



Legal briefing

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ALTERNATIVE DISPUTE RESOLUTION FOR COMMONWEALTH AGENCIES

Alternative dispute resolution (ADR) is an important option for expeditiously resolving disputes which otherwise may demand the resources of the courts to finalise, involving time, expense and consequent delay.

Our focus in this briefing is on the role of ADR in the Commonwealth context. We do not examine in detail all contexts in which ADR can be applied as an alternative to a litigated outcome. Rather, we focus on the factors peculiar to the Commonwealth where it is a party to an ADR process. We also look at some areas where the use of ADR might not have been so apparent in order to highlight the scope of utilising ADR in the Commonwealth context. We have not sought to deal with areas such as personal injury claims and commercial disputes, which, it is already well accepted, readily lend themselves to resolution through ADR and in respect of which ADR techniques such as mediation, arbitration and neutral evaluation are now commonplace.

Introduction

The broad objectives of ADR have been identified as:

- reducing the costs and delays of litigation
- building more harmonious and cohesive relationships in community, family and business affairs whilst avoiding the bitterness and divisiveness that can sometimes develop in protracted litigation
- enhancing Australia's system of law and justice, particularly for quick and fair dispute resolution, thus making it a favourable place internationally in which to do business.¹

ADR processes may vary according to context.

The *Federal Civil Justice System Strategy Paper* of December 2003 (the Strategy Paper)² states that ADR promotes facilitating the resolution of disputes at the lowest appropriate level. The Strategy Paper emphasises the need to settle disputes as fairly, quickly and cheaply as possible and assist self-represented litigants while preventing unmeritorious or misguided litigation from clogging the courts.



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The Commonwealth Attorney-General has made a number of recent statements which emphasise the importance of ADR in ensuring an affordable and efficient justice system. For example, in a speech to the Australian Financial Review Legal Conference 2008,³ the Attorney-General observed that, even if a matter cannot be resolved through ADR, the issues in dispute may be able to be significantly narrowed to shorten court proceedings. The Attorney-General stated:

To this end, I recently asked the National Alternative Dispute Resolution Advisory Council to report on strategies that would remove barriers to Alternative Dispute Resolution (ADR) by providing incentives to ensure its greater use, as an alternative to and during litigation.

The Attorney-General also very recently amended the *Legal Services Directions 2005* (LSDs)⁴ to require agencies to place a stronger emphasis on ADR (see below at pp 4–5).

Alternative dispute resolution in the Commonwealth environment

For all parties to have confidence in ADR as an effective way of dealing with disputes involving the Commonwealth and its agencies, the parties should be aware of particular factors relevant to applying ADR in the Commonwealth environment. These factors include:

- legislative requirements
- government management regimes that apply to resolving disputes
- particular statutory provisions that may bear on the scope of what can be agreed through ADR
- the requirements under the *Financial Management and Accountability Act 1997* (the FMA Act) and *Financial Management and Accountability Regulations 1997* (the FMA Regulations) that must be satisfied in regard to proposed Commonwealth expenditure that a settlement may envisage
- the LSDs, which do not permit settlement of clearly spurious monetary claims merely because of the cost of defending the claim (see Appendix C, para 2).

It would be wrong to see these factors as a sign that ADR has a diminished role in the government arena. Rather, it is necessary to understand and take account of them at an early stage so that realistic expectations of and confidence in ADR as an effective way of dealing with disputes involving the Commonwealth and its agencies are achieved.

Factors to be borne in mind for the facilitation of alternative dispute resolution

Constitutional requirements

Under the Constitution, the Commonwealth Parliament is confined to legislating upon certain subject matters (in particular, see ss 51 and 52 of the Constitution). This includes matters incidental to the execution of any power vested by the Constitution in the Parliament, the government or the federal judiciary (Constitution, s 51(xxxix)). The power of the Commonwealth to enter into a contract, which would include any settlement of a dispute, is governed by the Commonwealth's

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executive power (Constitution, s 61). The scope of the executive power is essentially limited to the purposes for which the Commonwealth has power to make laws.⁵ However, this fundamental proposition should not cause major difficulties when the Commonwealth mediates disputes. The subject matter of the dispute, by virtue of the Commonwealth's existing involvement, is in all likelihood going to be one in which the Commonwealth is properly involved. It would probably only be if some term or condition of the proposed settlement sought to oblige the Commonwealth to do something that was so divorced from the general subject matter of the issues in dispute that a difficulty might emerge in this area.

Legislative considerations

Some of the factors to bear in mind in approaching ADR are effectively no more than reflections of legislative constraints upon Commonwealth action in the subject matter of the dispute. Some outcomes sought by an opposing party through ADR may be inconsistent with the legislation in question. For instance, the opposing party may be asking the Commonwealth to impermissibly 'contract out of' relevant legislation.⁶ In such a situation, ADR may still be very useful because it may offer the Commonwealth the most effective opportunity to explain its position and explore other permissible ways of settling the dispute.

Fettering the exercise of a statutory power

Short of legislation actually precluding a particular outcome, an outcome pursued through ADR may still run the risk of being illegal or unenforceable if it purports to fetter the exercise of a statutory power. A Commonwealth agency or official ought not to agree to:

- refrain from exercising statutory powers or
- exercise statutory powers in a particular way in the future,

if to do so would be incompatible with the legislature's intended purpose in conferring those powers—that they be exercised at the appropriate time in the public interest and having regard to particular factors (see *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia* (1977) 139 CLR 54, particularly at 74–77). This area of the law is replete with complex distinctions (such as between so-called 'policy' or 'planning' decisions, which involve exercising statutory discretions, and ordinary 'operational' decisions, which involve implementing policy or planning decisions).⁷ For present purposes, it suffices to note that a great many disputes can be settled through mediation without impermissibly fettering the future exercise of statutory powers.

