NSW LRC CP 16

Submission of Professor Hilary Astor

Question 2.1 Improving NSW ADR legislation

Existing statutory provisions relating to ADR in NSW can be improved by updating them to incorporate contemporary developments in ADR. Whilst some NSW statutory provisions relating to ADR are of recent provenance and benefit from such contemporary understandings, others are dated and could be clarified and improved.

An illustration of this need for updating is provided by the following example. Some recent mediation provisions contain exceptions to the confidentiality of mediation and the immunity of mediators, for example in order to permit complaints against mediator misconduct to operate. The provisions relating to NSW courts and tribunals set out in CP 16 provide instances of such provisions. Older provisions simply have a blanket provision for confidentiality and immunity. The Farm Debt Mediation Act 1994, Sections 15 and 18, provide an example of outdated definitions of confidentiality and immunity. Because of these provisions, court or professional scrutiny of mediator misconduct (inter alia) is frustrated. For example, in one farm debt mediation case where the farmer alleged that he had been placed under sustained and unconscionable duress by the mediator, the court found that it was "ham strung to the point of impossibility" in investigating the issue by these provisions.[1]

Question 3.1 Matching disputes with dispute resolution methods

There is no simple formula that might match a dispute to a particular form of ADR: rather there are a wide range of factors that must be taken into account. Foremost amongst these are the nature of the dispute and the characteristics of the parties, especially any imbalances of power between them. However, the assumption that certain processes 'match' certain disputes is tempting but may be inaccurate and potentially risky.

For instance mediation is often suited to family disputes about inheritance, but if one party involved has an active history of threats and intimidation in relation to other parties it may be quite unsuitable. Mediation is often the process of choice for family disputes. However arbitration may be a much more suitable method of dealing with family property disputes, especially where an imbalance of power (caused for instance by one party having strong financial knowledge and the other having none) makes negotiation with the assistance of a neutral third party potentially risky. Commercial disputes are often thought to be suited to ADR methods such as arbitration or expert appraisal. However disputes involving small to medium business enterprises where there has been a long term partnership or where there is a family business may have many of the same emotional barriers to resolution that are found in family and inheritance matters, and mediation may be a better option.

The lesson to be derived from the assertions above appears to be that it is beneficial for legislation to make available a range of dispute resolution methods to allow a flexible response to disputes. This approach has been adopted for legislation dealing with court connected disputes where a range of cases with different characteristics are to be found.

However, counterpoised against the virtues of flexibility are the needs and rights of consumers to know what process they are volunteering (or being compelled) to participate in, and the need to

[1] *State Bank of NSW v Freeman* (unreported SCNSW, 31 January 1996, Badgery-Parker J.)

ensure that the process and its outcomes are fair. Where disputants are provided with a range of ADR options, a matching process must take place. If a party is offered mediation, for example, they need to understand what happens in mediation and to be able to evaluate whether or not it is suitable for their dispute. Where a wide choice of ADR procedures is available, the problem of matching may be resolved by having that decision made by an expert gatekeeper, familiar with the dispute and the parties. In the absence of such a gatekeeper the availability of a range of ADR options from which parties may choose may be risky. For example, ADR practitioners will likely readily provide examples of cases where a large, legally represented corporation chooses mediation from the available range of ADR where it is in dispute with an impecunious claimant. In terms of costs it may appear to be a good choice. However it is not so if the company wishes to take advantage of imbalances in negotiating experience and knowledge to secure an advantageous settlement. Further, lack of understanding of mediation does not only lead to parties accepting it in unsuitable cases but, perhaps more frequently, to their rejecting it in cases where it is suitable.

Where only one type of ADR is available, especially if ADR is mandated and there is the potential for great imbalances of power, the provision of careful protections for vulnerable persons against potential injustices is important. An example of such an ADR process would be the mediation of family disputes provided by Legal Aid agencies (including in NSW) where expert scrutiny of the suitability of the dispute for mediation and legal representation for all parties in the mediation is provided.

ADR is often used to allow people to resolve legal disputes without the need for legal representation. Whilst unrepresented persons may have some knowledge of court processes they are often less likely to understand what is entailed in ADR processes. For example there are few representations of ADR in popular culture, and even fewer accurate representations. It is difficult for those with no experience of ADR to make an effective choice between different processes in the absence of the knowledge and information required to make that judgment. Lack of effective understanding of ADR may also extend to some members of the legal profession, who may have had no legal education about ADR and no (or limited) experience of it.

