



ADR Blueprint

Draft Recommendations Report 2:
ADR in Government

Introduction:

On 7 May 2009 the New South Wales Attorney General, the Hon. John Hatzistergos MLC, released the *ADR Blueprint* Discussion Paper for public consultation. The *ADR Blueprint* contains 19 proposals to increase and better integrate Alternative Dispute Resolution (“ADR”) across the New South Wales civil justice system.

The *ADR Blueprint* states that there are three key strategies to developing a less adversarial and litigious culture in NSW: (p. 8)

- 1 Encourage people to use other appropriate dispute resolution strategies.
- 2 Change the culture of the legal profession, so it becomes less focused on running cases and more focused on solving problems.
- 3 Structure the civil justice system so that, when litigation is contemplated or commenced, the way the system works increases the likelihood that the dispute will be settled quickly.

In response to the comments received on the *ADR Blueprint* proposals through the public consultation process, a number of *ADR Blueprint Draft Recommendations Reports* are now being produced. Each *ADR Blueprint Draft Recommendations Report* concentrates on particular *ADR Blueprint* proposals, revising and refining those proposals to take into account stakeholder feedback, and setting out more detailed draft recommendations for reform.

The first *ADR Blueprint Draft Recommendations Report* ‘*ADR Blueprint Draft Recommendations Report 1: Pre-Action Protocols & Standards*’ was released on 2 September 2009 for public comment.

This is the second *ADR Blueprint Draft Recommendations Report*, ‘*ADR Blueprint Draft Recommendations Report 2: ADR in Government*’. Interested stakeholders and members of the public have the opportunity to comment on the draft recommendations contained in this *Draft Recommendations Report* before they are finalised and implemented.

Which ADR Blueprint proposals are covered in this Draft Recommendations Report?

This *Draft Recommendations Report* covers Proposal 8 of the *ADR Blueprint*.

Proposal 8: Require government agencies to be more accountable with respect to their adherence to the Model Litigant Policy and relevant Premier’s memoranda, by putting in place appropriate performance measures to monitor compliance and / or using appropriate auditing mechanisms.

This *Draft Recommendations Report* makes five Draft Recommendations for reform:

DRAFT RECOMMENDATION 1

The Model Litigant Policy be amended to:

- (i) give greater prominence to the role of ADR in resolving civil claims and litigation; and
- (ii) clarify that ADR should be used not merely to attempt to avoid litigation but also to attempt to resolve the dispute once litigation has commenced.

DRAFT RECOMMENDATION 2

Local councils comply with the Model Litigant Policy.

DRAFT RECOMMENDATION 3

Government agencies be required to respond to an annual survey of their use of ADR to resolve legal proceedings and other disputes and of their compliance with the ADR requirements in the Model Litigant Policy, and the results be publicly available.

DRAFT RECOMMENDATION 4

ADR clauses to feature in all appropriate government contracts; and a model government ADR clause to be developed that can be adapted to meet particular circumstances.

DRAFT RECOMMENDATION 5

An inter-agency Dispute Resolution Working Group be established (or use be made of the existing Legal Managers' Forum) to:

- (i) provide a forum for sharing experience and ideas on dispute management and resolution;
- (ii) develop best practice guidelines and other resources to assist agencies in using ADR techniques; and
- (iii) promote and encourage examples of high quality ADR programs within government agencies.

Comments invited:

If you would like to comment on these Draft Recommendations before they are finalised and implemented, please send your comments by **15 October 2009** to:

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Alternative Dispute Resolution and Government

Setting an example

The *ADR Blueprint* recommends a comprehensive package of proposals to expand and improve the use of ADR in New South Wales. Government agencies will have a central role in developing and implementing many of these proposals.

Government also has a central role as a *participant* in the civil justice system. Commonwealth and State government agencies are the most frequent litigant in courts and tribunal proceedings, as both applicants and defendants.

Given the scope of government services and activities, it is also inevitable that government is involved in a very *broad range* of complaints and disputes

The *Model Litigant Policy for Civil Litigation* (Annexure A) confirms that the State and its agencies are to act as a model litigant in the conduct of civil claims and civil litigation, and are to act with complete propriety, fairly, and in accordance with the highest professional standards.