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Financial Management and Accountability Act and Regulations

The FMA Act and Regulations are important to bear in mind, as they apply to settlements of legal claims involving a monetary payment by the Commonwealth. Commonwealth agencies which generally depend on parliamentary appropriations for their operational expenditure are accountable under the internal regulatory regime established by the FMA Act.

The FMA Act regulates the exercise of powers by chief executives of agencies regarding the spending of public moneys. Chief executives usually devolve these powers by delegation or authorisation to specified

senior officers in the agency. This should generally facilitate matters of smaller dimension being resolved with relative expedition, including disputes which are the subject of ADR. The Chief Executive Instructions of each agency provide guidance to the particular agency on the application of aspects of the FMA Act framework. These instructions often cover topics such as 'Approving and authorising proposals to spend public money', 'Procurement of property and services' and 'Contract management and variations'. Only a person who is designated as an 'approver' of the spending of public money under the FMA Act framework can approve spending which is to be made under a contract.

The FMA Regulations may be important when the Commonwealth seeks to resolve some disputes through ADR. Regulation 13 provides that a contract, agreement or arrangement under which public money is payable must not be entered into unless approved under Regulation 9, and, if necessary, Regulation 10. Regulation 10 provides that, if a spending proposal involves expenditure for which an appropriation of money is not authorised by an existing or a proposed law, the Minister for Finance and Deregulation must give written authorisation for the approval. The Finance Minister has delegated the power to give this authorisation in certain circumstances to the chief executives of FMA Act agencies.⁸ Before entering into a contract, agreement or arrangement under which public money is or may become payable, an approver must be satisfied that the proposed expenditure includes any expenditure that would occur if contingent liabilities under the contract crystallise. For example, this would be important in cases where any settlement proposal involved the Commonwealth giving an indemnity.⁹

In regard to those Commonwealth authorities and corporations whose governance and financial accountabilities do not fall under the FMA Act but instead the *Commonwealth Authorities and Companies Act 1997* (CAC Act), the position may not be so closely regulated. However, in the case of an authority, the legislation under which the authority is established and operates, any relevant direction of the governing board of the authority or its responsible Minister, as well as any policies applying to the authority under the CAC Act, will be relevant to resolving disputes through ADR. In the case of a Commonwealth company, the *Corporations Act 2001*, as well as any applicable policies under the CAC Act, may also be relevant.

Legal Services Directions 2005

The LSDs are a particularly important factor for all FMA agencies, and nearly all CAC Act agencies, to bear in mind when handling disputed legal claims.

First, all claims (not just monetary claims) are to be handled and litigation is to be conducted by agencies in accordance with the model litigant directions contained in Appendix B. The directions in Appendix B include specific requirements concerning ADR.

Secondly, the LSDs require that all monetary claims (other than those governed by a legislative or contractual mechanism) are to be handled by FMA agencies in accordance with Appendix C—and the same obligation is imposed on any CAC Act agency which handles claims, or conducts litigation, in the name of or on behalf of the Commonwealth.

Appendix C excludes settlement of clearly spurious claims merely because of the cost of defending the claim and settlements which may be based

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on a figure designed to please both parties but which does not take into account legal principle and practice. The notion of 'legal principle and practice' essentially requires the settlement to reflect a genuine estimate of what the outcome may have been if the dispute was litigated to an outcome in court. Before an FMA agency, or a CAC Act agency acting in the name of or on behalf of the Commonwealth, can settle a dispute, a meaningful prospect of liability must be established.

In his recent speech to a National Alternative Dispute Resolution Advisory Council (NADRAC) Forum,¹⁰ AGS's Chief Counsel Litigation, Tom Howe QC,¹¹ observed in relation to the term 'legal principle and practice' that:

The requirement is really directed to ensuring that spurious claims are not settled. Without descending to an exercise in arithmetic, ... a meaningful prospect of liability could exist, depending on the circumstances, where there is only a 10-20% chance of a court finding in favour of a claimant. Of course, in such cases a settlement should reflect, in a sensible way, the strengths and weaknesses in the respective cases of the parties, as well as the other matters set out in para [2] of Appendix C to the Legal Services Directions.¹²

The LSDs now make very clear that the Commonwealth and its agencies are only to *start* court proceedings if other methods of dispute resolution (for example, ADR or settlement negotiations) have been considered; and the Commonwealth and its agencies must *continue* to consider other methods for resolving a dispute throughout the course of litigation.¹³

Applying alternative dispute resolution in an administrative law setting

ADR outcomes which involve the making of an administrative decision must conform to any administrative law requirements applicable to the decision in question. Administrative decisions usually have to be made according to established legal principles, and must comply with any express or implicit statutory criteria. Often, the considerations which a decision maker is required to take into account will include some aspect of the public interest, going beyond the interests of a single person. However, legal requirements for valid decision making will often leave considerable latitude for settlements on agreed terms.

Where an administrative decision is itself the subject of challenge, and the decision is one which can be varied or revoked and remade, the latitude for a negotiated settlement through ADR may be very wide indeed. AGS *Legal Briefing* No. 67, 'Don't Think Twice – Can Administrative Decision Makers Change Their Mind?' (15 August 2003), looked at legal issues associated with the remaking of administrative decisions.

The *Administrative Appeals Tribunal Act 1975* (the AAT Act) makes specific provision for the resolution of applications for review before the Administrative Appeals Tribunal (the AAT) without the need necessarily to proceed to hearing (AAT Act, s 42C).

