AUSTRALIAN DISPUTE RESOLUTION ADVISORY COUNCIL

(ADRAC)

SUBMISSION TO NEW SOUTH WALES LAW REFORM COMMISSION ON CONSULTATION PAPER 18

DISPUTE RESOLUTION: MODEL PROVISIONS

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Introduction

The Australian Dispute Resolution Advisory Council (ADRAC) provides this submission in response to the New South Wales Law Reform Commission's Consultation Paper 18 (CP 18), of December 2016. ADRAC has had access to Consultation Paper 16 (CP 16), of April 2014 and notes the dispute resolution Model Provisions set out in CP 18 that arose from public consultation following CP 16.

ADRAC congratulates the New South Wales Law Reform Commission both on the original discussion paper CP 16 and on its development of the Model Provisions and explanatory comments in its Consultation Paper 18.

ADRAC comments below on aspects of Model Provisions 1, 2, 3, 4 and 5 but it also submits that there is an absence from the Model Provisions, of a pre-action protocol. ADRAC submits any dispute resolution framework focused on statutory provisions must also include a pre-action protocol.

ADRAC observes that at page 36 of CP 16 in question 4.4 the discussion raises the subject of pre-action provisions. It does so however, in the context of compulsory provisions under some legislative schemes which require ADR (usually mediation) before litigating. The matter is not thereafter addressed in CP 16 or CP 18.

ADRAC's proposal for a pre-action protocol is non-compulsory and aligned with the *Civil Dispute Resolution Act 2011* (Cth). That legislation does not offend rights to approach a Court. It encourages parties to pause and consider resolution before litigating. It discourages imposing reactive or knee-jerk applications on a Court. It is a piece of legislation which encapsulates the value of encouraging dispute resolution by ordinary and useful steps and is well worth emulating in form and content.

Who is ADRAC?

ADRAC (Australian Dispute Resolution Advisory Council) is an eleven member independent unaligned think tank focussed on the public interest in use of the full range of dispute resolution mechanisms.

ADRAC's charter, its membership and its work can be viewed on its website at www.adrac.org.au.

ADRAC's membership consists of the following:

- Jeremy Gormly SC (Chair)
- Andrew Bickerdike (CEO Relationships Australia – Victoria)

- Tom Howe QC (Chief Counsel, Dispute Resolution, Australian Government Solicitor)
- Margaret Halsmith (Chair, Resolution Institute)
- Adrian D'Amico (Defence General Counsel, Department of Defence)
- Shirli Kirschner (Principal, Resolve Advisors, mediator, facilitator and systems designer)
- Debbie Hastings (Deputy Commissioner for Review and Dispute Resolution (RDR) in the Australian Taxation Office)
- Alysoun Boyle (Mediator)
- Craig Pudig (Macquarie Group)
- Associate Professor Kathy Douglas (RMIT University)
- The Hon Denis Cowdroy OAM QC (Currently on leave)

ADRAC regards its heritage as stemming from the Commonwealth Attorney-General's former advisory council on ADR, known as NADRAC (National Alternative Dispute Resolution Advisory Council). NADRAC operated from 1996 until 2013 when its work was to be absorbed into the Attorney-General's Department. The new body ADRAC was formed by a number of the members of the abolished NADRAC who together with additional members now constitute the Council. The Council is assisted by an executive secretary Mr Matthew Varley, Solicitor of AGS.

ADRAC Comment on Drafted Models

Model Provision 1

ADRAC submits that the last sentence should be deleted from the definition of mediation in Model Provision 1.

ADRAC is currently conducting a substantial study of the mode of ADR known as conciliation. The study includes the ways in which conciliation is to be differentiated from other modes of ADR. It is likely to report its findings in May 2017.

Its work is raised here because for some decades mediation and conciliation were seen to be subsets of one another or so similar as to be difficult to distinguish. The work of ADRAC on conciliation has established so far that there are fundamental differences in theory and practice between conciliation and mediation, and they should not be confused or conflated.

In the light of its work so far ADRAC's submission to the New South Wales Law Reform Commission on Model 1 is focussed on the definition of "mediation" in Model Provision 1. It is submitted that the sentence of the definition which reads "*It [mediation] includes a process that fits this description even when such a process is described as 'conciliation' or 'neutral evaluation.'*" should be deleted.