By setting an example in dealing with its own disputes and litigation, the State can contribute to the development of high standards of practice by both the legal profession and ADR practitioners and organisations.¹

This Draft Recommendations Report explores how the State can best employ ADR, to comply both with its obligations as a model litigant and with its obligations to act in the public interest to resolve disputes and complaints without resort to litigation.

Special considerations for government

There are of course certain factors unique to government that may affect its use of ADR in ways which differ from other participants in the civil justice system. These considerations may include:

1. legislation prohibiting government agencies from agreeing to certain kinds of settlements;²
2. administrative or other legal principles that prevent settlements that fetter the exercise of a statutory power;³

¹ National Alternative Dispute Resolution Advisory Committee *Submission on the Review of the Legal Services Directions*, 2004 (available online at [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SubmissionontheLegalServicesDirectionsIssuesPaper\(April2004\)](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SubmissionontheLegalServicesDirectionsIssuesPaper(April2004))); p. 6.

² For example, where a party asks a government agency to “contract out” of legislation which the government agency is required to comply with. (Such as a proposed agreement to make workers compensation payments to Commonwealth employees in a way not allowed by legislation which provided an exclusive code of the obligations of the Commonwealth: *Behan v Australian Telecommunications Corporation* (1990) 26 FCR 337 at 346.) See T Howe QC “Alternative Dispute Resolution for Commonwealth Agencies” 88 *Legal Briefing* 1 Australian Government Solicitor, 18 August 2008; pp. 3, 5.

3. the inappropriateness of government settling frivolous or vexatious proceedings by making a monetary payment on a “commercial basis”,⁴ and
4. the importance of obtaining a judicial resolution on test cases or legal principles significant to the State.

It is important to appreciate, however, that these considerations should not generally result in government agencies rejecting the possibility of ADR: rather they are factors which should inform the *manner* in which the State considers the use of ADR in such matters.⁵

Even where the other party proposes a settlement that legislation would prohibit (see note 2 above), for example, ADR may be useful to offer the agency the chance to explain its position and explore other permissible ways of resolving the dispute.⁶

Many administrative law disputes, which were at one time regarded as inappropriate for mediation, may be resolved by agreement without impermissibly fettering the future exercise of statutory powers.⁷

In *Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600, the Court rejected the submission made by the ACCC that its public interest functions made it inappropriate for it to negotiate a settlement and to participate in mediation of proceedings it had brought alleging breaches of the *Trade Practices Act 1974* (Cth), and made an order requiring mediation.

The use of ADR is not limited to attempting to resolve substantive issues in dispute, but may also assist in other ways including improving ongoing relationship issues, and dealing with technical or procedural matters.

Finally, it has been pointed out, in relation to merits review of administrative decisions, that even in cases where mediation or conciliation are inappropriate, the effectiveness of merits review procedures may be enhanced by incorporating ADR techniques in them:⁸

“For example, internal and external review procedures might require reviewers to meet with the people affected by a decision wherever possible, to provide them with an opportunity fully to state their case and vent their emotions, to seek to identify and clarify all the matters in dispute, to share available information and to focus on developing innovative solutions that best meet the individual’s needs and interests.”

³ A government agency or official could not, for example, agree to exercise, or not to exercise, a statutory power in a particular way in the future, if that would be contrary to Parliament’s intended purpose in conferring those powers: T Howe QC (note 2 above) at p. 3.

⁴ Daniel Marcus and Jeffery Senger, “ADR and the Federal Government: Not Such Strange Bedfellows After All”, 66 *Missouri Law Review* 709, 2001; p. 712.

⁵ See NADRAC *Submission on the Review of the Legal Services Directions* (note 1 above) at p. 2.

⁶ See Howe QC “Alternative Dispute Resolution for Commonwealth Agencies” (note 2 above) at p. 3.

⁷ Howe QC at pp. 3, 5.

⁸ S Beresford-Wylie, “Alternative Dispute Resolution and Government Disputes” 92 *Canberra Bulletin of Public Administration* 52, 1999; at p. 55.