Other areas in which alternative dispute resolution could play a role

There are several more specific areas where a Commonwealth agency can pursue a settlement and facilitate mediated outcomes, though there may be constraints on what is attainable or even permissible. We mention

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these examples to indicate the potential for ADR to apply, even in matters which might not, at first blush, seem conducive to ADR.

Penalty proceedings

The first of these areas concerns penalty proceedings. These, essentially, are proceedings to recover pecuniary penalties for breaches of certain statutory prohibitions. The better known penalties concern breaches of certain provisions of the *Customs Act 1901*, the *Excise Act 1901*, the *Trade Practices Act 1974*—specifically in relation to restrictive trade practices proscribed in Part IV of that Act—and the *Workplace Relations Act 1996* and Regulations under that Act.

In some contexts, such as proceedings for a breach of the restrictive trade practices provisions in the Trade Practices Act,¹⁴ the nature of the proceeding is civil, not criminal. The civil standard of proof of ‘on the balance of probabilities’ applies (with more serious allegations requiring stricter satisfaction under that standard, following the well-known ruling of the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336). On the other hand, proceedings for a penalty for breach of the Customs Act or the Excise Act may lead to a conviction for an offence. The criminal standard of proof of ‘beyond reasonable doubt’ applies to such proceedings (noting that, at least in some courts, these cases can be commenced, prosecuted and proceeded with in accordance with the usual practice and procedure applicable in civil cases).¹⁵

It is well accepted that it is open to parties to penalty proceedings to settle upon the level of a pecuniary penalty which they jointly submit should be imposed by a court. In *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1981) 60 FLR 38, the Federal Court was prepared to accept that, in seeking to settle pecuniary penalty cases, courts could consider joint submissions as to agreed facts and appropriate penalties. Justice Sheppard said (at 41):

It is, of course, true that the penalty has been suggested to me by the agreement of the parties. Uninformed of their agreement, I may have selected a different figure, but I am satisfied that it would not have been very different from theirs. There is from time to time, amongst members of the profession and amongst the public, discussion concerning plea bargaining. Sometimes it is suggested that it involves disreputable conduct. It is my opinion that that is so if it at all implicates the Court in private discussions as to what the Court’s attitude will or would be likely to be if a particular course is taken. In this case nothing of that kind has occurred. The parties have made their own agreement and put it to the Court for approval, not knowing what its attitude was likely to be. ... This, of course, is not a criminal case; the liability is civil only. But, even in the most serious criminal cases, it is not unusual for the prosecution to accept a plea to a lesser charge, subject always to the approval of the Court. I have said what I have only to explain that the course which the parties have adopted is both proper and not uncommon, even though perhaps novel in the comparatively new field of trade practices.

Courts take the approach of fixing a penalty in the agreed amount so long as it is within the applicable permissible penalty range given the

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circumstances of the case.¹⁶ In *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, Burchett and Kiefel JJ, in the Full Federal Court, after noting the policy reasons in favour of negotiated resolution of penalty cases, observed (at 291):

The Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.

Comments to the same effect were made recently in the New South Wales Supreme Court by Justice Rothman in *CEO of Customs v Ozzy Tyre & Tube Pty Ltd* [2005] NSWSC 948, at paras [109]–[113].

Prosecutions by the Australian Customs Service

Some major prosecutions by the Australian Customs Service (Customs), albeit involving alleged serious offences, have utilised ADR processes. One example is the decision of the New South Wales Supreme Court in *Australian Customs Service v D'Aquino Bros* [1999] NSWSC 129.¹⁷ In this proceeding, Customs alleged that the first defendant, aided and abetted by the two other defendants, had smuggled alcohol into Australia in breach of provisions of the Customs Act. The presiding judge, Justice David Kirby, said (at para [4]):

It is clear that, were the matter to proceed, it would take a considerable amount of time. Indeed, the parties contemplated taking the evidence of a number of witnesses in Scotland. It was in this context that the Court ordered on 18 November 1998 that the matter proceed to mediation. That mediation proceeded ... over some five days in early February this year. The length of the mediation is itself some indication of the complexity of the issues. However, it was successful, and a Deed of Settlement dated 19 February 1999 was executed by the parties. That Deed has been shown to me in the course of these proceedings.

Under the deed of settlement, the second defendant was to be convicted of a smuggling offence and pay a penalty of just over \$230,000 in certain instalments. The proceedings against one of the two defendants were to be dismissed. The deed contemplated that, should the court refrain from giving its approval, the parties would not seek to implement the balance of the terms. Justice David Kirby made the orders as agreed in the deed of settlement, on the basis that he believed that 'the penalty is appropriate' and was 'within the range of penalties which this Court may impose' (see para [11]).

Agencies should exercise care in considering what may be the appropriate level of an agreed penalty to be submitted to the court. For example, in respect of some Customs offences, minimum penalties are stipulated. In addition, some agencies have developed guidelines regarding the range of factors which they will take into account when determining whether to reach an agreement on penalties.¹⁸

Criminal proceedings

The *Prosecution Policy of the Commonwealth: guidelines for the making of decisions in the prosecution process*¹⁹ (the Prosecution Policy) contains guidelines relating to the use of 'charge-bargaining' in truly criminal cases. Charge-bargaining involves negotiations between the defence and

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the prosecution in relation to the charges with which to proceed. Such negotiations may result in the defendant pleading guilty to fewer than all of the charges they are facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction. The Prosecution Policy states (at para 5.14):

Arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

- (a) a charge-bargaining proposal should not be initiated by the prosecution; and
- (b) such a proposal should not be entertained by the prosecution unless:
 - (i) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;
 - (ii) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
 - (iii) there is evidence to support the charges.