The provision of appropriate information about the nature of the process or processes that are available is therefore very important. This raises the question, posed by the Commission in CP 16, concerning the proper location of provisions about ADR. There are obvious reasons to do with flexibility and ease of updating that would indicate that statutory provisions may be best kept to a minimum. Statute and regulation should obviously provide a consistent and clear framework for ADR, including basic definitions and provisions concerning the legal framework of the process (e.g. re confidentiality and immunity in mediation). Further information about the precise nature of the procedures followed (e.g. the model of mediation to be used) is most commonly provided in regulation or rules. The easy availability of clear information accessible to the public on web sites and via other media may be the most important factor in allowing appropriate choice of process. For example the Australian Human Rights Commission video of its conciliation conferences provides information of this nature.

Question 3.2 – standardised terminology

These questions again counterpoise flexibility against certainty. The main problem caused by lack of standard ADR terminology is that consumers do not know what process they are electing or being mandated to use. As the Commission has noted, terms such as conciliation and mediation are used

to describe processes that vary widely. The nature of the process used should be clearly and accurately defined for participants to allow them to make informed choices about whether they wish to use ADR (if they have a choice) to choose between processes (where choices are available) and to prepare effectively for the process.

There is a danger of injustice if terms are used without clarity, inconsistently, or in a way that runs counter to generally understood definitions of ADR processes. For instance, the author was informed by one NSW agency that it referred parties to 'mediation' but the process provided required that the parties negotiate directly without a third party present to manage the interaction. Examples are provided in CP 16 of provisions that refer to 'mediation' and define it to mean a wide range of ADR processes. Such use of terminology is misleading and creates a risk of injustice and/or harm. The parties cannot make an informed consent to participate, cannot prepare effectively for the process, and power relationships may make agreements unfair or may expose the parties to intimidation. Such provisions should be reconsidered.

There is now no reason for failure to define processes properly and in a way that permits clarity, informed choice and proper preparation by the parties. Definitions are freely available. The recent burgeoning of ADR legislation provides excellent templates for updating such provisions. The NADRAC definitions also provide a good starting point. They are brief and confine themselves to the core characteristics of each ADR procedure. They are well known in the industry. ADR terms used in statutory provisions should generally not be inconsistent with these definitions. These terms have already had an effect in the field, with ADR providers amending their terminology to make it consistent with the NADRAC definitions.

These definitions were not intended to be a strait-jacket. In each context the ADR procedures used should be further defined and developed so that they are the best and most appropriate for the context and provide appropriate protections for vulnerable persons. Many models of mediation have already been developed to respond to the characteristics of disputes in particular jurisdictions. Such variation is not a problem, provided that the processes used are not inconsistent with generally understood definitions and the agency concerned provides appropriate information about what it means when it uses terms such as 'mediation' or 'conciliation'. The use of the term conciliation in the context of industrial disputes and human rights disputes, for example, is widely divergent. But in both contexts it has a long history, and information about the meaning of the process is available to participants and understood by their representatives.

It may be that the practice of ADR by many NSW ADR providers is clear, consistent and well publicised but that the relevant legislation has not been amended to reflect this. If this is the case, this reference provides a good opportunity to remedy these problems.

4 Mandatory or discretionary ADR

It is not possible to give a generally applicable answer to questions about the propriety of mandating the parties to use ADR, since the answer to the question depends on what form of ADR is proposed and how effectively it provides protections for vulnerable persons.

Very briefly, arguments in favour of mandating ADR include: -

- Most cases settle, and ADR may help them
    - settle earlier
    - settle aspects of the case thus limiting the matters for litigation
    - produce higher quality settlements
- There will be costs savings to parties and court
- ADR can avoid the costs of 'mega-trials : one of the objectives of courts in mandating cases to go to ADR, even against the opposition of a party or parties, is to avoid this cost in the interests of the parties and the public, given the enormous costs of some trials.[2]

- Parties have more control over their agreements
- Voluntary schemes have very low levels of participation
- Mandating provides experience of benefits of mediation to lawyers and parties who are repeat players - it overcomes resistance born of ignorance
- Resistance to using ADR may be expressed because of fear of appearing weak : the parties may resist but really desire mediation
- May help lawyers overcome client resistance

Briefly, the arguments in favour of mandating ADR include the following:

Mandatory referral:

- deprives litigants of their constitutional right to trial – or at least delays it
- supports the idea that the desire to have ones case tried is deviant, rather than different
- may be a financial barrier in some cases (if ADR effects an outcome it usually saves costs, but if it does not it usually increases them)
- mandating mediation is futile since one cannot compel co-operation, despite a requirement to mediate in good faith in some contexts
- mandatory ADR could be used cynically for bureaucratic ends such as clearing court lists, rather than wisely for suitable cases
- creates satellite litigation – paradoxically, litigation about alternatives to litigation
- may deprive NSW of useful or needed precedent

The answers to some of the Commission's questions about mandatory court-connected ADR may be found in some of the case law in NSW which has evolved around the issue of the desirability of mandating mediation and the meaning of a requirement of good faith participation.[3] Research about the way in which court – connected ADR provisions have been used in NSW, although dated, could also be useful in informing the Commission's consultations and discussions.[4]

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[2] See dicta of Justice Austin in *ASIC v Rich* [2005] NSWSC 489.