Does government make the best use of ADR?

The Australian literature on the use of ADR by government and on model litigant policies focuses almost entirely on the Commonwealth government.

Criticisms which have been made of the way in which Commonwealth agencies and their legal representatives conduct litigation and settlement negotiations have included:

- reluctance to settle matters, particularly at earlier stages;⁹
- reluctance to use ADR;
- a perception that the Crown often goes to trial because it is easier for the bureaucracy to accept a judgment from the courts than for someone to take responsibility for and justify a negotiated settlement;¹⁰
- a lack of authority in agency representatives to settle a matter, and delays in obtaining settlement instructions;¹¹
- external ADR practitioners are engaged late in the life of the dispute;¹² and
- a tendency to use high profile and very expensive ADR practitioners.¹³

The conduct by the Commonwealth of the protracted litigation arising out of the disaster involving the *HMAS Voyager* and the *HMAS Melbourne* in 1964 is commonly cited as an example of a failure to uphold the high standards required as a model litigant.¹⁴ In the *Commonwealth of Australia v Verwayan* (1990) 170 CLR 394 the High Court found that the Commonwealth had acted unconscionably.¹⁵

It has been reported recently that all but one of the 25 remaining *Voyager* claims were resolved by mediation.¹⁶

The *Tongue Report* on legal expenditure by Commonwealth government agencies in 2003 found, on the basis of survey responses by agencies, that the reported lack of use of ADR was noticeable.¹⁷

⁹ Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System*, Report 89: 2000 at [3.135].

¹⁰ ALRC (note 9 above) at [3.137].

¹¹ Robert McClelland, Attorney-General for Australia, *ADR in Government Forum*, 4 June 2008 (available at <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches>); ALRC (note 9 above) at [3.135].

¹² Fabian Dixon SC, *ADR in Government Forum*, 4 June 2008 (available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Home_NewsArchive).

¹³ Ibid.

¹⁴ Victorian Law Reform Commission, *Civil Justice Review: Report 14*, 2008 3.4 p. 171; P Meadows, "Disputes involving the Commonwealth: Observations from the Outside: A Solicitor's View" 92 *Canberra Bulletin of Public Administration* 41, 1999; at p. 44.

¹⁵ The Court found that the Commonwealth had acted unconscionably in departing from its assurance that it would not deny liability and would not rely on a limitation defence (that the action was filed too long after the event). See Meadows (note 14 above) at p. 44.

¹⁶ Australian Associated Press, *Govt settles all but one Voyager claim*, 8 December 2008.

Mr Tom Howe QC, Chief Counsel Litigation, Australian Government Solicitor, has suggested¹⁸ that part of the answer to the question why there isn't more participation in ADR by Commonwealth departments and agencies may be due to "various habits of thought" which government clients and/or their legal advisers subscribe to, whether consciously or unconsciously.

Mr Howe QC has suggested that the first such habit of thought may lie in not asking the right question. Instead of asking whether a case should be the subject of ADR, or expecting such cases to select themselves, it may be better to ask:

"Is there any reason why this case ought to proceed to a litigated outcome without recourse to ADR?"

Other habits of thought Mr Howe QC identifies as a barrier to the use of ADR include:

- The allure of the 'win/lose' paradigm, including:
 - getting distracted by certain weaknesses in an opponent's case; and
 - too readily regarding claimants as completely undeserving because they in some respects they may overreach or be unreliable;
- A concern by agencies or their legal advisers that raising ADR will be seen as 'going soft', or signal a lack of commitment or confidence in the strength of the case;
- A belief that, because unsuccessful attempts at direct negotiation with the opponent have been made, there is no role for ADR;
- Being more comfortable with litigation because agencies and lawyers know more about litigation than they do about ADR; and
- An uncritical assumption that ADR is inappropriate in particular fields (such as administrative law disputes).

It is difficult to determine to what extent the criticisms that have been made of the Commonwealth apply to the NSW government and its agencies. This is largely due to the fact that, at present, agencies are not required to report on their levels of legal expenditure, use of ADR, or compliance with the Model Litigant Policy. These issues are considered further below.