The last sentence of that definition reflects much of the theoretic and practical confusion about the nature of each of 'mediation', 'conciliation' and 'neutral evaluation,' and, with

respect, promotes much of that same confusion. That is a confusion that should not be perpetuated by legislation.

ADRAC's work on conciliation has demonstrated that the ADR mode of Conciliation has the following distinguishing features:

(a) conciliation has a special derivation in Australian jurisprudence arising from Section 51 (xxxv) of the Australian Constitution which reads;

> *S51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
> *(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State*;

That provision resulted in a long distinctly Australian history of legislative and industrial focus on the use of 'conciliation' in **legislative tools** managing industrial dispute;

(b) conciliation is a particular ADR mode now adopted in over 150 pieces of Commonwealth, State and territory legislation (details can be provided), to resolve dispute without litigation;

(c) 'conciliation' is a term used almost exclusively in legislative dispute resolution schemes and rarely (in Australia) outside such schemes;

(d) conciliators in Australian legislative schemes of every type and without exception endeavour to resolve disputes not, as in mediation, solely in accordance with the wishes of the parties, but in accordance with the principles policy that informs the legislative scheme in question. Human rights disputants are encouraged through conciliators appointed under statute, to resolve their disputes in accordance with the principles of the legislation. That is the case for any conciliator appointed under any legislative scheme. Conciliators will actively discourage resolution that is not in accordance with the legislative scheme and for this reason are often seen as evaluative and/or advisory rather than facilitative. The better description is that a conciliator urges a particular type of resolution that is consistent with the legislation that manages the type of dispute in question.

In mediation it is impermissible as a matter of principle, practice and party expectation for a mediator to impose on the parties any set of values, policy, pre-conceptions or requirements for resolution of a dispute. A mediator will aim to resolve a dispute entirely in accordance with the wishes of the parties and will facilitate a resolution in any form desired by the parties so long as it is not illegal.

In this way the duties of a conciliator fundamentally differ from those of a mediator.

Even where Court legislation such as the Civil Procedure Act prescribes use of mediation it correctly maintains the distinction of open or value-free mediation from legislation that requires conciliation. Court procedure legislation generally encourages parties to resolve but cannot and would never require parties to resolve in accordance with any principles, scheme or policy other than to avoid illegality. Its interest is in resolution not a form of resolution.

It is correct that 'conciliation' and 'mediation' are occasionally conflated, misused or used in a way that does not distinguish the two processes. A common misuse of the term conciliation derives from the ordinary English meaning of the word "conciliatory". Dispute often becomes impassioned. A person entering an impassioned dispute as a dispute resolution practitioner may encourage conciliatory behaviour. That is a good technique in any dispute or any mode of ADR, but it does not render the process one of 'conciliation'.

As to the inclusion of 'neutral evaluation' in the definition of mediation it is submitted that to do so involves a misuse of the processes of both mediation and neutral evaluation. Indeed, it confuses and conflates processes that are even further apart than mediation and conciliation. Neutral evaluation is an adjudicative process that may or may not be binding. It usually occurs by the formation of an opinion by an independent person proffered to the parties on either a pre-agreed mandatory acceptance basis (which makes it a form of arbitration), or a non-mandatory view which is obtained to assist parties to take a further step in their dispute. It is, at the very least, an advisory process quite different from mediation.

ADRAC submits that definitions to be adopted in Model Provision 1 should be as follows:

> *"MEDIATION" means a process in which the parties to a dispute, with the assistance of a third party dispute resolution practitioner (the mediator), come together in an endeavour to resolve their dispute in accordance with the parties' wishes.*
>
> *"CONCILIATION" means a process in which parties are brought together by legislation or other authority binding the parties to encourage resolution of a dispute in accordance with principles and policy consistent with the legislation or authoritative scheme binding the conciliator and the parties.*

Alternatively, the ALRC would consider using the NMAS definition of mediation[1]. That definition is used for accreditation as recommended by the ALRC. ADRAC considers the NMAS definition to be as sound as the shorter definition as it proposes above.

ADRAC notes that the New South Wales Bar Association asserted that there was no concrete evidence of problems resulting from ambiguous definitions. The problem of ambiguous definition is unlikely to produce identifiable concrete evidence. The harm or mischief of

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[1] 1 Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:
(a) communicate with each other, exchange information and seek understanding
(b) identify, clarify and explore interests, issues and underlying needs
(c) consider their alternatives
(d) generate and evaluate options
(e) negotiate with each other; and
(f) reach and make their own decisions.

defective and over-inclusive definitions is one of vagueness and potential harm to the integrity of sound dispute resolution processes.

