THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: jd:cl
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15 May 2012

The Hon. Greg Smith SC MP
Attorney General and Minister for Justice
Level 31, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Attorney General,

Evaluation of the court arbitration scheme

Thank you for your letter of 2 March 2012 inviting the Law Society of New South Wales to comment on the proposed evaluation of the court arbitration scheme under Part 5 of the *Civil Procedure Act 2005*.

The Law Society's Arbitration Liaison Committee (Committee) has considered the issues raised in your letter and provides the following comments for your consideration.

Review of Arbitration Scheme

The Committee is aware that usage of the court arbitration scheme has decreased dramatically over the past decade. In light of this decline the Committee agrees that a review of the court arbitration scheme is necessary in order to determine whether the scheme is still a useful alternative dispute resolution service.

The table below outlines the decline of court annexed arbitration in the Local Court and District Court for the period 2005 to 2008. More recent statistical information is not immediately available from JusticeLink, however at the Local Court Downing Centre Sydney (which deals with approximately 70% of the state-wide Local Court workload) only 14 matters were referred to arbitration in 2011.

Arbitration Referrals

Calendar Year	Local Court Referrals	District Court Referrals
2005	1154	384
2006	820	212
2007	606	111
2008	401	9

The Committee believes there are several reasons for the decline in the number of referrals, including the introduction of effective case management and time standards by the courts,

the overall decline in the number of defended civil matters proceeding before the courts and the concern that arbitration may add to the overall cost of litigation.

Notwithstanding this, the Committee is of the view that the court arbitration scheme remains a valid alternative dispute resolution option and should be recognised as being an important tool which can assist the courts in achieving the "just, quick and cheap" resolution of disputes. The Committee submits that the NSW Government should be committed to promoting arbitration as an important alternative dispute resolution process which lessens the strain on courts and publicly funded tribunals, regardless of the outcome of the review.

Benefits of Arbitration

The Committee believes that there are a number of benefits to arbitration which support an argument for maintaining the court arbitration scheme.

Most importantly, arbitration offers disputing parties an alternative dispute resolution process that is less formal and less expensive than court based litigation, which is particularly beneficial for self-represented litigants. The arbitration process is also more flexible than litigation in that an arbitrator is not bound by rules of the court and is not subject to the same caseload allocation constraints of the courts. Parties also have the benefit of ensuring that commercially sensitive disputes are determined confidentially and without the public glare of the court system.

Arbitration also complements and supplements other alternative dispute resolution processes in that it provides a process of determination where mediation and other party based settlements may not be viable. Similar to mediation, one of the main benefits of arbitration is that generally the parties have a say in the appointment of the arbitrator. This allows an arbitrator with specialised knowledge and skill to be appointed which can aid the efficient and effective resolution of a dispute.

Maintaining the Court Arbitration Scheme

The Committee believes that whether or not the court arbitration scheme is retained is a threshold issue which ultimately should be considered in the context of the review on pre-litigation requirements under Part 2A of the *Civil Procedure Act 2005*.

If the Government proceeds with some form of pre-litigation requirement, where parties are required to take reasonable steps to resolve a dispute before commencing litigation, the Committee suggests that there would be little utility in retaining the scheme in its current form. In this instance, arbitration might be better promoted as a pre-litigation option rather than a court annexed process.

However, the Committee is of the view that it would be possible for the arbitration scheme to continue to operate under the auspices of the court in the context of a pre-litigation requirement if processes were amended as outlined below at "Recommendations for Reform".

The Committee is also of the view that there are compelling reasons for the arbitration scheme to remain within the auspices of the court.

Firstly, the court arbitration scheme was created as an additional resource to assist the courts in managing caseloads. While the court arbitration scheme is not relied upon to the same extent that it was a decade ago, caseloads can fluctuate over time and there is no certainty that courts will be able to manage future demands in the same manner as they do presently. The Committee is concerned that if this resource is removed it will not be easily

re-established if future demands on the court increase. By maintaining the scheme, the resource will be readily available to assist with any future caseload increases as well as the demand that will arise for alternative dispute resolution processes as a result of the implementation of any pre-litigation requirements legislation.

