The Chief Justice
New South Wales

18 June 2014

Mr Joseph Waugh PSM
Senior Law Reform officer
NSW Law Reform Commission

Joseph_Waugh@agd.nsw.gov.au

Dear Mr Waugh

Dispute Resolution – Review of Statutory Provisions

Thank you for the opportunity of providing submissions on this matter. I attach a memorandum prepared by Justice Ward of this Court in consultation with the other judicial members of the Court's Alternative Dispute Resolution Committee.

I support the views expressed in that memorandum.

Yours sincerely

T F Bathurst
Chief Justice

The Honourable T F Bathurst
[redacted]

GPO Box 3, Sydney NSW 2001, Australia
DX 829 Sydney
[redacted]
Website: www.lawlink.nsw.gov.au/sc

Supreme Court
New South Wales
Court of Appeal

To: Chief Justice

From: Justice Ward

Date: 4 June 2014

Subject: New South Wales Law Reform Commission Consultation Paper 16

MEMORANDUM

You have asked for comments in relation to the consultation paper issued by the New South Wales Law Reform Commission on dispute resolution frameworks in New South Wales. I have reviewed the paper and have liaised with other judicial members of the ADR committee and the following reflects our general views.

In general terms the consultation paper summarises the processes for alternative dispute resolution across the various statutory provisions which presently deal with the submission of disputes (whether on a mandatory or voluntary basis) to alternative dispute resolution and poses a number of questions.

Of most relevance for the Court in our opinion are the questions dealing with the following issues:

(i) mandatory versus voluntary ADR processes (Q. 4.7 – 4.8)

(ii) should there be a statutory obligation to participate in good faith at mediation (Q. 4.9)

(iii) should there be sanctions on failure to participate (Q 4.10)

(iv) practice and accreditation standards (Q 8.2 – 8.3)

(v) statutory regulation of ADR practice standards (Q. 9.2)

As a general comment, the position that was taken when there was consultation by the AG's department as to the then proposed framework for the delivery of alternative dispute resolution scenarios, which led to the now defunct pre-litigation protocols, was that in general there was not a need for the introduction of mandatory ADR processes in the case management of

disputes in this Court, in circumstances where the *Civil Procedure Act* and *Uniform Civil Procedure Rules* already make provision for the practitioners to facilitate the just, quick and cheap disposal of disputes in the Court. It was noted that the Court had on its own initiative put in place procedures for non-consensual mediation by way of mandatory pre-hearing mediations in the context of family provision disputes. It was at that stage proposed that there would be a programme put in place in other areas (such as the possession and defamation lists) to encourage pre-hearing mediation, although that may not yet have been implemented. You may or may not wish to make reference to this in any response to the consultation paper.

Turning to the particular questions on which you may wish to provide a response, we comment as follows:

Question 4.7

- *[1] In what circumstances should a provision require parties to participate in or attend ADR processes?*

- *[2] How should such compulsory provisions be expressed?*

Question 4.8

- *[1] In what circumstances should a provision give the parties a choice to participate in ADR processes?*

- *[2] How should such a provision be expressed?*

The paper notes that opinion is divided as to whether ADR processes should be compulsory or voluntary.

In principle, the Court would not have an opinion as to whether parties should be required to participate in or attend ADR processes in the context of particular disputes (such as, for example, the farm debt mediation provisions). That would be a matter for the legislature. However, it would be appropriate to point out that mandatory ADR processes will not necessarily be suitable for all disputes (criminal and some administrative disputes being obvious examples, as well as urgent applications for interlocutory relief) and therefore to sound a note of caution if what is contemplated are uniform mandatory ADR provisions.

Similarly, it is unlikely to be necessary for there to be mandatory ADR processes applicable for large commercial disputes where there are sophisticated parties usually represented by experienced legal representatives, who may be expected to be aware of the availability of ADR processes and to have the ability to reach an informed view as to whether those processes may assist in the timely resolution of their disputes.

As to ADR processes in the context of appellate disputes, the Court's pilot programme in this area a few years ago did not produce a large response

from litigants. There are differing views in the profession as to the usefulness of mandatory ADR processes at the appellate level. While there has been some success in Canada in judge-led mediations of disputes at the appellate level, this cannot be directly translated into the New South Wales context where judges do not (and should not) be involved in ADR processes of this kind.

One factor in determining whether mandatory ADR processes should apply to small disputes is the need to maintain access to justice for parties who may have limited resources. Experience of matters involving family disputes (such as disputes involving small estates) suggests that the parties' emotional involvement in the disputes is a factor that in some cases may inhibit the effectiveness of ADR processes and hence the size of the matter in issue is not necessarily a useful guide as to when ADR processes should be mandatory.

Section 26(1) of the *Civil Procedure Act* gives the Court a discretion to refer a proceeding or parts of proceedings for mediation, with or without the consent of the parties. Given that there are already provisions in the *Civil Procedure Act* and *Uniform Civil Procedure Rules* to facilitate the timely and cost-effective resolution of disputes, it is not considered that further legislative provision is required at that level.

