THE DISPUTE GROUP

RESPONSE TO THE LAW REFORM COMMISSION

ADR REFERENCE

Consultation Paper 16 "Dispute Resolution: Frameworks in NSW"

1 July 2014

BACKGROUND – THE DISPUTE GROUP

The Dispute Group is Australia's fist top-tier independent Dispute Resolution group. It's Members, through collaboration and peer review, seek to inform best practice in the field of ADR. They are:

Alan Limbury, who established the first ADR practice group in an Australian law firm in 1987. A founder and former Chairman of LEADR and of the Law Council of Australia's Standing Committee on Dispute Resolution.

Angela Bowne SC, has been a mediator since 1992, contributes chapters on ADR in LexisNexis Intellectual Property Precedents and is the Chair of the NSW Bar Association Alternative Dispute Resolution Committee.

Harold Werksman, a founding director of LEADR and inaugural member of the Alternative Dispute Resolution Committee of the Law Society of New South Wales.

Jeremy Gormly SC, was the Chairman of National Alternative Dispute Resolution Advisory Council (NADRAC) from 2011-13. It advised the Federal Government on Dispute Resolution.

Max Kimber SC, a leader in industrial and workplace disputes and mentor of new mediators.

Dr Rosemary Howell, delivers ADR services to a diverse range of business and government clients and is the architect of the Masters of Dispute Resolution program at UNSW. Inaugural LEADR Award for 'Significant Contribution to ADR' (2013).

William Joseph Nicholls, LLB (Hons) UNSW, Executive Director, The Dispute Group and Sessional Lecturer 'Resolving Civil Disputes' Faculty of Law UNSW.

The views expressed in this Submission are those of the TDG. They do not necessarily reflect the view of any organisation which individual TDG members represent or are involved with in another capacity.

SUBMISSION

1. The Dispute Group (**TDG**) submits, for the reasons advanced below, that there is no need for "a consistent model or models for dispute resolution in statutory contexts", as contemplated in the Terms of Reference of the "Dispute Resolution: Frameworks in New South Wales", Consultation Paper issued in April 2014 (**the Paper**).

2. Accordingly, it will not be "appropriate" for the Commission to recommend the introduction of a uniform model or models for dispute resolution to be utilised either in the context of court ordered dispute resolution or in alternative dispute resolution more generally, as foreshadowed in the Paper at paragraph 1.23.

3. Nevertheless, TDG submits that legislative intervention is warranted in the respects detailed in paragraph 16 below.

4. It is now generally accepted that the goal of "just, quick and cheap resolution of disputes" is enhanced by the use of mediation and other forms of dispute resolution. Inevitably, that goal will be undermined if ADR processes become the subject of comprehensive and detailed uniform legislative (or other) provisions – as they will rob the parties to such processes of flexibility ie the capacity to move towards resolution in the manner and at the speed that they regard as most suitable for the resolution of their own disputes.

5. In other words, the more rules that are created to regulate ADR processes, the harder it will be to break down the "argument culture" that still permeates and drives the adversarial nature of the justice system: see King, Fryberg, Batagol and Hyams "Non Adversarial Justice", the Federation Press (2009) at pg 4.9.

6. The Paper helpfully identifies the vast array of legislation wherein the ADR processes are found, but then seems to proceed on the basis that:
    (a) such differences were not deliberately enshrined in that legislation and are problematic; and that
    (b) uniformity, or at least a greater level of uniformity than currently exists, would/will be beneficial, even in the absence of persuasive evidence that such differences have caused real problems for the participants involved in such ADR process.

7. TDG is strongly of the view that in the absence of such evidence it would be better to "leave well enough alone" – especially if the price of uniformity is a loss of control/flexibility in the hands of "the disputants".

8. The Paper quite correctly points out (see para 3.31) that there is a "tension": between the perceived "need" for consistency about ADR processes and the "need to preserve" desirable flexibility in those processes and procedures. TDG is firmly of the view that "flexibility in ADR" should be the central tenet when considering ADR "frameworks", leaving it to the participants in ADR processes to fashion and adopt an ADR process that they believe best suits them in their quest to resolve their dispute(s).