[3] There were a number of early cases where mediation was ordered against the wishes of the parties or one of them, but the mediation succeeded. The court found that there are cases where parties unwilling to go to mediation because of a fear that to show willingness may appear as a sign of weakness, yet engage in successful mediation when it is ordered. Some early cases included *Higgins v Higgins* [2002] NSWSC *Morrow v Chinadotcom* [2000] NSWSC 209; *Remuneration Planning Corporation v Fitton* [2001] NSWSC Court; *Idoport v NAB [2001] NSWSC 427.* More recent cases may exist and may be usefully considered.

[4] Kathy Mack *Court Referral to ADR: Criteria and Research* Australian Institute of Judicial Administration and NADRAC, 2004.

It is the view of the author that there is no circumstance where there should be an absolute requirement, applying as a result of law or practice, to use ADR in all cases. There should always be provision for exceptions to take account of those cases where ADR is not appropriate or opens the parties to the risk of unfairness or other harms. The nature of these exceptions should respond to the circumstances of the jurisdiction, but should always include a reference (in some appropriate form) to considerations of justice, fairness, and/or the appropriateness of ADR. Conditions that refer to matters such as expedition and cost may be appropriate, but should not be the only relevant considerations.

The Commission has noted the variety of provisions relating to the conditions under which mediation and other forms of ADR should be avoided, including the provisions relating to APVOs. These are an excellent example of the need for ADR provisions to respond to context and demonstrate why the approach of seeking a 'model clause' is likely to be risky and undesirable.

Indeed the answer to many of the questions posed in Chapter 4 of this CP provoke the same response, or at least a response consistent with the arguments made above. There is not likely to be a single or simple answer to the questions posed. What constitutes a good provision for ADR is likely to vary with context.

4.9 Good faith participation

Some ADR provisions are designed to ensure that the parties attend ADR and participate effectively in the process. Such provisions are designed to maximise the chances that ADR will produce a satisfactory outcome, and save costs to parties and the state. They attempt to prevent the abuse of ADR processes, for example by parties using them as a 'fishing expedition' or a delaying tactic. Such provisions frequently require the parties to participate in good faith. In the case of federal family law provisions the requirement is that the parties make a 'genuine effort' to resolve the dispute. I would argue that ADR in family law matters is a useful resource for the Commission in relation to this aspect of this reference. Of course, family law is substantially a federal jurisdiction, and not all disputes have the same characteristics as family matters. Nevertheless family dispute resolution has benefitted from federal funding and those resources have supported legal and practice development in family dispute resolution in ways that can be relevant or adapted to other contexts.

The challenges of good faith participation provisions lie in

- defining what constitutes good faith participation (or the making of a genuine effort, or reasonable endeavours etc.)
- defining the consequences of failure to participate in the manner required

There is some considerable jurisprudence on the meaning of 'good faith' which might be explored. However many of the decisions and commentary do not relate to ADR, are context specific and not consistent with each other.[5] In the context of mediation, the judgment of Justice Einstein in *Aiton v Transfield* (1999) 153 FLR 236 is particularly helpful. The Commission's consultations will no doubt provide useful information about the practical challenges of implementing such provisions in practice.

Defining the required level of participation

[5] See Hilary Astor "Making a genuine effort in family dispute resolution: what does it mean?' In (2008) 22 *Australian Journal of Family Law* 102, at 101.

One of the difficulties of defining what is required in ADR is that, in many contexts ADR is designed to save costs and to resolve disputes without the need for the parties to be legally represented. This raises problems because the capacity of the parties to participate may be affected by emotional, intellectual or mental health issues. They may not have the capacity to participate to any great degree. Evaluating good faith participation may be challenging in some contexts. It may be difficult, for instance, for a mediator to tell whether a party is not formulating options for negotiation because they lack capacity or because they are being obstructive and acting in bad faith.[6] What may legitimately be required of unrepresented parties in a family dispute about inheritance may be quite different to what is required in a commercial matter where the parties are represented.

In *Aiton v Transfield* (1999) 153 FLR 236 Justice Einstein argued in favour of a limited definition of good faith: it should mean that the parties are required to have an open mind in the sense of a willingness to consider options put forward by the other party or the mediator, and a willingness to give consideration to putting forward options for the resolution of the dispute.

In 2008 I argued that this definition is a good one and could be usefully adapted for use in the context of the federal family law legislation to (partly) define the meaning of genuine effort.[7] In that article I also argued that a definition is needed to promote consistency and fairness in family mediation and to prevent forum shopping. The same considerations are likely to apply in other contexts.