Nonetheless, it may at least be likely that many of the cultural barriers to the use of ADR considered above also apply to State government agencies and to their internal and external legal representatives.

¹⁷ Sue Tongue, *Report of a Review of the Impact of the Judiciary Amendment Act 1999 on the Capacity of Government Departments and Agencies to Obtain Legal Services and on the Office of Legal Services Coordination*, 2003; at [190] p. 49.

¹⁸ Tom Howe QC *Why isn't there more alternative dispute resolution by Commonwealth departments and agencies?*, ADR in Government Forum, 4 August 2008; available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Home_NewsArchive.

Model Litigant Policy

The Model Litigant Policy: Content

NSW government agencies are required to comply with the *Model Litigant Policy for Civil Litigation* (see Annexure A).

The Policy applies to “civil claims and civil litigation” involving the State or its agencies, including litigation before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes. The Policy requires the State and its agencies to act “honestly and fairly in handling claims and litigation”, including by:

- dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
- paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid; and
- endeavouring to avoid litigation, wherever possible. In particular, regard should be had to Premier’s Memorandum 94-25 Use of Alternative Dispute Resolution (see Annexure B)¹⁹.

The only reference to the use of ADR, as set out in the third dot point above, is in the context of avoiding litigation wherever possible. The Policy does not expressly require agencies to use ADR to attempt to resolve disputes **once litigation has commenced**.²⁰

It is recommended that the Model Litigant Policy be amended, to give greater prominence to the role of ADR in resolving civil claims and litigation, and to clarify that ADR should be used not merely to attempt to avoid litigation but also to attempt to resolve the dispute once litigation has commenced.

It would also be beneficial if an updated Premier’s memorandum on the use of ADR were issued. (The Premier’s Memorandum referred to in the Model Litigant Policy and included as Annexure B is described as ‘not current’, although it does not appear to have been superseded.)

¹⁹ And to Premier’s Memorandum 97-26 relating to litigation or proposed litigation *between* government agencies or with multiple agencies as defendants.

²⁰ The Commonwealth Model Litigant policy requires the Commonwealth and its agencies to act honestly and fairly in handling claims and litigation by: (paragraph 2(d))

“endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate”.

Where it is not possible to avoid litigation, the Commonwealth and its agencies are required to keep the costs of litigation to a minimum, including by: (paragraph 2(e))

“(iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution”.

DRAFT RECOMMENDATION 1

The Model Litigant Policy be amended to:

- (i) give greater prominence to the role of ADR in resolving civil claims and litigation; and**
- (ii) clarify that ADR should be used not merely to attempt to avoid litigation but also to attempt to resolve the dispute once litigation has commenced.**

The Land and Environment Court of NSW submitted that the question of compliance by local councils with the Model Litigant Policy should be considered.

The Chief Judge noted in particular that councils appear generally reluctant to delegate authority to negotiate and settle disputes in an ADR process, and that many settlement options have to be referred back to the council for consideration, adding to cost and delay. The Commonwealth model litigant policy requires agencies to ensure that arrangements are made so that a person participating in any settlement negotiations can enter into a settlement of the claim or legal proceedings in the course of the negotiations.²¹

The NSW Model Litigant Policy currently only applies to the State and its agencies.²² In view of the vital public functions of local government, and of the Chief Judge's observations, there seems no reason why local government should not also act in accordance with the Policy (subject to any necessary modifications).

Councils are legally required to adopt a code of conduct that incorporates *The Model Code of Conduct for Local Councils*.²³ The Model Code, however, does not include any standards equivalent to model litigant principles.

Councils could, for example, make a formal, public commitment to "opt in" and agree to act in accordance with the Model Litigant Policy. Alternatively the *Model Code of Conduct for Local Councils* could be amended to incorporate the Model Litigant Policy.

DRAFT RECOMMENDATION 2

Local councils comply with the Model Litigant Policy.

²¹ At paragraph 2(e)(iv): see note 20 above.

²² The Legal Services Commissioner has recently suggested that the model litigant policy should apply to all legal practitioners. Steve Mark, *Conflicts of Interest: Challenges for the Government Lawyer*, 5th Annual Public Sector In House Counsel Conference, 27-28 August 2009 (available at <http://www.lawlink.nsw.gov.au/olsc>).