9. TDG contends that there is <u>no reason, let alone a compelling one</u>, to codify ADR processes (and procedures) with a view to achieving "uniformity" especially when the price or cost of such an exercise will be to "strait jacket" the participants in ADR processes rather than leave them with capacity to fashion and move between such processes if and when they desire to do so.

10. TDG is also extremely concerned that any move towards the introduction of highly prescriptive, uniform rules about the operation of ADR processes will inevitability result in the "institutionalisation" of ADR that will place it on the spectrum of dispute

resolution mechanisms at a point much closer to arbitration and litigation, that is neither necessary nor helpful to the overall "health" of ADR processes.

11. Arbitration was, initially, heralded as the quicker, cheaper and more flexible option to litigation. However, in more recent years, it has lost its appeal and utility to many ADR users as it now highly regularised, and institutionalised – it is conducted in an adversarial way and its processes and outcomes are regularly the subject of litigation.

12. Whilst TDG accepts that there is a significant degree of overlap in the definitions currently in use for various ADR processes (especially between evaluative mediation and conciliation and perhaps with neutral evaluation), unless there be compelling evidence that such overlap cause real problems for intending participants in ADR processes, then this is a "lesser of two evils" situation. That is, attempts to define the various ADR processes with such precision so that there is no overlap whatsoever, will not only be difficult but contrary to the desirability of the parties being able to fashion their own ADR process to suit themselves.

13. Ultimately, responsibility for ensuring that the intended participants in an ADR process fully understand "what they are buying" falls on the dispute resolution practitioner in conjunction with the parties or their representatives during the course of preliminary conferences and prior to the signing of any agreement that is to govern the proposed process. (In this context, see, for instance, the Paper at para 3.29).

14. TDG is also firmly of the view that there is certainly no warrant for seeking to match up certain "types" of dispute resolution processes to different "types of dispute" (see Paper at para 3.36). This is because there is no basis for the conclusion that disputes of a particular "type" are always (or even usually) best suited to being dealt with by a particular "type" of dispute resolution process. Indeed, one of our members has experience in neutral evaluation of high value commercial disputes that will never be litigated, (cf the proposition in the Paper at para 3.37). The reason why it is inappropriate to attempt to match types of disputes with types of ADR processes is because the prime determinant is the disposition and character of the parties' decision-makers. If they are reasonable and amenable to resolution, any type of dispute may be resolved by whatever means they choose.

15. TDG submits that there is no need for the legislature to regulate the proper training and accreditation of mediators, for the following reasons:

    (a) since 2008 there has been in place a National Standard for the accreditation of mediators and, even before its introduction, there were and continue to be numerous training and accreditation bodies that train to that and even higher standards, including LEADR, IAMA, ACDC, CIArb Australia and the Bar Associations and Law Societies;
    (b) accreditation to the National Standard, although voluntary, is a requirement for appointment by courts and for acceptance on many mediation panels;
    (c) any requirement for minimal training and accreditation standards before a person may mediate would preclude parties from selecting the mediator of their choice, in circumstances in which their dispute may be best suited to mediation by a person not so trained or accredited, for example, mediation of a family dispute by a family member;
    (d) although arbitration had been used for significant commercial and other disputes for many years prior to the adoption in such disputes of mediation in the mid-1980s, there is no perceived need, nor any outcry, to regulate the training and accreditation of arbitrators, which is conducted by many of the same bodies as currently train and accredit mediators. Since arbitrators impose binding decisions on the disputants, whereas mediators have no power to do so, there is no warrant to regulate the training and accreditation of mediators without also regulating the training and accreditation of arbitrators.