It is important for parties to know exactly what ADR process they are entering. No party should be directed into a process the nature and function of which is either vague or misleading. A party entering mediation is entitled to believe that the mediator will facilitate a settlement based solely on the interests of the parties and will have no professional or other agenda. Parties entering a conciliation should be aware that their dispute falls within a statutory (or other binding authoritative) scheme the settlement of which by a conciliator involves urging the parties to a resolution consistent with that scheme. A party entering conciliation, thinking that it is a mediation, will be significantly misled about the role of the ADR practitioner involved.

Finally, ADRAC submits that the first sentence of paragraph 2.8 (page 7) where Model Provision 1 is being considered, is incorrect. The sentence reads *"the expression 'mediation' is used in so many and varied circumstances that formulating a definition of mediation that is concise, accurate and applies consistently may not be possible"*.

ADRAC submits that the essential component of mediation is extremely confined. It requires a confidential process in which a mediator assists parties to a resolution without external power or authority, based solely on the interests and wishes of the parties. The training to achieve that role is precise. Standards exist to promote it, yet it is a process that can be used in any form of dispute. The reference in the above sentence to "many and varied circumstances" fails to distinguish between the precise and confined role of the mediator on the one hand, and the infinite variety of circumstances in which mediation can occur.

Finally, ADRAC notes that the proposed ALRC definition of "mediation" appears to be an attempt to give the provisions in question a broad application: hence, "mediation" is defined broadly and is "deemed" to include particular ADR processes (conciliation and neutral evaluation) which, as ordinarily understood, are quite distinct.

ADRAC supports the intended broad reach of the provisions, but suggests that this could be better achieved by moving away from references to a specific form of ADR known as "mediation" in favour of generic references to "assisted dispute resolution" or "ADR". For instance, ADRAC considers that there is no principled or policy reason why "mediation communications" should enjoy a greater level of protection, in terms of confidentiality and [non]-admissibility, than other ADR processes. Defining "mediation" very broadly is considered much less preferable than making clear that the provisions of the model apply to all forms of assisted dispute resolution, consistent with the Terms of Reference (which are not limited to "mediation").

Model Provision 2

ADRAC accepts that Model Provision 2 is a useful contribution but suggests that clause 2(b)(iii) should read:

> *(iii) The disclosure is made for the purpose of enabling a party to the mediation or a mediator to seek legal advice.*

The change is designed to ensure that any compromise to the confidentiality of a mediation is limited to the parties to a dispute or the mediator of that dispute. Confidentiality provisions should not enable an interested non-party, particularly a hostile interested non-party, to overturn confidentiality arrangements between parties. Such a consideration would be inconceivable in settlement negotiations and the same should apply to mediation, conciliation or any other mode of dispute resolution.

Model Provision 3

ADRAC supports Model Provision 3 as a useful contribution.

The submission made is confined solely to the sentence in paragraph 2.15 pp 10-11 which reads "*The result is that determinations and orders by a mediator enjoying absolute immunity cannot be the subject of civil proceedings even in cases of gross error or if the mediator is motivated by 'envy, hatred and malice'*." The statement contained in the sentence involves a misconception. An inherent attribute of a mediator is that they lack any power to make a determination or to make orders. If a person is either making a determination or an order then they are not mediating.

There is no vagueness or uncertainty about this distinction. It is a universally recognised feature of mediation that the mediator has no power, determinative right, or capacity to make an order.

The situation is different with conciliators. Some legislation enable conciliators to move to determination and to enter orders (although neither of those capacities is needed to define the role of a conciliator).

Model Provision 4

ADRAC submits that clause 2(d) should be deleted from the Model Provision.

The Model Provision about termination of mediation is sound in every respect except imposing a presumption that a mediation would terminate simply because litigation commences or recommences. It is common for parties to continue mediation (in the same way as they may continue ordinary inter-party negotiations), after Court hours, or even parallel with a running hearing. ADRAC submits that a better presumption is that a mediation is presumed to continue unless there is evidence adduced of an intention by any party to the mediation or the mediator to terminate the mediation.