The Prosecution Policy goes on to list the factors relevant to a decision to accept a proposal advanced by the defence (para 5.15). It also notes that in no circumstances should the prosecution entertain a charge-bargaining proposal initiated by the defence if the defendant maintains their innocence with respect to a charge or charges to which the defendant has offered to plead guilty (para 5.16).

Coercive information-gathering processes of courts and authorities

ADR can also play a useful role in resolving disputes arising out of the exercise of the coercive information-gathering processes of courts and statutory authorities. In the case of the processes of the courts, disputes between the parties often arise with respect to the scope of documents sought under a subpoena (an order of the court) or through discovery of documents (a process in civil proceedings under which one party must disclose relevant documents to the other before trial).

Subpoenas are often issued seeking broad categories of documents. Some subpoenas may run the risk of being set aside as oppressive to the recipient.

In the proceedings in the New South Wales Supreme Court in *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 619 (23 June 1999), the plaintiff criticised the defendant, which had issued a subpoena to the New South Wales Police Service, for entering into discussions with the police service about whether it would press the subpoena for production of certain documents in relation to which the police service would invoke public interest immunity privilege. Justice Levine dismissed this complaint, upholding the legitimacy of those discussions. Among other things, he dismissed any need for the plaintiff to be involved in those discussions. His Honour said (at para [518]):

It is quite open to the Police in what I regard as legitimate discussions with the party issuing the subpoena to indicate that in respect of documents caught by the subpoena that those documents would be the subject of *claim* for public interest immunity. In the face of a

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statement to that effect by the Police, it is perfectly open to the party issuing the subpoena to choose not to litigate that claim. That does not amount to the abrogation to the Police by the Police of the function of the Court. I do not understand Mr Woodhouse to have been seeking to assert that the documents 'affected by public interest immunity' were in fact protected as a matter of law by that doctrine. His position was that in the event that the subpoena was called upon a body of the material would be subject to such a claim. The defendant was entitled to elect not to litigate such a claim.

This provides support for the general practice where lawyers acting for the recipient of a subpoena for documents negotiate a position with the lawyers for the party who has caused the subpoena to issue under which the difficulties associated with the scope of the subpoena are resolved. This practice avoids the need to involve the court itself in addressing those difficulties.

As to discovery of documents, there are often questions as to whether discovery of every document relevant to an issue in dispute is necessary. Full discovery can become a protracted and resource-intensive exercise. Agreement between the parties on more limited categories can expedite the discovery process.²⁰

In the course of responding to subpoenas or demands for documents by authorities under coercive powers, or through giving discovery of documents, disputes often arise as to whether particular relevant documents attract legal professional privilege (sometimes referred to as client legal privilege), particularly in long commercial cases. This can involve large volumes of documentation. If the claim to the privilege is challenged, the court would need to rule whether each document concerned attracts the privilege. This could involve the court in a long and exacting decision-making process. The prospect of this can be avoided by appointing a lawyer, independent of the parties, to adjudicate the claims on the basis that the parties agree to be bound by the lawyer's decision.

This type of situation confronted Justice Gyles in *Commissioner of Taxation v de la Vega* [2003] FCA 972 (12 September 2003) where there were claims to legal professional privilege over a large volume of documents that had been obtained under the coercive process of s 263(1) of the *Income Tax Assessment Act 1936*. Justice Gyles said (at para [4]):

Confronted with a difficult practical problem, my first reaction was to give consideration to the exercise of the power of the Court to order arbitration, albeit with consent of the parties, as it appeared to me that there would be the necessity to review, not just matters of principle, but the application of those principles to many documents.

As it turned out in that case, Justice Gyles did not pursue the arbitration option (which would have involved engaging a lawyer independent of the parties) as the parties and the court agreed on an approach under which counsel for the Commissioner of Taxation, upon giving certain undertakings of confidentiality to the Court, was allowed to have access to the documents for the purposes of forming a view on whether the documents in question did attract the privilege. Justice Gyles noted with approval the expedition which adopting this approach gave to disposing of the matter (para [8]).

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The issue of efficiently dealing with claims to legal professional privilege to documents sought by the exercise of coercive powers received consideration by the Australian Law Reform Commission (ALRC) in its very recent report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*.²¹ The ALRC noted support, in submissions it had received, for a dispute resolution process to deal with privilege claims expeditiously, as an alternative to litigation.²² The ALRC recommended that, where a privilege claim was disputed, the federal authority concerned consider offering the privilege claimant the opportunity to agree to an independent review mechanism.²³ The ALRC also recommended the establishment of a model procedure for resolving disputed privilege claims which, among other things, would provide guidance on the manner in which the independent review mechanism could be applied to a claim.²⁴

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Commonwealth initiatives in alternative dispute resolution

In the last 10 to 15 years the Commonwealth has taken a number of initiatives to support and implement ADR. This demonstrates the increasing importance ADR has gained in the community.

The establishment of NADRAC

In October 1995, the then Commonwealth Attorney-General, the Hon. Michael Lavarch MP, established the National Alternative Dispute Resolution Advisory Council (NADRAC). NADRAC had its genesis in the report of the Access to Justice Advisory Committee entitled *Access to justice: an action plan*.²⁵ This committee was chaired by the Hon. Justice Ronald Sackville of the Federal Court of Australia. In its report, the committee said that it saw the need for a national body to advise the government and federal courts and tribunals on ADR issues to develop ADR as a concept in the federal justice system.