If ADR processes are to be mandatory in particular contexts, then a requirement that each party (and, if a corporation or partnership, someone with knowledge of the circumstances of the dispute) should attend the mediation and should have the necessary authority to settle the dispute. Attendance of legal representatives should not, as a general matter, be precluded, in order to assist the parties in the resolution of the disputes.

Where there is provision for mandatory ADR processes, the time at or by which the parties are required to participate in the processes should be specified. It is important that parties engaging in ADR processes do so with the benefit of a clear understanding of the strengths and weaknesses of their legal position. Hence a requirement for ADR processes to be undertaken at an early stage of disputes may be counterproductive. It is obviously important also to consider the proportionality of costs in determining the timing of the ADR process.

Essentially, the concept of ADR processes is not to force parties against their will to settle proceedings or not rely upon legal rights. It is to require or encourage parties to assess strength and weaknesses of their claims made against them and to adopt a commercial or sensible or practical approach to achieving a reasonable compromise having regard, among other things, to the costs of the litigation process that will ensue if a consensual agreement cannot be reached.

As to the various ADR processes, the most common alternative to contested litigation (leaving aside contested commercial arbitrations, which to a large extent mirror the processes of curial litigation) is that of mediation. Other processes, such as non-binding expert determination or neutral

evaluation have had less attraction in the legal profession and have not in the past proved as successful in promoting the resolution of disputes.

Our suggestion would be that the Court offer no comment as to whether disputes arising in particular contexts should be subject to a statutory requirement that the parties to participate or attend the ADR processes, save to observe that if there is to be a provision of this kind then it would be preferable to make clear the time at which such a process is required to be undertaken and that each party be required to attend (and be permitted legal representation) with authority to settle the relevant dispute.

Question 4.9

- *[1] in what circumstances should a provision require parties to participate in ADR in good faith?*

- *[2] How should such provisions be expressed?*

The requirement that parties participate in ADR in good faith is one for which there is already provision under s 27 of the Civil Procedure Act. It is commonly an obligation imposed on the parties to private mediation agreements. In the context of private mediation agreements the obligation is generally framed simply as a requirement that the parties act in good faith during the mediation. Although reference is made in the consultation paper to one instance where the obligation to participate in good faith lies only on one party (Racing NSW), in general it seems preferable that all parties have the same obligation.

Our suggestion would be that the Court respond that an obligation to participate in good faith is what it would be reasonable to expect of parties to ADR processes.

Question 4.10

- *[1] In what circumstances should a provision deal with the consequences of a party's failure to participate in ADR?*

- *[2] How should such provisions be expressed?*

The consultation paper gives examples of particular context in which there are specific consequences if a party fails to participate in ADR processes. From the Court's point of view, the spectre of satellite litigation should be avoided to the extent possible. One way of doing this is that where mandatory ADR processes are to be imposed, they operate as a gateway for curial determination of the disputes (either by precluding proceedings being commenced unless the parties have first sought to resolve the matter by an ADR process, such as the Residential Tenancies legislation, or by precluding a matter being listed for hearing before such a process has been attempted, as is the effect of the family provision processes).

The suggestion that failure to attend may give rise to a monetary penalty is unlikely to be appropriate across the whole range of disputes that might otherwise be suitable for ADR processes. The possibility of costs sanctions may be appropriate in some contexts (such as where the failure amounts to unsatisfactory or professional misconduct under the *Legal Profession Act*) but again is unlikely to be suitable across the whole range of civil disputes due to the spectre it will raise of satellite litigation. There have been a number of cases in which lawyer or party conduct was relevant and where costs sanctions have been imposed. However, it is undesirable for the underlying rationale of ADR processes to be subverted by opening the way to judicial review of the parties' conduct in those processes in general.

In passing, it is noted that paragraph 5.24 of the report refers to the provisions Uniform Civil Procedure Rules in relation to adoption, variation, rejection or the like in respect of referee reports, in the context of the other impacts of agreements or outcomes of ADR. The process of referral to a referee under the rules would not ordinarily be considered an ADR process as such. Query whether such a comment should be made in response to the suggestion to the contrary that seems to emerge from the consultation paper.

Question 8.2

- *[1] In what circumstances should provisions apply practice and accreditation standards to ADR practitioners?*
- *[2] How should such provisions be framed?*
- *[3] What alternatives are there for dealing with practice and accreditation standards?*

In NSW, mediators who are accredited by Recognised Mediator Accreditation Bodies (RMABs) under the National Mediator Accreditation System (NMAS) are required to comply with the NMAS Approval Standards and Practice Standards. Various additional guidelines and rules exist, such as the Law Society of NSW Guidelines for Legal Practitioners who act as Mediators (there is reference to these at Chapter 9 of the Consultation Paper).