16. TDG sees no difficulty with the legislature being left, in any particular context, to decide on the nature and extent of any ADR regime seen to be appropriate to the particular subject matter being regulated by statute (eg whether it be retirement village resident disputes or employment disputes or family law disputes). However, TDG submits that ADR processes should be the subject of legislative regulation in NSW (and elsewhere) as follows:

    (a) to adopt/reflect the *Federal Civil Dispute Resolution Act* 2011 as a means of ensuring not only that "disputants" take "ownership" of their own disputes and their resolution and that the costs to the State associated with the administration of the litigation process are minimised (see the Paper para 1.3-1.9). In TDG's view, there is every reason why parties should be required to take "genuine

steps" before commencing legal proceedings (save in those exceptional circumstances dealt with in the Federal legislation). (See the Paper at 4.7-4.13). The decision in *Superior IP International Pty Ltd v Ahearn Fox Patent & Trade Mark Attorneys* [2012] FCA 282 on its own, demonstrates this need – to combat and eventually remove the ignorance of some lawyers about their true functions. See also http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=adr

(b) to accord to mediators and other ADR practitioners engaged without court order the same immunity from suit as is conferred where the process is court-ordered, as under s. 33 of the *Civil Procedure Act, 2005* (NSW). Since the function of the mediator is the same, whether the mediation be voluntary or court-ordered, there is no justification for immunity in one case and no immunity in the other;

(c) existing provisions which make ADR communications inadmissible, or inadmissible subject to specified exceptions, should be replaced by provisions that ADR communications should be inadmissible without the leave of a court or tribunal which, in deciding whether or not to grant leave, must have regard to the public interest and the interests of justice, as recommended in the Federal sphere by NADRAC and as legislated in Hong Kong and Singapore. See http://www.unswlawjournal.unsw.edu.au/sites/all/themes/unsw/images/Alan-L-Limbury.pdf.

17. The Reference is a very important one to all ADR practitioners and to the community at large. There can be no doubt that the world is moving away from litigation and towards the prevention of disputes and early intervention in those disputes that cannot be prevented. Given this laudable and encouraging trend, it is critical that ADR not be "shoehorned" into being a mere step in that failing process and or "strait jacketed" by litigation process rules.

18. TDG would be happy to respond to any questions about its views and to participate in face to face discussions about this Reference.

SUMMATION

This completes the submission prepared on behalf of TDG.

TDG would like to thank you for the opportunity to contribute to this inquiry.

Should you have any further questions, please contact William Nicholls on [redacted] or email at [redacted]

William Nicholls

Executive Director

1 July 2014

For information about our Members please see enclosed biographies or visit www.thedisputegroup.com

Alan Limbury

Areas of Practice

BANKING AND FINANCE
BUILDING AND CONSTRUCTION
COMPETITION AND CONSUMER PROTECTION
INFORMATION TECHNOLOGY
INSURANCE AND RE-INSURANCE
INTELLECTUAL PROPERTY
LOCAL GOVERNMENT
PARTNERSHIP AND JOINT VENTURE
PERSONAL INJURY AND CLINICAL NEGLIGENCE
PROFESSIONAL NEGLIGENCE
APPELLATE

Qualifications

BA (Hons)(Jurisprudence) and MA, University of Oxford
Master of Dispute Resolution (MDR), University of Technology Sydney
Barrister, United Kingdom (Inner Temple)
Solicitor and Barrister, Supreme Court of NSW
Trained in negotiation and mediation by Harvard University, CDR Associates,
ACDC, IAMA, UTS and NSW Law Society
Trained in arbitration by WIPO and the Chartered Institute of Arbitrators;
Chartered Arbitrator (2005-2010)
Accredited Mediator, National Standards for Accreditation of Mediators; also accredited as a mediator by CEDR (UK), the Academy of Experts (UK), the International Mediation Institute, IAMA, LEADR (Advanced) and as a Specialist Accredited Mediator by NSW Law Society

Appointments

Member of several Australian and international Mediation and Domain Name Arbitration panels.
Chairman, Medicines Australia Code of Conduct and Appeals Committees; Australian Self Medication Industry Complaints Panel and Medical Technology Association of Australia Code Appeals Committee.
Former Chairman, Business Law Section, Law Council of Australia and of its Trade Practices Commitee; member of its Customs Law and Intellectual Property Committees.