NADRAC operates as a non-statutory body within the Attorney-General's Department. It has provided successive Attorneys-General with policy advice on developing of high-quality, economical and efficient ways of resolving or managing disputes without the need for a judicial decision, and on promoting using and raising the profile of ADR. Its role has recently been broadened to promote mediation, arbitration and conciliation as cheaper alternatives to litigation. It is also able to offer advice on the use of ADR in the context of criminal prosecutions.

NADRAC report on legislating for alternative dispute resolution

The Commonwealth has undertaken some important initiatives in developing ADR in recent times. These are summarised in NADRAC's report entitled *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-makers and Legal Drafters* (November 2006) (the NADRAC Report).²⁶ The NADRAC Report identifies the key issues that policy makers need to consider when incorporating ADR processes into new or existing legislation. It then addresses these issues by reviewing relevant statutes and cases and providing a discussion of relevant policy issues. The NADRAC Report also recognises that legislation may not be necessary in every case. It begins by addressing this possibility and discussing alternatives to legislation.

One initiative mentioned in the NADRAC Report is the Strategy Paper of December 2003, referred to above at p 1. The Strategy Paper was prepared by the Attorney-General's Department in consultation with the courts, the legal profession, legal service providers, and other stakeholders. The Strategy Paper promotes facilitating the resolution of disputes at the lowest appropriate level and emphasises the need to settle disputes as fairly, quickly and cheaply as possible. It underlines the importance of assisting self-represented litigants while preventing unmeritorious or misguided litigation from taking up court time. The Strategy Paper focuses on ways of managing federal civil disputes, how litigants interact with the system, and the role of courts and lawyers in the system.

A second initiative mentioned in the NADRAC Report is the emphasis on the use of ADR in the LSDs. As noted above, further emphasis has now been given to ADR through recent revisions of the LSDs.

The NADRAC Report identifies the key issues that policy makers need to consider when incorporating ADR processes into new or existing legislation.

Alternative dispute resolution in some federal courts and tribunals

Federal Court of Australia

The Federal Court of Australia has developed procedures for ADR—or mediation, as the court calls it—which are explained in a very helpful memorandum developed by the court entitled *Mediation*.²⁷ The memorandum states that, once an application form has been filed, a judge may order that the people involved in the case meet in a mediation. Usually, but not always, everyone agrees to this. The mediation is presided over by a mediator, who helps the parties settle their differences through negotiation. All discussions are confidential and 'without prejudice' (that is, evidence as to what a party said in the course of the mediation cannot be used as evidence against that party in court).

The memorandum states that, during the mediation, the parties are the negotiators, and the mediator may help by suggesting possible solutions. The mediator does not discuss the mediation with a judge or any party unless the relevant party agrees to the information being disclosed. At the end of the mediation, all of the mediator's notes are destroyed and the only record that is kept on the Federal Court's file is a note that the mediation took place. If only part of a case is settled at the mediation, the *Federal Court Rules 1979* allow the mediator to report to the court on the agreement reached between the parties.²⁸

As explained in the memorandum, the mediation starts with the mediator explaining the process to the parties. The mediator may ask questions of the parties and their lawyers. This helps to clarify the issues and provides information which has not already been included in the documents filed with the Federal Court. The applicant or their lawyer usually speaks first. The respondent or their lawyer then has an opportunity to speak.

As part of this process, the parties can 'put on the table' various ideas to settle the case. According to the memorandum, many cases settle at the mediation. One of the purposes of mediation is to allow the parties to approach the dispute as a business or commercial problem rather than a legal one. At the mediation, parties are encouraged to speak for themselves rather than depend upon their lawyers. This should help the parties to talk about the issues that are important to them.

The memorandum explains that any case in the Federal Court may be mediated, but cases about business practices, discrimination, shipping, patents, and copyright and designs are more likely to have a mediation.

The Chief Justice of the Federal Court has also recently issued a notice to practitioners entitled *Case management and the Individual Docket System* (5 May 2008).²⁹ The notice observes that it has been 10 years since the individual docket system was introduced into the Federal Court and restates the purposes and principles underpinning the individual docket system. The notice identifies the underlying purposes as being the just resolution of disputes as quickly, inexpensively and efficiently as possible and requires that the parties and their representatives give effect to these purposes in conducting proceedings. The underlying principles which the court will have regard to in the management of a particular case are identified as follows:

- (a) identifying and narrowing the issues in dispute as early as possible
- (b) ascertaining the degree of difficulty or complexity of the issues really in dispute
- (c) setting a trial date early
- (d) minimising unnecessary interlocutory steps by permitting only interlocutory steps that are directed to identifying, narrowing or resolving the issues really in dispute between the parties
- (e) exploring options for assisted dispute resolution as early as is practicable.

The first of these principles is significant in the context of matters involving the Commonwealth which, for reasons including those articulated earlier in this briefing, may not always be capable of complete resolution by way of negotiated settlement. It is also consistent with the Attorney-General's recent comments (extracted above at p 2) to the effect that, even if a matter cannot be settled by ADR, litigants should explore whether the issues in dispute can be significantly narrowed to shorten court proceedings.

Narrowing of issues is also an aim of the recently issued notice to practitioners and litigants (taxation) issued by the Chief Justice entitled *Tax list directory* (4 April 2008)³⁰ and in the *Notice to Practitioners—Directions for the Fast Track List* issued by the Victorian District Registrar.³¹

Administrative Appeals Tribunal

The availability of ADR in the AAT is very important in the Commonwealth context. Special provision has been made in the AAT Act for the purposes of encouraging ADR. Subsection 3(1) of the AAT Act defines 'alternative dispute resolution processes' as including:

- conferencing
- mediation
- neutral evaluation
- case appraisal
- conciliation
- procedures or services specified in the regulations.