The Commission suggests that one approach would be to refer to the NMAS standards in legislation or to require that ADR practitioners be accredited under NMAS. As to accreditation standards, this is an area of some sensitivity (and dispute) at present and our suggestion would be that the Court not comment on accreditation standards or procedures as such.

As to particular practice standards, s 31 of the *Civil Procedure Act* sets out the confidentiality requirements with which mediators must comply. The Act does not set out any other applicable practice standards.

The Commission's paper suggests the possibility of incorporating more practice standards, such as independence and impartiality requirements, and/or a duty to manage power imbalances (see paragraph 8.5). A requirement of independence

and impartiality by those acting as ADR practitioners is in principle something that the Court would not suggest was inappropriate. However, query whether this might best be framed as a duty of disclosure by the ADR practitioner of matters that might give rise to a conflict of interest, of the kind commonly contained in private mediation agreements. This would permit the parties to retain an ADR practitioner to assist in the resolution of their dispute even though the ADR practitioner might have had some association with one or other of the parties, provided it was disclosed. If parties wish to choose a private mediator, then assessment of that party's independence or impartiality is ultimately a matter between the parties.

Insofar as it is suggested in the consultation paper that one approach might be to impose as a practice standard a requirement of ADR practitioners to identify and manage power imbalances, again the concern is that this will lead to satellite litigation. It is not clear how such a power imbalance would be defined; nor how it is considered it should be addressed.

Question 8.3

- *[1] In what circumstances should provisions enforce ADR practice standards?*
- *[2] How should such provisions be framed?*
- *[3] What alternatives are there for enforcing practice standards?*

The Commission considers that it is particularly important to ensure high practice standards when ADR is used as an alternative to litigation in courts and tribunals (see paragraph 8.8). To the extent that reference has been made in the consultation paper to matters impacting on the quality of mediation (T Sourdin, '*Poor Quality Mediation - A system failure*' (2010) 11 (8) ADR Bulletin 1), you may wish to note that the Court's experience of litigant satisfaction with the court-annexed mediation process is that it is consistently positive.

The Court has in place a process whereby its court annexed mediators are approved after consideration of their accreditation and experience. Section 26(2) of the Act states that where the Court refers parties to mediation, the mediator may (but need not be) a 'listed mediator'. Practice Note No. SC Gen 6 includes a list of nominating entities that accredit mediators. These entities establish panels of 'suitable persons' who are nominated to the Court for use in court ordered mediation.

It is noted that the *Civil Procedure Act* does not include provisions designed to enforce practice standards such as, for example, a formal complaints mechanism. Disputes arising from mediation, for example, would fall to be dealt with in the ordinary course. Court appointed mediators have the same immunity from liability as judicial officers. Any suggestion that such immunity should be

relaxed is not acceptable if the Court is to continue to offer a court annexed mediation process.

It is noted by the Commission that NMAS Approval Standards require RMABs to have complaints systems that meet industry benchmarks (paragraph 8.12).

Question 9.2

- *[1] What role should Acts and Regulations play in regulating ADR?*
- *[2] In what circumstances would provisions in Acts and Regulations be appropriate for regulating ADR?*
- *[3] What provisions that regulate ADR in current Acts and Regulations are inappropriate?*

As to the role of statutes or regulations should play in regulating ADR, and the appropriateness or otherwise of current regulation, these are ultimately matters for comment by the legislature and the profession. Our suggestion would be that the Court would not comment on these questions. It is not apparent, at the Court level, that particular ADR provisions have had such an operation as to warrant comment on the inappropriateness of such provisions.

As a general matter, it can be noted that there is already a legislative framework in place under which legal practitioners are obliged to inform clients about reasonably available ADR options (r 17A of the New South Wales Barrister's Rules; r 23.A.17A of the New South Wales Solicitor's Rules). Therefore the availability of ADR processes is already required to be brought to the attention of clients. Furthermore, ADR courses have become part of the curricula at a number of law schools.

General

In the calendar year 2013, a total of 1088 case referrals to mediation were recorded, being cases that had either a referral order or timetable that included mediation but without a referral order. This encompasses both the Court's mediation services as well as referrals to private mediators.

Of the 1088, there were 464 family provision cases (where mediation is a necessary precursor to obtaining a hearing date). Of the remaining 624, that were not "mandatory" in that sense: only one was recorded as having been referred not by consent; 621 were recorded as being referred by consent', and in 2 it was unknown whether the referral was by consent or not.

As to settlement rates for court-annexed mediation, where that is evidenced from consent orders or heads of agreement are signed at the close of the mediation session, in 2013 there were 654 mediations of which a 55% settlement rate was

achieved with a further 22% of cases noted as still in negotiation. Anecdotally, at least in the family provision context, about 50% of the cases noted as “still negotiating” settle a short time after the conclusion of the court-annexed mediation and before a hearing date is given.

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