Experience

Alan Limbury is a pioneer of mediation in Australia. He established the first ADR practice group in an Australian law firm in 1987 and was a Founder and former Chairman of LEADR. He contributed to the adoption by the Law Society of NSW of a model contract clause for the resolution of disputes (1987) and guidelines for solicitors who practise as mediators (1988) and to the Law Council of Australia's policy on ADR, model legislation and rules for court-annexed mediation, ethical standards for mediators and the role and responsibilities of lawyers in mediation (1999-2007). Alan has been mediating since 1986 in over 1,800 commercial and intellectual property disputes in Australia, New Zealand and the UK. Alan also has experience in assisting companies to devise negotiation strategies to resolve long running litigious disputes such as class actions. Alan has authored many papers over a prolific career as a commercial litigation solicitor and mediator. He was described in the 1996/97 edition of Legal Profiles as "the leading practitioner" in ADR in Sydney; by The Times of London in 2007 as "the leading Australian mediator"; and by Who's Who Legal 2013 as "one of the most highly regarded" commercial mediators worldwide and "a genius".

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Angela Bowne SC

Areas of Practice

INTELLECTUAL PROPERTY
DEFAMATION
ARTS, MEDIA & ENTERTAINMENT
SCIENCE & TECHNOLOGY
TRADE PRACTICES & CONSUMER PROTECTION
COMPUTER/SOFTWARE & IT
PROFESSIONAL NEGLIGENCE
BANKING & FINANCE
FRANCHISING
COMMERCIAL
PARTNERSHIP & JOINT VENTURE
APPELLATE

Qualifications

Barrister, NSW Bar
BLegS (Hons) (Macq), BA (Usyd)
Accredited Mediator, National Standards for Accreditation of Mediators
LEADR Mediation Course
Advanced Mediation Courses CDR, MATA, ACDC
WIPO Workshop for Mediators in Art and Cultural Heritage
NSW Bar ADR approved expert determiner and arbitrator

Appointments

Chair, Alternative Dispute Resolution Committee, NSW Bar Association
Director, Australian Centre for International Commercial Arbitration
NSW Bar representative, National Mediator Accreditation Committee, NSW Supreme Court ADR Steering Committee, NSW ADR Blueprint Steering Committee
General Editor, LexisNexis Intellectual Property Precedents and author, ADR and Patents Chapters
Member, Editorial Board, Intellectual Property of Australia and NZ Journal
Part-time member, Copyright Tribunal of Australia (1998-2007)
Chair, Sydney Chamber Opera, ATYP Foundation

Experience

Angela Bowne SC has practised as a barrister since 1986 and was appointed Senior Counsel in 2003. She trained as a mediator with LEADR in 1992 after appearing in AWA v Daniels (t/a Deloittes), the first case ordered to mediation by an Australia court. Since then, she has combined her practice as a barrister with her ADR practice, mediating regularly (as well as representing parties in mediations) and also acting as an expert determiner, neutral evaluator and facilitator.

Angela has been Chair of the NSW Bar Association's ADR Committee since 2008, and is actively involved in the Bar's strong professional development program in ADR. She is a member of the mediation panels of the Supreme Court of NSW, District Court of NSW, NSW Bar Association, Australian Centre for International Commercial Arbitration, the World Intellectual Property Organisation, and LEADR. Angela's practice as a barrister has focused on intellectual property (copyright, patents, trade marks), contracts, consumer law, confidential information, and professional negligence.

She is experienced in defamation, franchising, banking and finance law, and commercial law and has a special interest in arts, media and entertainment law, science and technology law, and pharmaceutical and medical law.

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Harold Werksman

Areas of Practice

BANKING AND FINANCE
CORPORATE AND SHAREHOLDERS
PROPERTY AND LEASING
PROFESSIONAL NEGLIGENCE
PARTNERSHIP/JOINT VENTURE
INSURANCE
COMPUTER / SOFTWARE
BUILDING AND CONSTRUCTION
INTELLECTUAL PROPERTY
MEDICAL NEGLIGENCE
TRADE PRACTICES AND CONSUMER PROTECTION
EMPLOYMENT

