contribution – I can say from my personal involvement that it has been both influential and much appreciated. I am confident the effort will be repaid by further improvements across the board in the use of ADR.