Even if a matter cannot be settled by ADR, litigants should explore whether the issues in dispute can be significantly narrowed to shorten court proceedings.

ADR is not confined to the above but does not include arbitration or court procedures or services.

The President of the AAT is authorised to direct that a proceeding, or any part of a proceeding, be referred for a particular ADR process (including conferencing) (AAT Act, s 34A(1)). Parties who are directed to participate in an ADR process must act in good faith (AAT Act, s 34A(5)). Further, the President is authorised to make directions about the procedure to be followed in an ADR process (AAT Act, s 34C). The person who is to conduct an ADR process must be a member or officer of the AAT or a person engaged under s 34H of the AAT Act.

If, in the course of the ADR process, agreement is reached as to the terms of a decision of the AAT that would be acceptable to the parties, the parties must lodge the terms of the agreement with the AAT. If neither party withdraws from the agreement within seven days and the AAT is satisfied that a decision in the terms of the agreement or consistent with those terms would be within the powers of the AAT, the AAT may, if it appears to it to be appropriate to do so, make and give effect to that decision (AAT Act, s 34D).

In the absence of the parties' agreement otherwise, evidence of anything said or done in the course of the ADR process is not admissible:

- (a) in any court
- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence
- (c) in any proceedings before a person authorised by the consent of the parties to hear evidence.³²

The person conducting an ADR process, in the performance of his or her duties as an 'alternative dispute resolution practitioner', has the same protection and immunity as a Justice of the High Court (AAT Act, s 60(1A)). ('Alternative dispute resolution practitioner' is defined as a person who conducts an alternative dispute resolution process under Div 3 of Part IV (AAT Act, s 60(1A).)

In addition, the AAT has developed *Alternative Dispute Resolution (ADR) Guidelines*, issued in June 2006.³³ Under these guidelines, most referrals to an ADR process will be made by the member or conference registrar after consultation with the parties at the first conference. When deciding if an ADR process will assist in the resolution of the application, the member or conference registrar must consider:

- the capacity of the parties to participate effectively
- whether the parties are represented
- the context of the application, including the history of past applications by the applicant
- any identified need for urgency
- the number of parties involved in the application
- the complexity of the issues in dispute
- the bona fides of the parties
- cultural factors
- the safety of the parties

- the likelihood of an agreed outcome or reduced issues in dispute
- the relative cost to the parties of an ADR process and a determination
- case management requirements of the AAT
- whether an ADR process might offer a more flexible solution than a determination.

Recently, the President of the AAT, the Hon. Justice Garry Downes AM, in an extra-curial address, said of ADR in the AAT:

[T]he Tribunal's case management strategy is to encourage the parties to settle an application where possible. The parties may lodge terms of agreement as to the outcome in the application at any stage during the review process. Where terms of agreement are lodged, the Tribunal can issue a decision that is consistent with the terms of the agreement provided that the following conditions are met:

- the decision would be within the powers of the Tribunal; and
- the Tribunal considers that it is appropriate to make a decision in those terms: s 34D and 42C of the AAT Act.

The Tribunal may decline to give effect to terms of agreement if there is doubt as to the correctness of the decision requested by the parties.³⁴

In a recent article in the *Australian Journal of Administrative Law*, the President of the AAT said:³⁵

... it is important to remember that ADR processes can be used for a range of purposes. While the primary goal may be to attempt to reach an agreed outcome in a matter, ADR processes can also help to clarify and narrow the issues that are in dispute between the parties. Settling a matter in its entirety is not the only possible outcome of an ADR process.

Supreme Courts of the states and territories

Some of the Supreme Courts of the states and territories have gone further than others in making structural provision for ADR. For example, the New South Wales parliament has already made important provision for the use of ADR across a broad front. Part 4 of the *Civil Procedure Act 2005* (NSW) provides for mediation in the Supreme Court as well as subordinate civil jurisdictions. If the court in question considers the circumstances appropriate, it may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned (Civil Procedure Act, s 26(1)).

There are two types of mediation: court-annexed mediation and private mediation. The parties can use either type. Court-annexed mediation involves a registrar or other officer of the court as the mediator. In private mediation, the mediator is a person engaged directly by the parties to mediate the dispute. It is not necessary that a private mediator be a lawyer, but it is desirable that the person be qualified as a mediator (Civil Procedure Act, s 26(2)). These mediations are conducted in circumstances of confidentiality (Civil Procedure Act, s 31).

The court in question ... may ... refer any proceedings before it ... for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned (Civil Procedure Act 2005 (NSW), s 26(1)).

Supreme Court of New South Wales

The Supreme Court of New South Wales, in the context of Part 4 of the Civil Procedure Act, has issued Practice Note SC Gen 6 entitled *Mediation* (17 August 2005) (the Practice Note). The Practice Note applies to proceedings in the Court of Appeal, the Common Law Division (civil cases only) and the Equity Division. Its purpose is to explain the court's mediation procedures and its expectations of parties in proceedings that have been referred to mediation (Practice Note, para 4).

Where proceedings are referred to mediation under s 26 of the Civil Procedure Act, the court's order should provide for one of the following:

- If the parties agree on a mediator or if the court appoints a specific mediator (for example, where specific expertise is considered desirable), an order should be made that the proceedings be referred to that mediator.
- If the court appoints a registrar or other officer as the mediator, the order should be that the proceedings be referred to that person for mediation.
- Otherwise, the order should be that, if the parties cannot agree on a mediator within a specified time (say 14 days) after the referral under s 26 of the Civil Procedure Act, the joint protocol described in the Practice Note will then apply and the mediator will be the person appointed under the joint protocol (Practice Note, para 18).