CP 16 does not review the relevant case law or jurisprudence on these issues, contenting itself with a review of relevant statutory provisions. It may be useful for the Commission to consider the precedents cited above, consider any more recent attempts at defining good faith in the context of mediation, and to canvass the meanings used by stakeholders and their consistency or otherwise. With these resources it may be possible to arrive at a definition of good faith that can be utilised in the ADR context. At a minimum, such consultation should provoke discussion by stakeholders which will promote contextual development of understandings and definitions of good faith.

Consequences of failure to participate in good faith

If good faith requirements are to have meaning, there must be consequences for failure to comply with them. CP 16 lists examples of provisions dealing with such consequences. Costs consequences are perhaps the most obvious sanction since one of the aims of ADR is to prevent litigation. There is the consequent question about the appropriate extent of costs orders – if it were successfully argued that, but for the failure of one party to negotiate in good faith or to attend ADR, the matter would have settled, could that party therefore be liable for all subsequent costs of litigation? The more serious the consequences of failure to participate in good faith the more important becomes the question of defining what is meant by such a requirement.

Chapter 6 Appointment and accreditation of ADR practitioners

The questions raised in this chapter would usefully be reviewed in the context of the national debates about accreditation of mediators, and existing arrangements relating to qualification of arbitrators which are considered later in the CP.

[6] Astor, ibid at 120.
[7] Astor, ibid.

In relation to mediators, there is an increasing recognition that mediation, badly performed, can have considerable costs consequences and can harm the interests of parties. At the federal level there are qualification requirements for family dispute resolution practitioners, and in other fields there are recent developments in relation to the qualification of all mediators via accredited providers of training and assessment. These are discussed in Chapter 9 of CP 16. These developments had not taken place when many statutory provisions relating to mediation were enacted in NSW. Perhaps the most important question that arises at the present time is whether or not developments in standards, training and qualifications are such that training and accreditation under the NMAS, or another rigorous training and accreditation system, should be a requirement for all who mediate in statutory contexts in NSW. It is arguable that this should be the case, with further qualifications or experience being required to take account of the particular needs of different jurisdictions. Qualification in another profession (such as law) should not in itself be sufficient qualification for the practice of mediation.

Certainly where there is a statutory requirement of ADR, or the possibility of referral to ADR, the state has a responsibility for standards and there should be carefully considered provisions to ensure the quality of practitioners. Arguably a basic requirement of qualification should be in statute, with the details developed in related rules.

8.5 Identifying and managing power imbalances

As the Commission notes, power relationships between the parties are an important issue in ADR. In processes such as mediation or conciliation the parties may arrive at agreements that depart from the law. They are more likely to be unrepresented and are required to negotiate effectively for their own needs and interests. Because the role of the mediator or conciliator is to be neutral as between the parties there is a limit to the amount of assistance that can be offered to a party who is struggling to do what is required of them in mediation or conciliation.

Protections relating to power imbalances should be set out in statute, regulations or rules that deal with referral to ADR, so that the referral agent takes power relationships into account when deciding which ADR method is appropriate, if any. An example of such a provision is to be found in the federal *Family Law (Family Dispute Resolution Practitioners) Regulations 2008 Reg 25* (FDRP Regs)which provides that family dispute resolution practitioners must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by a number of matters, most of which relate to issues of power (they are a history of family violence, safety, equality of bargaining power among the parties, risk of child abuse, emotional, psychological and physical health of the parties, and any other matter that the practitioners considers relevant.)

It is better to name the relevant factors specifically, rather than only to use an umbrella term such as a requirement to take power relationships into account. First, the relevant factors can be crafted to be appropriate to the context – for example whether both parties are represented during the process. Second, there is a danger that a broad term such as 'power relationships' may not be understood, or may be interpreted as limited to matters of physical violence or intimidation. As the Commission recognises, relevant power relationships are much broader. For instance, a party's capacity to negotiate may be affected by lack of knowledge (such their understanding of law or financial matters), by disability, or by their emotional health (for example by clinical depression).

Problems of power are not always apparent at the point of referral to mediation or conciliation. It is important therefore to have a provision for termination of the process if problems become apparent

during a mediation or conciliation. An example of such a provision can be found in the FDRP Regs at Regulation 29(c).

The effectiveness of provisions relating to power relationships depend upon the referral agent and the mediator or conciliator being able to identify and deal appropriately with issues of power. Training for such persons is important. This is recognised, for example, in the FDR Regulations, that require accreditation which includes matters such as family violence.

Protecting the parties from unfairness or injustice caused by power relationships is therefore not a simple matter but must be taken into consideration at the stage of referral, during ADR, in the model of ADR which is used, and in the training of referral agents and practitioners.

Provisions that deal with power relationships are therefore likely to be appropriately placed at several points in the regulatory mechanisms for ADR in each jurisdiction. Whilst rules and regulations may be the appropriate place for much of this material, statutory provisions should contain some reference to power relationships (however described) as a matter to be taken into account when making referral decisions.