²³ Section 440 of the *Local Government Act 1993*. The *Model Code of Conduct* was published in the Government Gazette on 27 June 2008, and is available on the website of the former Department of Local Government at (http://www.dlg.nsw.gov.au/Files/Information/Model_Code_of_Conduct_June_2008.pdf).

Complying with the Model Litigant Policy and Reporting of Use of ADR

The *ADR Blueprint* noted (at p. 14) that, whilst responsibility for ensuring compliance with the Model Litigant Policy rests with the Chief Executive Officers of NSW government agencies, there is currently no mechanism to test whether government agencies are in fact complying with the spirit and intent of the policy.

Proposal 8 of the *ADR Blueprint* recommended that government agencies be required to be more accountable with respect to their adherence to the Model Litigant Policy and relevant Premier's memoranda, by putting in place appropriate performance measures to monitor compliance and/or using appropriate auditing mechanisms.

All submissions in response to the *ADR Blueprint* which expressed a view on whether this proposal was appropriate supported it. There was strong support for the principle that it is important for government to set an example in its use of ADR.

Several submissions²⁴ stated that government agencies should be required to report annually on expenditure on legal services and disputes, including details of matters resolved through ADR and of why ADR was not used in the other matters. One submission²⁵ suggested that compliance by State government agencies and their legal representatives should be required by statute.

A Victorian Parliamentary committee recently recommended that the Victorian Government should undertake an annual review to ascertain compliance with the model litigant guidelines, and that the Government should publish the results of the review.²⁶

The Department of Justice and Attorney General and NSW Treasury are currently conducting the *NSW Government Better Services and Value Taskforce Review of Government Legal Expenditure*. The operation of the Model Litigant Policy, including whether additional measures are needed to ensure compliance, will be examined as part of the Review.

Reporting use of ADR in the UK and the US

The United Kingdom and the United States provide valuable examples of both the use of ADR by government and of the ways in which the use of ADR is publicly reported.

²⁴ Legal Aid NSW, Institute of Arbitrators and Mediators Australia, and Trillium Group.

²⁵ Legal Aid. The Commonwealth Model Litigant Policy is contained in the Legal Services Directions, which Commonwealth government agencies are required to comply with by section 55ZF of the *Judiciary Act 1903* (Cth).

²⁶ Parliament of Victoria, *Law Reform Committee Inquiry into Alternative Dispute Resolution and Restorative Justice*, May 2009; Recommendation 37. Available at <http://www.parliament.vic.gov.au/lawreform/inquiries/ADR/default.htm>.

The United Kingdom

As discussed in the *ADR Blueprint* (p. 14), in 2001 the United Kingdom formally pledged that government departments and agencies would consider and use ADR in all suitable cases, and put in place performance measures to monitor the effectiveness of the pledge.

The Ministry of Justice produces an *Annual Pledge Report*, monitoring the effectiveness of the government's commitment to using ADR. Agencies are asked to provide various statistical details including details of:

- number of cases concluded in the reporting period,
- number of cases where ADR (and Arbitration, which is reported separately) was offered;
- number of cases where ADR was used; and
- estimated savings (excluding costs) resulting from use of ADR;
- estimated costs saved resulting from use of ADR; and
- estimated total savings resulting from use of ADR.

The United States

In April 2007 the US Attorney General submitted a report to the President entitled the *Report for the President on the Use and Result of Alternative Dispute Resolution in the Executive Branch of the Federal Government*.²⁷ The Report summarises in considerable detail the extensive use of ADR programs by Executive Branch agencies, and sets out challenges and opportunities for further expansion and improvement of ADR in government.