Qualifications

Bachelor of Laws (Distinction), University of Witwatersrand
Bachelor of Arts, University of Witwatersrand
Specialist Accredited Mediator, Law Society of New South Wales
Advanced Mediator, LEADR
Accredited Mediator, ACDC and IAMA
Accredited Mediator, Mediation and Conciliation of Workplace Disputes
Accredited Mediator, National Standards for Accreditation of Mediators
Advanced Harvard Negotiation Course
Executive Coaching Program
Guest lecturer on negotiation strategies – Master of Dispute Resolution – University of Technology and College of Law

Appointments

Director, Transparency International Australia Limited
Former Member ComCover Advisory Council
Founding Director & Hon Treasurer, LEADR

Experience

Harold Werksman is a pioneer in the use of Alternative Dispute Resolution processes.
He was a founding director of LEADR and a member of the first Law Society ADR Committee.
He has conducted mediations and negotiated settlements for parties in a wide range of commercial disputes, developing specialist negotiating strategies and hybrid processes for the resolution of commercial disputes.
Harold has acted for a big four accounting firm over many years in resolving complex commercial disputes involving public company takeovers and acquisitions of businesses. He represented Integral Energy in the second largest software dispute run in Australia which was successfully settled by mediation.
He has acted for BlueScope Steel Limited in resolving major commercial disputes concerning supply contracts and carriage of goods issues.
Harold heads the Dispute Resolution and Litigation Division of Holding Redlich, a mid-tier law firm.
His strength is his commercial understanding and breadth of experience gained from acting for commercial clients both big and small and the variety of disputes he has resolved over more than 30 years in the law.
He is an expert negotiator and a trained executive coach. He has worked with executives in both public companies and NGO's to facilitate better communication between executives, employees and board members.
He was nominated by general counsel as one of "Australia's Best Lawyers As Judged By Their Clients" in The Australian (September 2010).

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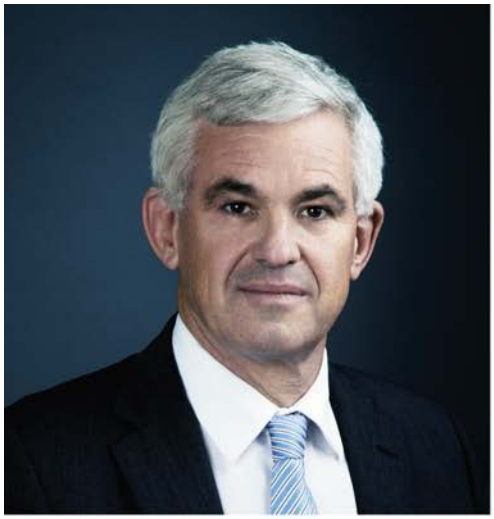

Jeremy Gormly SC

Areas of Practice

PROFESSIONAL NEGLIGENCE
MEDICAL NEGLIGENCE
COMMERCIAL
DISCIPLINARY PROCEEDINGS
APPEALS
WILLS AND PROBATE
COMMISSIONS OF INQUIRY

Qualifications

Barrister, NSW Bar
Accredited Mediator, LEADR and NSW Bar Association
Accredited Mediator, National Standards for Accreditation of Mediators

Appointments

Chaired NADRAC – Advisor to Attorney General on ADR 2011-13
Former Chair, Mediation Committee at NSW Bar Association
Former Chair, Common Law Committee at NSW Bar Association
Former Chair, NSW Bar Council Professional Conduct Committee
Former Secretary and Member, NSW Bar Council
Former Member, Legal Profession Admission Board

Experience

Jeremy Gormly SC was the Chairman of NADRAC – the National Alternative Dispute Resolution Advisory Council from 2011-13. NADRAC advised the Commonwealth Attorney-General on the national development of ADR techniques in the court system, in business, commerce, on relationship issues and generally.
Jeremy is a practising barrister and mediator. He has mediated hundreds of commercial, equity, professional and medical negligence disputes. On a joint Commission from the Commonwealth Attorney-General and the Minister for Science and Personnel he was appointed to mediate long outstanding claims from the 1964 HMAS Voyager-Melbourne collision.
Jeremy was appointed Senior Counsel in 2001.
His principal areas of practise as a barrister are in professional negligence and acting as counsel assisting in inquiries. He has appeared in the Thredbo Landslide inquiry, Collapse of the NSW Grains Board (ICAC), Andrew Mallard Murder Conviction Crime and Corruption Commission (Western Australia), the McGurk Tape inquiry (ICAC), the Curti Taser inquest and numerous other inquiries.
Jeremy has written and lectured on ADR, electronic courtroom, pure economic loss, ethics, inquisitorial proceedings and advocacy.