Under this joint protocol, where the court's order requires a mediator to be appointed under the protocol, the plaintiff sends to the principal registrar a copy of the pleadings, or a copy of the summons if there are no pleadings, and informs the principal registrar of the relevant information needed to commence the mediation process. The plaintiff gives the principal registrar this information by letter within seven days of the court's order, and at the same time gives each other party a copy (Practice Note, para 19).

Within 14 days after the conclusion of the mediation, the plaintiff in writing informs the principal registrar of, among other things:

- the duration of the mediation
- whether the parties were represented at the mediation by solicitors or counsel
- whether the parties agreed to settle or partly settle the proceedings, or whether the parties resolved any issues
- the terms of settlement (to the extent that any terms of settlement are not confidential to the parties)
- if the parties agreed to the court making orders, a signed consent order in a form suitable for entry by the registry (Practice Note, para 34).

It is important to note that Part 4 of the Civil Procedure Act does not prevent:

- the parties to proceedings from agreeing to and arranging for mediation of any matter otherwise than as referred to in Part 4
- a matter arising in proceedings from being dealt with under the provisions of the *Community Justice Centres Act 1983* (NSW) (Civil Procedure Act, s 34).

Supreme Court of Victoria

The Supreme Court of Victoria may at any stage of a proceeding (with or without the consent of the parties) order a proceeding to mediation (*Supreme Court (General Civil Procedure) Rules 2005* (Vic), Order 50.07). Also, at any time, the parties can ask the court to refer them to a mediator. The mediator can be appointed by the court or agreed upon by the parties. Among other things, the mediator can be ordered to report to the court whether the mediation is finished. If the mediation leads to a settlement, the parties can make a written agreement to this effect and apply to the court to have orders made to finalise their case.³⁶

Supreme Court of the Australian Capital Territory

The Australian Capital Territory first addressed the issue of ADR in 1997 with the enactment of the *Mediation Act 1997* (ACT). The Mediation Act provided for the registration of mediators and conferred upon them protections from liability exposure. Some further developments have taken place. As things stand, Div 2.11.7 of the *Court Procedures Rules 2006* (ACT), applying generally to the ACT Supreme Court and the ACT Magistrates Court, provides for mediation and so-called 'neutral evaluation'. 'Mediation' is defined as a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute (Court Procedures Rules, Rule 1176(1)). 'Neutral evaluation', on the other hand, is defined as a process of evaluation of a dispute in which the evaluator seeks to identify and reduce the issues of fact and law that are in dispute (Court Procedures Rules, Rule 1176(3)).

A mediation is conducted by a mediator registered under the Mediation Act. On the other hand, an evaluation is conducted by an evaluator. An evaluator will be either:

- the registrar of the court, or
- someone else that the court considers has the skills and qualifications to be an evaluator and appoints as an evaluator (Court Procedures Rules, Rule 1178(1)).

The court may, by order, of its own motion on application from a party, refer a proceeding, or any part of a proceeding, for mediation or neutral evaluation (Court Procedures Rules, Rule 1179). Each party to a proceeding or part of a proceeding referred for mediation or neutral evaluation has a duty to take part, genuinely and constructively, in the mediation or neutral evaluation (Court Procedures Rules, Rule 1180). The court may make orders to give effect to an agreement or arrangement between the parties arising out of a mediation session or neutral evaluation (Court Procedures Rules, Rule 1181(1)).

The court may, by order, of its own motion on application from a party, refer a proceeding, or any part of a proceeding, for mediation or neutral evaluation (Court Procedures Rules 2006 (ACT), Rule 1179).

Other Supreme Courts

It is generally fair to say that the other Supreme Courts have less formalised arrangements for ADR. In the Supreme Court of Queensland, ADR takes two forms: first, a trained mediator assists the parties to come to a negotiated agreement; and, second, an independent person called a 'case appraiser' considers the merits of a case and estimates what decision a court might make. Approved mediators and case appraisers are professionals approved by the Supreme Court.³⁷

The Supreme Court of Western Australia has developed a process for mediation where, in the absence of the parties agreeing on an external mediator, the mediator will be a registrar of the court trained in mediation.³⁸

Conclusion

Increasingly, courts and tribunals expect lawyers and parties to routinely consider ADR as a means to achieve an agreed outcome or, in the absence of a complete settlement, to narrow the issues in dispute, thereby reducing costs and delays of litigation. Recent remarks and reforms by the Attorney-General have emphasised the importance of ADR in ensuring an affordable and efficient justice system.

In this context, it is important that Commonwealth agencies are aware of all the factors relevant to the application of ADR at the Commonwealth level, as well as some of the less obvious applications. When these factors are fully understood and taken into account there can be realistic expectations of, and confidence in, ADR as an effective way of dealing with disputes involving the Commonwealth and its agencies.

It is important that Commonwealth agencies are aware of all the factors relevant to the application of ADR at the Commonwealth level, as well as some of the less obvious applications.

Tom Howe QC is one of AGS's most senior litigation practitioners. He has 22 years experience providing general legal advice and assistance on all issues relating to public law matters. He was recently appointed by the Attorney-General, The Hon. Robert McClelland, as one of four new members of the National Alternative Dispute Resolution Advisory Council (NADRAC).

Simon Daley is AGS's Special Counsel Litigation and the National Practice Leader of AGS's Litigation and Dispute Management Practice Group. He has over 20 years experience in government practice and has worked in all areas of public law, with a particular focus on regulation, law enforcement, revenue, and assisting with the conduct of inquiries.