The Report is based on survey results obtained from over 100 agencies and sub-agencies quantifying and evaluating existing federal ADR programs.²⁸

The Report's findings include:²⁹

- the Department of Justice estimated that mediation saved almost \$18 million in litigation/discovery expenses, almost 67,000 hours of attorney/staff time, and over 1,350 months of litigation/discovery time in the two most recent fiscal years;
- the Department of the Air Force's "ADR First" policy in contract disputes enabled it to avoid an average of \$57.6 million in liability each year (2002-2006 financial years); and
- the Air Force refers almost half its civilian workplace disputes to an ADR process, which averages 30 days or less and achieves full resolution in an average of 75% of those disputes: whereas Equal Employment Opportunity cases which went to a formal administrative phase took an average of 390 days.

Each of the civil litigations divisions of the Department of Justice has prepared a policy on the use of ADR and case identification criteria.³⁰ The policies include:

²⁷ Available at http://www.adr.gov/president_reports.html.

²⁸ At p. 24.

²⁹ Pages 98, 10, 106-107.

- guidance on the use of ADR and on how it can be used in particular types of matters;
- detailed criteria to assist in determining whether a matter is suitable for ADR;
- criteria for the selection of ADR providers; and
- details of ADR training programs for staff.

DRAFT RECOMMENDATION 3

Government agencies be required to respond to an annual survey of their use of ADR to resolve legal proceedings and other disputes and of their compliance with the ADR requirements in the Model Litigant Policy, and the results be publicly available.

Use of ADR by External Legal Providers

It is important to ensure that government agencies retain continuing responsibility for the manner in which legal disputes are resolved after external legal representatives³¹ are engaged.³²

The Model Litigant Policy provides that compliance with the Policy is primarily the responsibility of the CEO of each agency, in consultation with the agency's principal legal officer – but that “[i]n addition” lawyers, whether in-house or private, are to be made aware of the Policy and its obligations.

The Legal Management Services of the Department of Justice and the Attorney General's has recently produced *Guidelines for Outsourcing Government Legal Work*.³³ The Guidelines state (at pp. 6-7) that legal firms engaged to undertake government legal work are required to comply with government policy guidelines, and that agencies should explain requirements under the Model Litigant Policy.

The Guidelines also state that specific evaluation criteria in the tender process for outsourced legal work might include commitment to ADR (p. 11), and that in evaluating the tenders it is particularly important that opportunities be considered for resolution of disputes through ADR means rather than litigation (p. 17).

The *NSW Government Better Services and Value Taskforce Review of Government Legal Expenditure* will examine the use of ADR by government agencies, including

³⁰ Department of Justice, Office of the Senior Counsel for Alternative Dispute Resolution, *Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution*, published in Vol. 61 No. 136 *Federal Register* 36895, 15 July 1995. (Available at <http://www.usdoj.gov/crt/adr/notice.php>.)

³¹ Either external to the agency in the case of the Crown Solicitor's Office, or external to government in the case of private legal representatives.

³² See NADRAC, *Submission on the Review of the Legal Services Directions*, 2004 (note 1 above) at p. 6.

³³ Available on the website of the Department of Justice and Attorney General at [http://infolink/lawlink/lms/ll_lms.nsf/vwFiles/Guide-Outsourcing2008.pdf/\\$file/Guide-Outsourcing2008.pdf](http://infolink/lawlink/lms/ll_lms.nsf/vwFiles/Guide-Outsourcing2008.pdf/$file/Guide-Outsourcing2008.pdf).

the use of ADR by both external and in-house lawyers representing Government agencies in legal proceedings. The *Review* may lead to further recommendations for reform.

ADR clauses in government contracts

Another important way in which government can utilise ADR is to include appropriate dispute resolution clauses in all government contracts.³⁴

ADR clauses are commonplace in contracts entered into by State government agencies. More work can be done, however, to ensure that ADR clauses feature in all appropriate contracts and are based on a best practice model clause.

It is recommended that a model ADR clause be developed for agencies to adopt, with any appropriate modifications.

Once the model clause has been developed, a Premier's Memorandum could be issued to agencies directing them to the model clause.

DRAFT RECOMMENDATION 4

ADR clauses to feature in all appropriate government contracts; and a model government ADR clause to be developed that can be adapted to meet particular circumstances.

ADR and Managing Complaints and Disputes

Wide scope for ADR

This Draft Recommendations Report has so far focused primarily on the use of ADR in legal proceedings or in disputes where legal proceedings appear imminent. There is, however, a much broader potential for the use of ADR processes and techniques by government.

