



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

ADR in Government Forum
Members Dining Room 2, Old Parliament House,
Canberra

Wednesday 4 June 2008, 5.40 pm

CHECK AGAINST DELIVERY

[Acknowledgements]

- **First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.**

[Other Acknowledgements]

- **Chair, the Honourable Justice Murray Kellam, AO, Chair of NADRAC (also speaking)**
- **Mr Tom Howe, QC, Chief Counsel Litigation, Australian Government Solicitor (also speaking)**

- **Mr Fabian Dixon, SC, Convenor, NADRAC's "ADR in Government" Committee (also speaking)**
- **Mr Robert Cornall, Secretary, Attorney-General's Department**
- **Members of the NADRAC Council**
- **Ladies and gentlemen**

[Introduction]

- 1. I would like to thank the Chair of NADRAC, Justice Murray Kellam, for his invitation to speak here this evening.**
- 2. I'm also pleased to announce that a fellow presenter this evening, Tom Howe, has recently been appointed to NADRAC. I think Tom will make a great contribution to NADRAC's important work in developing alternative dispute resolution in Australia.**
- 3. Thanks to all of you for being here and showing your interest in for Alternative Dispute Resolution.**

[Access to justice and litigation]

- 4. As you may be aware, one of Labor's key priorities in Government is improved access to justice.**
- 5. We also want to ensure that our justice system is practical, cost efficient and facilitates the timely resolution of disputes.**

- 6. I'm not convinced that the best way of achieving this always involves pursuing litigation to its end.**
- 7. As Labor recognised in its election platform, access to justice requires reducing the cost of legal services and removing artificial barriers to justice.**
- 8. And I believe that there is a leadership role for the Commonwealth to play in this regard.**
- 9. In part, this means ensuring government does not lose sight of the fact that often the other party to a dispute is an individual with limited means. Of course there will be many cases where it is appropriate for government to enforce or defend rights or obligations. But if we reach a situation where it is only large corporations and governments who can afford to do this, access to justice will mean little to ordinary, working Australians.**
- 10. It also means ensuring greater accountability on the part of government for its legal**

expenditure. Soon after becoming Attorney-General I raised questions about the significant growth in Commonwealth legal expenditure in recent years.

- 11. It is also worth observing that the data does not necessarily reflect the total burden on agencies – including the significant input from staff who are drawn away from other work.**
- 12. I am serious about delivering on Labor's election commitment to remove impediments to prompt dispute resolution and keep a check on litigation costs.**
- 13. Last Friday I announced the first wave of reforms to improve the way the Commonwealth buys legal services. This is the first step in a comprehensive review which will enable the Government to get smarter about its legal expenditure.**
- 14. I will say more on those reforms which relate to ADR shortly. But suffice to say that as a**

Government we will be encouraging agencies to pursue better ways to resolve disputes.

[Alternative Dispute Resolution]

- 15. There are clearly many benefits to Alternative Dispute Resolution.**
- 16. In not only reduces costs, but it also frees up court time and resources, provides increased privacy and confidentiality for parties, and is generally less stressful for those involved.**
- 17. Another significant feature of ADR is that the process is managed by an impartial third person, who has an important role to ensure that all the relevant people are involved.**
- 18. This is important because when participants feel that they are being heard, this can have a powerful impact on the way they view the dispute. We must ensure that the parties, and not just the lawyers, are engaged in the process. It makes no sense if parties feel coerced into an outcome with which they do not agree.**

- 19. I also believe that the success in an ADR process is not defined only by whether or not the dispute is resolved.**
- 20. An ADR process can help to draw out facts, identify issues, develop mutual understanding and possibly throw up new options for consideration.**
- 21. ADR can also be a very effective tool for building a relationship of trust between the parties. This process may lead to later settlement or at the very least reduce some of the adversarial game-playing that could complicate later court proceedings.**

[ADR AND GOVERNMENT LAWYERS]

- 22. With those benefits of ADR in mind, I am committed to encouraging government departments and agencies to do all they can to resolve Government disputes without necessarily having to go to court.**

[Resolve Disputes Earlier]

- 23. I believe that a key obligation of a government lawyer should be to examine the potential to resolve a dispute without recourse to litigation. And, of course, that should not occur on the steps of the court.**
- 24. Negotiating a resolution should be considered as soon as it is possible to form a view about the nature of the claim.**
- 25. This forms part of the ‘model litigant obligation’ in the Legal Services Directions. The obligation requires agencies to deal with claims promptly and not cause unnecessary delay, and endeavour to avoid, prevent or limit the scope of legal proceedings wherever possible.**
- 26. Despite this, I think it is time for us to reassess whether the Commonwealth too often falls back on litigation when it is faced by a dispute.**
- 27. As with anyone responsible for managing a dispute, there is always a temptation for public servants to seek the security of a decision by an**

external authority – either a court or another government agency – rather than exercising and trusting their own judgement.