Model Provision 5

ADRAC is not aware of any reason to limit enforceability of settlement agreements to "mediations" conducted by an accredited mediator. If, as seems likely, a settlement agreement takes the form of a contract which the disputants intend to be legally binding, its enforceability should not depend on accreditation of the dispute resolver but on the factors set out in model clause 5(4)(b).

ADRAC Proposed Additional Model Provision – Pre-Action Protocol

ADRAC submits that there should be included among Model ADR provisions the equivalent content of the *Civil Dispute Resolution Act 2011* (Cth).

The legislation is short and simple. It invites a party in dispute take a "genuine step" towards resolution of the dispute prior to commencement of litigation. A party notified of a dispute must show that it has responded in a genuine way. The parties can file "genuine steps" statements if the dispute fails to resolve and litigation commences. If a party has failed to take genuine steps and report them in a statement to the court, that failure can be taken into account, both in how the matter is case managed and in cost consequences.

At the time the *Civil Dispute Resolution Act* was being considered in the Federal Parliament prior to 2010, it struck considerable opposition. The arguments against the legislation were examined in Senate Committee but the legislation was ultimately passed.

It was said of the legislation that it would produce the following problems:

(a) satellite litigation as parties litigated whether or not a genuine step had been taken to resolve before the commencement of litigation;

(b) front end loading of costs as parties might be required to prepare "a case" before commencing in Court. In fact, the Act proposed only that the parties demonstrate that they had made some attempt to enter discussions in the ordinary way. No ADR mechanism such as mediation or arbitration was required by the Act;

(c) that the Act would produce formulaic responses in that parties would simply file a standard "genuine steps statement" as though it were another "form";

(d) the subjectiveness of 'genuine' steps.

The legislation has now been in place since 1 August 2011. Its role has been modest but when used, effective.

None of the predictions of harm suggested prior to passage of the Act has taken place. Satellite litigation has not occurred. The front end loading of costs argument was always specious in that most dispute is settled prior to litigation without going through pseudo-litigation preparation. The formulaic objection has not occurred because parties must demonstrate in a document known as a 'genuine steps statement' that an action specific to the dispute has occurred. The same sort of consideration applies to the subjectiveness objection. This was an objection used in respect of the *Civil Dispute Resolution Bill* but also in the New South Wales and Victorian equivalents which required a 'reasonable' rather than a 'genuine' step to be taken.

Experience has shown that Judges will determine what genuine or reasonable steps are, as a matter of fact. They do so within the context of a particular dispute. The step must appear to be bona fide. There appears to be no useful distinction to be drawn between a genuine step and a reasonable step.

New South Wales and Victoria each repealed their equivalent legislation prior to it having the opportunity to take effect. It did so on much the same arguments as those raised against the *Civil Dispute Resolution Bill (Cth).* The New South Wales version was the *Civil Procedure Act 2005* (NSW) Part 2A. The Victorian equivalent was contained in the *Civil Procedure Act 2010* (Vic) Ch 3 which was repealed by the *Civil Procedure and Legal Profession Amendment Act 2011* (Vic).

Operation of the Commonwealth legislation over the last five years has demonstrated that the predictions of harm made for it have proven incorrect. Provisions of the type provided in the *Civil Dispute Resolution Act 2011* provide Courts with another opportunity to ensure that parties act reasonably. Its greatest benefit however, is that it better enables lawyers at the front end of a dispute to encourage "highly invested" clients to take a step towards resolution before litigating because a costs risk may result at the conclusion of litigation.

ADRAC commends to the New South Wales Law Reform Commission the substantial study on pre-action requirements called "Exploring Civil Pre-Action Requirements – Resolving Disputes Outside Courts" by Professor Tanya Sourdin[2] for the Australian Centre for Justice Innovation (ACJI) Monash University 2012. ADRAC also refers to the chapter contained in Resolving Civil Disputes Michael Legge (Editor) Lexus Nexus being Chapter 10, p.145 *"Changing Dispute Culture; The Civil Dispute Resolution Act 2011"* by Jeremy Gormly.

ADRAC recommends to the ALRC the inclusion of a model provision that adopts the approach and the language of the *Civil Dispute Resolution Act 2011 (Cth)*

[2] Now Dean of the Law School of Newcastle University and a former member of NADRAC, and a selector of members for ADRAC.