Complaint handling and dispute management

Few people involved in a dispute with government begin by starting legal action. The vast majority of complaints against government are of course resolved without litigation.

³⁴ See for example the ADR Pledge made by the Lord Chancellor in March 2001 (see *ADR Blueprint* at p. 14); Alan Fels, "The Growing Importance of Conflict Management", 92 *Canberra Bulletin of Public Administration* 21, 1999, at p. 22; Fabian Dixon SC, *ADR in Government Forum*, 4 June 2008 (see note 12 above).

The way in which government responds to disputes with members of the public is not only an essential aspect of government public service, but is also vital to reducing the exposure of government to unnecessary litigation.

The former chair of the Australian Competition and Consumer Commission, Mr Alan Fels, made the following comments about conflict management, by which he meant dispute avoidance and handling and alternative dispute resolution:³⁵

“Conflict management is not about some warm and fuzzy issue. Put simply, disputes are non-productive, costly and damaging. Conflict management is therefore about efficiency in terms of reducing the costs which disputes can cause, and at the same time about focusing on the needs of the Australian public who, as Australian public servants, we are here to serve.”

Factors that have been identified as increasing the likelihood of government agencies being involved in litigation include a lack of effective complaint handling and grievance processes, and poor handling of customer relations, procurement, employment and industrial relations issues.³⁶

The State Plan requires government agencies to ensure that complaints handling procedures satisfy the Ombudsman’s guidelines.³⁷ The NSW Ombudsman has produced a number of resources for government agencies about complaint handling, including *The Complaint Handler’s Toolkit*.³⁸

Although these matters are largely beyond the scope of the *ADR Blueprint*, they may be able to be addressed in the way proposed in Draft Recommendation 5 below.

Developing ADR and dispute management in government

Education, training and other assistance are vital if government agencies are to expand and develop ADR and dispute avoidance programs.

It is recommended that an inter-agency working group be established to provide a forum for sharing and exchanging ideas on dispute management and avoidance and for promoting the development of ADR across the NSW Government.³⁹

³⁵ Alan Fels, “The Growing Importance of Conflict Management”, (note 34 above); p. 21.

³⁶ NADRAC, *Submission on the Review of the Legal Services Directions*, 2004 (note 1 above) at pp. 3,7.

³⁷ State Plan, S8, p. 64. See also Premier’s Memorandum M2007-18 *Customer Satisfaction State Plan Commitment – S8* (7 November 2007).

³⁸ 2nd ed, 2004, available at <http://www.ombo.nsw.gov.au/show.asp?id=107>.

³⁹ The Australian Law Reform Commission, in its review of the Federal Civil Justice System (see note 9 above) recommended that an interagency dispute management working group be established, to provide a forum for sharing experience and knowledge on dispute management and resolution, to assist in developing dispute avoidance, management and resolution plans, and to evaluate such arrangements (Recommendation 70).

In the United States an Interagency Alternative Dispute Resolution Working Group was established to promote and facilitate federal ADR, following a memorandum issued by President Clinton in May 1998. The Working Group has established four Sections to represent the major areas in which ADR is used: Civil Enforcement and Regulatory, Claims against the Government, Contracts and Procurement, and Workplace. See *Report for the*

The Working Group could include representatives from:

- front-line staff involved in responding to complaints or disputes with the public and business;
- managers responsible for dealing with disputes within agencies, such as workplace grievances;
- senior staff responsible for managing civil claims and litigation; and
- in-house and external lawyers representing government agencies.

Working Group representatives could champion the use of ADR in both their own agencies and across the whole of government.

The Working Group could have the following functions:

- provide a forum for sharing experience and ideas on dispute management and resolution;
- develop best practice guidelines and other resources to assist agencies in using ADR techniques; and
- promote and encourage examples of high quality ADR programs within government agencies.

A Legal Managers' Forum currently exists, and could be an appropriate forum through which to pursue these objectives.