Secondly, the Committee believes that the retention of an arbitration scheme within the auspices of the court ensures that the court maintains a supervisory role over the process. This is likely to provide parties with confidence in the integrity of the process and ensure that arbitrators have the requisite skill and experience to conduct arbitrations.

Recommendations for Reform

The Committee suggests the following reforms which could improve the operation of the court arbitration scheme:

1. Earlier referral to the court arbitration scheme. The Committee recommends that the referral process be amended to enable an application to be made prior to the commencement of litigation. Currently civil proceedings must be commenced, a defence filed and the parties must appear at a callover before consideration may be given to referral of the matter to arbitration. Given the case management directions of courts, it is likely that substantial time and costs have been incurred in preparing the case for a court hearing by the time that the callover is listed. By this stage parties are often committed to a court hearing and less likely to consider referral to the court arbitration scheme. The ability to access the court arbitration scheme at an earlier stage will reduce the cost to litigants and ensure that the court arbitration scheme remains a viable option.

   The Committee also believes that there should be greater scope for judicial officers to recognise matters which are appropriate for referral to arbitration. This may be particularly attractive or appropriate in matters which involve unrepresented litigants, or matters which have languished before the courts for some period of time without progressing.

2. Centralising the court arbitration scheme. The Committee recommends that referral to the court arbitration scheme be centralised. At present referral to the arbitration scheme is dependent upon the registrar at each court. The manner in which the scheme is promoted or made available varies from registrar to registrar. If the court arbitration scheme is reformed so that it is no longer a referral option considered by registrars at the time of call over, the Attorney General should consider whether there is benefit in centralising the process in a similar manner to the Cost Assessment Scheme which replaced the taxation of costs by individual registrars. A centralised process is likely to confer administrative cost savings by eliminating the duplication of the administrative functions that support the court arbitration scheme across court registries. A centralised arbitration scheme will ensure that the scheme availability is uniformly promoted and accessible to litigants.

   A centralised arbitration referral system would also be useful for other court or tribunal processes to dovetail into it, for example the Consumer Tenancy and Trade Tribunal (CTTT) or the Administrative Decisions Tribunal, if necessary. While there is flexibility in those tribunals as to how matters proceed, and some do have mediation services attached, they could potentially benefit from an arbitration option, particularly where those tribunals may experience high caseloads and matters may be delayed. While the Committee is aware that arbitration is not permitted in respect of residential building disputes (covered by the jurisdiction of the CTTT), it may, however, be appropriate for other disputes coming before the tribunals.

3. Selection of arbitrator. The Committee suggests that parties should have the right to agree upon the selection of an arbitrator who has been appointed to an arbitration panel. Many arbitrators are known to have particular expertise in an area of law and parties should be allowed to choose the arbitrator with the most relevant expertise. The capacity for parties to have a say in who is appointed from the panel may enhance their willingness to engage in arbitration.

4. Limiting the right of rehearing. The Committee is of the view that the right of a rehearing should be limited. The unfettered right to apply for a rehearing of an arbitrated matter means that litigants may perceive an arbitration hearing to be a dry run of the matter before litigation. As a result, arbitration may be perceived to be simply adding to the cost of litigation. This issue could be addressed by introducing provisions that only allow the introduction of fresh material during a court rehearing where leave is granted. Additionally, provisions could be introduced which require a court rehearing an arbitrated matter to only rehear the matter on the basis of the transcript of evidence, where kept, and the documentary material which was before the arbitrator. Similar provisions exist in s 352(6) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Committee thanks you again for the invitation to comment on the proposed evaluation of the court arbitration scheme. Any queries in relation to this letter should be directed to the Executive Officer for the Arbitration Liaison Committee, Ms Carina Lofaro on (02) 9926 0214 or via email carina.lofaro@lawsociety.com.au.

Yours sincerely,

Justin Dowd
President