NSW A-G's DEPARTMENT: ADR BLUEPRINT: APRIL 2009

COMMENTARY ON THE PROPOSALS BY THE LITIGATION LAW & PRACTICE COMMITTEE OF THE LAW SOCIETY OF NSW

Introduction:
The Litigation Law & Practice Committee of the Law Society (the Committee) welcomes the opportunity to provide comments on the proposals contained in the Blueprint.

The Committee has long supported alternative dispute resolution (ADR) procedures to resolve civil disputes. However, the Committee cautions against the introduction of ADR techniques to every civil dispute. For example, ADR is most suitable in commercial disputes, as stated in the introductory paragraphs of the Blueprint. Also, it must be pointed out that lawyers regularly recommend ADR procedures to their clients at appropriate stages of the dispute, commencing with the retainer.

Some cases, by their very nature, are unsuitable for ADR and therefore compulsory pre-trial protocols in all matters would be unnecessary. Undefended matters are a category of cases where it would be unnecessarily cost intensive to have pre-trial ADR procedures. In the Supreme Court's 2008 Annual Review, of the 7,056 Common Law filings 5,326 were not defended. Therefore, incurring additional costs on those 5000 cases would have been unnecessary, apart from the considerable costs incurred. Also clearly unsuitable for ADR would be cases involving small sums.

In the interim Report on the Costs of Civil Litigation, published in the UK recently, Jackson LJ sounded a general warning to re-examine pre-action protocols to ensure that they are not costs prohibitive.

The following comments are provided on the individual proposals.

1 **Proposal 1: Establish an ADR Directorate within the NSW Attorney General's Department to coordinate, manage and drive ADR policy, strategy and growth in NSW.**

The Committee would welcome such an initiative, and agrees that an ADR Directorate should work closely with the Courts, Law Society, Bar Association and other interested groups and parties to ensure strategies are framed to benefit potential litigants.

2 **Proposal 2: Provide better information to consumers about non-court options to resolve disputes. Position LawAccess as a 'one stop shop' for information about dispute resolution services for consumers and business.**

The Committee supports proposal 2.

3 **Proposal 3: Provide consumers with resources about how thy can resolve disputes themselves, including ensuring existing resources are easily accessible.**

The Committee supports proposal 3.

4 **Proposal 4: Place a legislative obligation on legal practitioners to provide information to their clients about ADR.**

This proposal is opposed. There is nothing to be gained by re-formulating the existing rules as legislation .Empirical evidence suggests that solicitors usually impart this information to their clients at appropriate stages of the dispute, commencing with the retainer.

5 Proposal 5: Put a much greater emphasis on negotiation/mediation/conciliation skills in legal education.

The Committee agrees that ADR training should be a serious feature of legal education from undergraduate level upwards. Steps should be taken to consult the law schools as to the most appropriate means of doing so.

6 Proposal 6: Enact 'guiding principles for the conduct of civil disputes', which parties would be encouraged to honour. A court would take compliance with the principles into account should it ultimately be asked to adjudicate a civil dispute. Serious failure to comply with the principles could result in adverse cost orders.

The Committee is of the view that the Appendix 1 standards[1], which include pre-action protocols (mandatory pre action detailed letter of demand correspondence and negotiation), are not only oppressive on prospective litigants but carry inherent risks, that are not necessarily ameliorated by framing the standards as unenforceable 'statutory guidelines' due to the proposed sting of potential costs consequences if they are not followed, or their adherence is not bona fide. Whilst Proposal 6 does not propose the imposition of mandatory pre-action mediation, the ADR Framework includes commentary on this issue in the context of Proposal 10. We address that here.

The key risks of pre-action protocols including mandatory pre-action mediation, enshrined either as statutory guidelines with potential costs consequences or as mandatory requirements include:

- the pre-action battle ground becomes whether a party has or has not complied with the pre-action protocol
- it adds another layer of cost to the litigious process, for example in South Australia (Rule 33 pre-action letter of demand and offer) claimants in practice serve a draft pleading with all relevant documentation rather than waste costs in preparing a letter, which does little to promote early settlement
- it can entrench parties into positions that does not promote early resolution of the dispute
- pre-action mediation can often be premature due to lack of case preparedness, which may forever sour the prospects of a mediation at a later stage
- unrepresented litigants would be prejudiced by this additional procedural layer.
- It is not appropriate for low value claims.

1. Victorian Law Reform Commission Proposed Standards of Conduct for Parties to Disputes (including Pre-action Protocols)

7 **Proposal 7: Encourage collaborative law practices in a greater range of civil law matters.**

Whilst collaborative law practices probably have a valuable role to play in the Family Law environment and in Wills & Probate disputes (including possibly Family Provision Act disputes) it has not received mainstream acceptance in the commercial dispute resolution community. Its value as an ADR technique in, for example, property and construction disputes (as suggested in the ADR Blueprint) is yet to be demonstrated, and the Committee would not support this branch of ADR in that context at this stage.