DRAFT RECOMMENDATION 5

An inter-agency Dispute Resolution Working Group be established (or use be made of the existing Legal Managers' Forum) to:

- (i) provide a forum for sharing experience and ideas on dispute management and resolution;**
- (ii) develop best practice guidelines and other resources to assist agencies in using ADR techniques; and**
- (iii) promote and encourage examples of high quality ADR programs within government agencies.**

Annexure A

Model Litigant Policy for Civil Litigation

Introduction

- 1.1 This Policy has been endorsed by Cabinet to assist in maintaining proper standards in litigation and the provision of legal services in NSW. This Policy is a statement of principles. It is intended to reflect the existing law and is not intended to amend the law or impose additional legal or professional obligations upon legal practitioners or other individuals.
- 1.2 This Policy applies to civil claims and civil litigation (referred to in this Policy as litigation), involving the State or its agencies including litigation before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes.
- 1.3 Ensuring compliance with this Policy is primarily the responsibility of the Chief Executive Officer of each individual agency. In addition, lawyers, whether in-house or private, are to be made aware of this Policy and its obligations.
- 1.4 Issues relating to compliance or non-compliance with this Policy are to be referred to the Chief Executive Officer of the agency concerned.
- 1.5 The Chief Executive Officer of each agency may issue guidelines relating to the interpretation and implementation of this Policy.
- 1.6 This Policy supplements but does not replace existing Premier's Memoranda relating to Government litigation, in particular Premier's Memoranda nos. 94-25, 97-26, and 95-39.

The obligation

2. The State and its agencies must act as a model litigant in the conduct of litigation.

Nature of the obligation

- 3.1 The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.
- 3.2 The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:

- a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
- b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;
- c) acting consistently in the handling of claims and litigation;
- d) endeavouring to avoid litigation, wherever possible. In particular regard should be had to Premier's Memorandum 94-25 Use of Alternative Dispute Resolution Services By Government Agencies and Premier's Memorandum 97-26 Litigation Involving Government agencies;
- e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - i) not requiring the other party to prove a matter which the State or an agency knows to be true; and
 - ii) not contesting liability if the State or an agency knows that the dispute is really about quantum;
- f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- g) not relying on technical defences unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum 97-26;
- h) not undertaking and pursuing appeals unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable; and
- i) apologising where the State or an agency is aware that it or its lawyers have acted wrongfully or improperly.

3.3 The obligation does not require that the State or an agency be prevented from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

3.4 In particular, the obligation does not prevent the State or an agency from:

- a) enforcing costs orders or seeking to recover costs;

- b) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
- c) pleading limitation periods;
- d) seeking security for costs;
- e) opposing unreasonable or oppressive claims or processes;
- f) requiring opposing litigants to comply with procedural obligations; or
- g) moving to strike out untenable claims or proceedings.

Annexure B

M1994-25 Use of Alternative Dispute Resolution Services by Government Agencies

Status: not-current

The purpose of this Memorandum is to reaffirm that it is Government policy for agencies to use alternative dispute resolution (A.D.R.) techniques, as stated in a previous Memorandum (No: 1989-42), as far as appropriate.

Organisations engaged in commercial activities, whether private or Government, can benefit considerably from A.D.R. techniques (such as conciliation, mediation or arbitration) rather than resorting to litigation. Use of A.D.R. techniques can reduce the expense and time involved in resolving commercial disputes.

There are other advantages of these techniques. The procedures used, particularly in mediation and conciliation, are flexible and can be tailored to suit the needs of the parties. In mediation and conciliation differences between the parties can be resolved by pragmatic business-oriented means, rather than by strict adherence to legal principles. The adversarial approach which may result from use of the court system is replaced by a process of seeking cooperation and compromise on the part of the parties' executives who can be expected to have a greater appreciation of the commercial issues of their dispute.

There are now a range of private providers of A.D.R. services, as well as the Australian Commercial Disputes Centre referred to in the previous Memorandum. Agencies should follow the Government's usual requirements for the engagement of professional services in order to ensure a competitive selection is made of an appropriate A.D.R. provide.

All areas within your administration should be encouraged to use A.D.R. services whenever possible so as to achieve settlement of disputes by these means rather than resorting to the court system.

Premier

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