28. I think there is a greater need for trained, experienced officers, to have the confidence to do this.

29. I do know from my own experience as a lawyer that at times, relationships between disputants can seem so hostile that there appears to be no prospect of resolution by direct negotiation. It may be that an attempt at negotiation has already failed.

30. However, I strongly believe that even though a case may appear intractable, an ADR process may still be effective and government lawyers should do all they can to resolve government disputes through this mechanism.

31. Formally recognised ADR processes are an important option in this regard that should be considered.

- 32. But there are also other strategies that can be used to avoid protracted and expensive litigation.**
- 33. As I mentioned earlier, last Friday I announced the first round of reforms to Commonwealth legal expenditure and services.**
- 34. Part of this will include adding a note in the Legal Services Directions to clarify that the Commonwealth is not prevented from using available mechanisms to bring about settlement in appropriate cases.**
- 35. This could include making such formal offers of settlement or payment into Court as are permissible under relevant court rules, which may expose the other party to a costs order if they reject a reasonable settlement offer.**
- 36. In this way, I consider that there is a place for both formal and informal means of achieving outcomes which benefit both parties.**

[Have the Authority to Settle]

- 37. I also believe that in most cases it should be possible for a government representative to obtain appropriate authority to settle in advance.**
- 38. The ‘model litigant obligation’ already requires that wherever practicable, agency representatives participating in alternative dispute resolution have authority to settle the matter.**
- 39. However, a frequent complaint I hear about government is that during engagement in settlement negotiations or in ADR, the matter cannot be immediately resolved because the attending government representative doesn’t have sufficient authority.**
- 40. I understand that there may be an issue in some circumstances, for example, when new information is presented that changes the basis on which a settlement authorisation was given, particularly in respect of major claims.**
- 41. However I urge you all to more actively consider the potential for earlier settlement of disputes and strategies for your agency.**

- 42. I take this matter seriously, and have already announced that I will strengthen the requirement for agencies to use ADR under the Legal Services Directions.**
- 43. I want to further emphasise the ‘obligation’ to ensure that an appropriately authorised officer participates in settlement negotiations, as well as ADR.**
- 44. I hope this will allow greater focus on settlement options under the Legal Services Directions and will result in a more speedy resolution of these matters wherever possible.**

[ADR AND THE RUDD GOVERNMENT]

- 45. In addition to this initiative, I am serious about focusing on other mechanisms to ensure better access to justice through alternative dispute resolution.**
- 46. I have come to this ADR forum to help make sure that ADR and the opportunities it offers are well understood across Government.**

47. The most well-known ADR processes are arbitration, early neutral evaluation, conciliation and mediation. There are other ADR processes lawyers can use, and I recommend the NADRAC website to you – www.nadrac.gov.au.

It contains useful information about ADR, the processes and how to find an ADR provider.

48. The site has just been significantly redeveloped and I am very pleased to announce that the new site is available from today.

49. I have also asked OLSC to develop a proposal for a survey of Commonwealth litigation as at a date in the second half of 2008.

This will collect evidence about the Commonwealth's litigation practices.

50. The survey would examine whether settlement options have been considered and actively pursued, and whether matters are expected to be resolved without the need to proceed to hearing.

51. I see the benefits of this proposal as two-fold. First, the information gathered through this

process will provide me with an overview of the status of the Commonwealth's civil litigation load and help to identify whether particular ADR strategies should be adopted across the Commonwealth.

52. Secondly, it will provide senior managers within Commonwealth agencies with a single compilation of information about their litigation caseload from an ADR perspective.

53. Of course I acknowledge that some agencies will already compile this information about their litigation caseload for their own internal purposes.

Nonetheless, a report for me focussed specifically on ADR will inevitably raise the question of whether the caseload could be handled differently or more effectively by considering ADR options.

54. I hope too that the survey would identify good practices for the successful use of ADR within Commonwealth agencies, so that the benefits of

those experiences can be shared across the Commonwealth.

55. I have asked OLSC to develop the survey well in advance of the date, so that agencies will have time to assess the status of their litigation matters well before the survey takes place.

56. The survey will focus in the first instance on civil matters, rather than criminal or regulatory matters. I will consider extending the survey to regulatory and enforcement litigation at a later date.

[Conclusion]

57. I want ADR to be seen as built into the fabric of our system of justice – not simply an add-on.

58. I think that there is a need to change what appears to be a fairly risk averse and, therefore, adversarial culture within government.

I want to encourage government agencies to move to a ‘resolution culture’.

59. I know that Government agencies face particular challenges.

They are responsible for ensuring that Commonwealth resources are expended lawfully and are protected from unjustified claims.

60. However, I don't think that obligation precludes the early resolution of legitimate disputes through direct negotiation or ADR.

61. I urge you all to more actively consider the potential for earlier settlement of disputes and strategies for your agency.

62. This evening's forum provides a great opportunity to hear what others have to say and have the opportunity to share experiences and insight.

63. I welcome that opportunity, and I wish to thank Justice Kellam, the NADRAC Council and staff for the role they are playing in supporting the expansion and use of ADR.

ENDS