8 **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.**

The Committee agrees with Proposal 8.

9 **Proposal 9: Incorporate the main elements of pre-action protocols as 'best practice standards' in the 'guiding principles for the conduct of civil disputes' (Proposal 6). If a dispute is subsequently litigated the court could take the extent of compliance into account, when determining costs (including indemnity costs) (Proposal 15). Alternatively, practice directions could be issued mandating specific steps that must be taken before certain types of cases commence.**

See our comments under Proposal 6, which apply equally to Proposal 9.

10 **Proposal 10: Progress amendments to uniform commercial arbitration legislation, based on the UNCITRAL Model Law on International Commercial Arbitration, supplemented by any additional provisions as are necessary or appropriate for the domestic scheme.**

The Committee agrees with Proposal 10.

11 **Proposal 11: Establish a single Sydney International Arbitration Centre that has the physical space, organisational facilities, secretarial, computer and research support in the one location, to position Sydney better as a centre for international commercial arbitration.**

The Committee agrees with Proposal 11.

12 **Proposal 12: Give high priority to the collection and analysis of data about the ways civil matters are finalized in the courts, and data about the cost effectiveness of case management strategies.**

The Committee agrees that statistical collection and analysis of the effectiveness of ADR and case management strategies in the resolution of civil proceedings will assist the development of policies going forward.

13 **Proposal 13: Change the language and processes used by courts to resolve civil disputes – along the lines suggested by the British Columbian working**

group on civil justice reform – so that the primary focus is on preparation for ADR rather for trial.

Whilst the proposal to abandon pleadings is far from radical or novel, the mapping out of a party's case at an early stage of the proceedings, either in the form of contentions (the language used for example in the Commercial List, Supreme Court) or summary submissions, or however one chooses to badge disclosure of a claimant's case, is an inevitable, essential part of the resolution process to enable the parties to get to grips with the issues in dispute. The interposition of Case Management conferences to discuss the issues in dispute and dispute resolution plans would impose an additional strain on the Courts, and there would be no guarantee that the parties would be doing anything more than paying lip service to the procedure if held too early in the litigious process. The Committee is of the view that re-badging and language change rarely produces results in practice.

14 **Proposal 14: Give high priority to the collection and analysis of data about court annexed and private mediations, including how quickly they are able to effect settlements, and whether they ultimately reduce the proportion of matters that proceed to trial.**

The Committee agrees with the approach proposed.

15 **Proposal 15: Provide that the court is to take into account parties' attempts to engage in ADR when making orders as to costs.**

The Committee is of the view that the imposition of costs consequences for a party declining to participate in mediation, or to act without bona fides within that process, is draconian, and will not lead to the successful, early resolution of disputes. History and experience demonstrates that parties, properly advised, will often successfully mediate when they have sufficient information about each other's position and often, not before. This can be after the close of pleadings, after discovery, after the service of evidence or prior to the matter being set down for trial. Forced mediation, with adverse costs consequences for failed participation is unlikely to lead to an early or successful resolution of the dispute.

16 **Proposal 16: Improve arbitration by penalizing failure to disclose if a matter is subsequently litigated (there is some evidence that parties have been using as a 'dry run' and keeping 'smoking guns' until the actual trial).**

The Committee does not agree that the proposed penalty is necessary, given the dramatic reduction in numbers of court referred arbitrations.

17 **Proposal 17: Increase the small claims jurisdiction of the Local Court from $10,000 to $30,000 and make greater use of assessors.**

The Committee opposes the proposed increase in the small claims jurisdiction limit. We refer to the Committee's submissions to the NSW Attorney General on 30 April 2009 on a proposal to increase the monetary jurisdiction of the General Division of the Local Court to $100,000.

18 **Proposal 18: Introduce the following strategies to encourage earlier settlement of disputes in the small claims division.**

Whilst the Committee welcomes measures to efficiently dispose of small claims disputes, the caveat is that the imposition of any ADR measures must not be of such complexity or burden so as to drive up costs and provide a parallel distraction to the early resolution of the claim.

19 **Proposal 19: Move to a system where all mediators on the District and Supreme Court mediators' panels are accredited under the National Mediator Accreditation System, and all court-annexed mediations (where registrar or other officer of the court is the mediator) are carried out by a person accredited under the National Mediator Accreditation System.**

The Committee agrees that all Court mediators should carry the appropriate accreditation, and understands that this is indeed the case on a State level. Subject to cost considerations, a National Accreditation system may be appropriate.

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