Notes

- 1 National Research Priorities: Submission by National Alternative Dispute Resolution Advisory Council (NADRAC), 2002.
- 2 See Preface, p vi; more generally, see pp 128-138. The Strategy Paper can be found at <http://www.ag.gov.au/publications>
- 3 17 June 2008, Melbourne.
- 4 Effective from 1 March 2006, as amended by the Legal Services Amendment Directions 2006 (No. 1) effective from 3 April 2006; issued by the Attorney-General under s 55ZF of the *Judiciary Act 1903*.
- 5 *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 9; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 185 ff; *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396.
- 6 For example, the Federal Court has ruled that the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA Act) constitutes a comprehensive code of entitlements not amenable to displacement by agreements between the employee and the employing agency (see *Behan v Australian Telecommunications Corporation* (1990) 26 FCR 337, particularly at 346). Nevertheless, the power given to Comcare (and other relevant authorities under the SRCA Act) to undertake 'own motion' reconsiderations of decisions leaves considerable scope for exploring and implementing agreed outcomes.
- 7 *Minister for Immigration, Local Government & Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 116.
- 8 See Financial Management and Accountability (Finance Minister to Chief Executives) Delegation 2007 (effective from 1 July 2007) covering delegations from the Finance Minister to all Chief Executives, except for delegations from the Finance Minister to the Finance Chief Executive. Delegations to the Finance Chief Executive are contained in the Financial Management and Accountability (Finance Minister to Finance Chief Executive) Delegation 2007 (also effective from 1 July 2007). The position on delegations under Regulation 10 is explained further in Finance Circular 2007/01: *FMA Regulation 10*.
- 9 There would also be a need here to meet the requirements of Finance Circular 2003/02: *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*.
- 10 4 June 2008.
- 11 Tom Howe QC was recently appointed to NADRAC.
- 12 Tom Howe QC, 'Why isn't there more alternative dispute resolution by Commonwealth departments and agencies?', *ADR in Government Forum 2008*, jointly convened by the National Alternative Dispute Resolution Advisory Council and the Office of Legal Services Coordination, 4 June 2008, available at http://www.ags.gov.au/publications/agspubs/presentations/Tom_Howe_ADR_July_2008.pdf
- 13 See paras 4.2 and 12 of the LSDs; and paras 2(a), (aa), (b), (d), (e)(iii), (e)(iv), and 5.1 and 5.2 of Appendix B of the LSDs.
- 14 See Part IV.
- 15 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.
- 16 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Comptroller-General of Customs v Kingswood Distillery Pty Ltd* [1997] BC9708056 (unreported, WASC, Sperling J, 5 December 1997). See also *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41-993; and *Australian Competition and Consumer Commission v Navman Australia Pty Ltd* [2007] FCA 2061.
- 17 See also the decisions in *Comptroller-General of Customs v Kingswood Distillery Pty Ltd* [1997] BC9708056 (unreported, WASC, Sperling J, 5 December 1997) and *Comptroller-General of Customs v Kingswood Distillery Pty Ltd* (unreported, NSWSC, Sully J, 11 February 1997).
- 18 See, for example, the ACCC's Co-operation Policy for Enforcement Matters.
- 19 Issued by the Office of the Commonwealth Director of Public Prosecutions. Available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>

- 20 For an insight into some of these difficulties and a consideration of how they might be overcome, see *BHP Billiton Petroleum (Bass Strait) Pty Ltd v Esso Australia Resources Pty Ltd* [2007] VSC 281 (7 August 2007), particularly paras [12] and [40]–[44]. See also the comments in *Garms v Telstra Corp Ltd* [1998] VSC 40 (21 August 1998) at para [16].
- 21 ALRC Report 107 (January 2008).
- 22 ALRC Report 107, at para 8.262.
- 23 ALRC Report 107, Recommendation 8-11, see p 456.
- 24 ALRC Report 107, Recommendations 8-13 and 8-14, see pp 457-460.
- 25 AGPS, Canberra, 1994.
- 26 The NADRAC Report can be found at <http://www.nadrac.gov.au> on the Publications page.
- 27 The memorandum can be found at www.fedcourt.gov.au/litigants/mediation
- 28 Native title cases provide an interesting example of mediation in the Federal Court. Once proceedings are filed, they may be referred to the Native Title Tribunal for mediation by a Tribunal member. If the mediation is not resolved within 3 months, the parties may request the application be returned to the court. The court may then refer the matter for mediation, usually by a registrar who will seek to help the parties to reach an agreement or to clarify the issues that are really in dispute: see Introduction to native title issued by the Federal Court.
- 29 See www.fedcourt.gov.au/how/practicenotes_nato3.html
- 30 See para 5.4(a).
- 31 See para 6.5.
- 32 AAT Act, s 34E.
- 33 See the Alternative Dispute Resolution page on the AAT's website, <http://www.aat.gov.au/docs/ADR/ADRGuidelines.pdf>
- 34 'Case Management in the Administrative Appeals Tribunal', *Thailand–Australia Mature Administrative Law Program Visit to Australia by Professor Dr Ackaratorn Chularat President of the Supreme Administrative Court of Thailand and Other Judges and Court Officials*, Sydney, February 2007, p 12.
- 35 Downes, the Hon. Justice Garry AM, 'Alternative dispute resolution at the AAT' (2008) 15 AJ Admin L 137.
- 36 See the instruction *Mediation in the Supreme Court*, <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Support+Services/Mediation/SUPREME++Mediation++Home>
- 37 See Queensland Courts, Practice and Procedure, <http://www.courts.qld.gov.au/2683.htm>
- 38 See <http://www.supremecourt.wa.gov.au/content/faq/mediation.aspx>

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