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Max Kimber SC

Areas of Practice

ADMINISTRATIVE LAW
DISCRIMINATION
INDUSTRIAL AND EMPLOYMENT
WORKPLACE INQUIRIES / INVESTIGATION
APPELLATE

Qualifications

B Comm/LLB, University of New South Wales
Master of Laws, University of Virginia
Accredited Mediator, LEADR and NSW Bar Association
LEADR Advanced Mediation Training
Accredited Mediator, National Standards for Accreditation of Mediators

Experience

Max commenced as a practising barrister in 1979 after completing postgraduate studies in the USA on a Fulbright Scholarship. He was appointed Senior Counsel in 1999.

The focus of his work over 30 years has always been the resolution of workplace issues whether via litigation in Federal and State courts; by conciliation or arbitration before Federal and State Industrial tribunals; or via private negotiation or mediation.

He has acted for employees, contractors, unions as well as for employers across a vast range of industries.

He has also acted for the Federal Government and regularly acts for the NSW Government especially in the fields of health, police, payroll tax and education.

Max was appointed Junior Counsel Assisting the Federal Government's Agent Orange Royal Commission and appeared for the NSW Government in a two year arbitration of the terms and conditions of engagement of Visiting Medical Officers in the public hospital system.

Max played a central role in the development of unfair contract law and of the Police Commissioner's "confidence"/removal powers in New South Wales and has recently conducted ground breaking litigation as to the operation of the Independent Contractors Act 2006 (Cth).

Max completed mediator and advanced mediator training in the mid ninties and has extensive experience with the mediation process having participated as either mediator or counsel in countless work related mediations, many involving Australia's biggest companies.

He is a regular presenter at mediation forums and mentors new mediators.

Max sees himself as a "resolutionary" – committed to the prevention and early resolution of conflict with a focus on the common and separate interests of all the parties.

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Dr Rosemary Howell

Areas of Practice

MEDIATION
FACILITATION
NEGOTIATION
COACHING
IN-HOUSE TRAINING
STRATEGIC PLANNING

Qualifications

Bachelor of Laws, Melbourne University
Barrister and Solicitor, Supreme Court of Victoria
Solicitor, Supreme Court of New South Wales
Doctor of Juridical Science, University of Technology Sydney
ICCP Certificate and Advanced Certificate in Executive Coaching
Accredited Quality Auditor (IQA program)
Accredited Administrator, Myer-Briggs Type Indicator (MBTI)
Accredited Mediator, National Standards for Accreditation of Mediators

Appointments

Professorial Visiting Fellow, University of New South Wales (UNSW)
Visiting Professor, Catholica University Lisbon
Coach, UNSW team, ICC Mediation Competition Paris

Experience

Dr Rosemary Howell has experience as a lawyer, strategic planner, teacher and CEO and has served a term as Secretary General of the Law Council of Australia. She delivers mediation, coaching, facilitation, strategic planning and training services to a diverse range of business and government clients in 6 countries. She teaches negotiation and dispute resolution at undergraduate and postgraduate level at UNSW and she is the architect of the Masters of Dispute Resolution program.
She also provides these programs to organisations as diverse as the Commonwealth Bank and the ACCC.

Further Training and Experience

Harvard Negotiation basic and advanced training programs
Teaching Fellow, Harvard Negotiation Program
Teaching Assistant with the Harvard Faculty (including Professor Roger Fisher) in Melbourne and Sydney
UC Berkeley Mindfulness Initiative

Awards

2013 International Who's Who of Commercial Mediation
2013 UNSW Award for Academic Service for 'significant contribution towards developing, enabling and supporting community and collegiality at the Law School'
2013 Inaugural LEADR Award for 'Significant Contribution to ADR'

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