NEW SOUTH WALES BAR ASSOCIATION SUBMISSION

NEW SOUTH WALES LAW REFORM

COMMISSION CONSULTATION PAPER 18

"*DISPUTE RESOLUTION: MODEL PROVISIONS*"

Executive Summary

1 The New South Wales Bar Association welcomes the opportunity to comment on the New South Wales Law Reform Commission's CP 18, *Dispute resolution: Model provisions*.

2 There is much to commend in the discussion of CP 18 of possible approaches, including those adopted in other jurisdictions. The Bar Association supports the view of the Commission in CP18 to exclude the model provisions from being applied to a range of "mediations" already provided for in the various NSW statutes listed in Appendix B, including importantly the *Civil Procedure Act 2005* and the *Civil and Administrative Tribunal Act 2013*.

3 However, the Bar Association respectfully suggests that Model Provision 5: *Enforcement of mediated settlement agreements* is both unnecessary, given the existing preparedness of NSW Courts to enforce mediated settlement agreements, and has drafting problems of such magnitude that it would be better for Model Provision 5 to be deleted entirely.

4 In addition, there are some other important drafting issues addressed in the following brief commentary on the proposed model provisions.

Model Provision 1: Definitions of accredited mediator and mediation

5 In relation to the proposed definition of "*Accredited mediator*", the Bar Association first notes that this phrase only occurs in Model Provision 5(2)(b). The Bar Association suggests that Model Provision 5 should be deleted in its entirety (as noted in paragraph 3 above and developed at paragraphs 20-38 below).

6 The National Mediator Accreditation System (**NMAS**), which is referred to in the proposed definition of "*Accredited mediator*", is only a voluntary industry scheme for mediator accreditation. The criteria embodied in the NMAS thus are not within the control of the NSW Parliament.

7 Accordingly, the proposed definition of "*Accredited mediator*" should be deleted. It has no work to do. Given the definition of "*mediator*" already contained within the proposed definition of "*Mediation*" next discussed, it is not necessary to have a separate definition

of "*Mediator*" in place of the deleted definition of "*Accredited mediator*".

8 If the current definition of "*Mediation*" substantially remains, it is suggested that, in the definition of "M*ediation*", add at the end of the first sentence the words "*by agreement*". Without this addition, the definition might very well capture arbitration as well as mediation (contrary to the aim expressed at [2.7] of CP 18 to "*distinguish mediation from negotiation, arbitration and other forms of dispute resolution*"). The addition would also emphasise the fact that the mediator has no power to impose an outcome on the parties, i.e. mediation is not an adjudicative process and reduces the risk of it being confused with adjudicative processes where the outcome is imposed on the parties, such as arbitration or expert determination.

9 In the definition of "*Mediation*", at the end of the second sentence, delete the words "*or 'neutral evaluation'*". The only possible resemblance that neutral evaluation bears to mediation is that the parties are generally not bound by the evaluator's opinion. Given that in the predominant model of mediation, facilitative mediation, the mediator does not offer opinions to the parties, this matter can hardly be regarded as a significant similarity.

10 Apart from this possible similarity, the processes are completely different. (Therefore, our suggested deletion of the words "*or 'neutral evaluation'*" should not mean that other possible models of mediation, such as evaluative mediation in which the mediator may, at the request of the parties, offer opinions during the course of the mediation, might somehow fail to be included in the proposed definition of "*Mediation*" after the amendments suggested above have been made.) Anecdotal evidence also suggests that neutral evaluation is relatively rarely used. Given this, the risk of confusion inherent in including it within the definition of mediation is not worth taking.

11 An alternative possible approach to the definition of mediation could be to use a definition more closely following the definition now found in the *Civil Procedure Act 2005* (Part 4 s 25) for the first sentence of the definition but dealing with the two matters raised above so that the definition would read:

> *"**Mediation**" means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute by agreement. It includes a process that fits this description even when such a process is described as "conciliation".*

Model Provision 3: Mediator's immunity

12 Model Provision 5(3) requires a mediator to "*draw the attention of the parties to the effect of Model Provision 5(2) before the mediated settlement agreement is signed*". If the mediator fails to do this then, under Model Provision 5(4)(b)(iii), the Court may refuse to give orders under Model Provision 5(2).

13 The consequence of such a failure by the mediator may thus be that the party seeking to enforce the mediated settlement agreement is unable to do so. In this situation, that party may seek to recover his, her or its loss from the mediator (the loss being the benefits that would have flowed to the party from successful enforcement of the agreement).

14 In this situation, does Model Provision 3 provide the mediator with immunity? Pursuant to Model Provision 3(1), it seems to provide immunity only if the mediator's omission to give the advice required by Model Provision 5(3) is a "*matter or thing … omitted to be done by a mediator … for the purposes of a mediation session under this Act*".

15 It is submitted that it is oxymoronic to regard an omission to do something as having been done for a particular purpose. The whole point is that the thing was ***not*** done and, given this (unless the mediator made a conscious decision not to comply with Model Provision 5(3)) it is not possible to attribute a purpose to not doing the thing.

16 In its present form, therefore, Model Provision 3(1) creates a serious risk that a mediator who fails to comply with Model Provision 5(3) will not be granted immunity. The simple and better solution to the problem, as is submitted below, is to delete Model Provision 5(3) (even if all of Model Provision 5 is not deleted, the preferable primary solution also proposed below). If a solution deleting at least Model Provision 5(3) is not adopted, then Model Provision 3(1) should be expanded in order to achieve its purpose.

17 The Bar Association also endorses Model Provision 3(3) in confirming that Model Provision 3 is not intended to alter the operation of s 33 of the *Civil Procedure Act 2005* (NSW) or cl 2 of sch 1 of the *Civil and Administrative Tribunal Regulation 2013* (NSW).

18 The intention of the Commission, articulated in paragraph [2.18] appears to have been to provide good faith immunity only to "accredited" mediators. However, Model Provision 3 on its face applies to all mediators. While that arguably (given paragraph [2.18]) was not originally intended, it is submitted that the word "accredited" should not be added before "mediator" in Model Provision 3(1) or 3(2). This is because good faith immunity should be available to all mediators conducting a "mediation" as defined in the Model Provisions. Also, at the end of Model Provision 3(1) the words "*session under the Act*" should be deleted, given that "*mediation*" is already a defined term.

19 It is also submitted that parties to a mediation should be free to grant immunity to their mediator except for fraud; that is, by agreement, they could give their mediator a higher level of immunity than that granted by Model Provision 3. Model Provision 3(1) might be thought to strike down such an attempt. Accordingly, it is submitted that Model Provision 3 should include a fourth paragraph, as follows:

"(4) Nothing in this Provision is to be taken as preventing parties to a mediation, by

written agreement, granting the mediator greater immunity than provided by paragraph (1).”

Model Provision 5: Enforcement of mediated settlement agreements

20 The Bar Association had suggested in its 2 July 2014 submission in response to CP 16 at [17] that statutory provisions should not attempt to stipulate or deal with impacts of agreements reached and other outcomes of ADR such as mediations. After considering Model Provision 5 as currently drafted, the Bar Association adheres to that view and suggests that Model Provision 5 be wholly deleted.

21 Paragraph [2.33] of CP 18 suggests that, if the mediation settlement agreement is not enforceable under the mechanism proposed in Model Provision 5, including because the mediator failed to draw the parties' attention to the consequences provided for in Model Provision 5 before they enter into the settlement agreement, “the agreement can still operate as an agreement but will not be registrable as a court order”. However, it is not at all clear from the proposed wording of Model Provision 5 that this suggestion in [2.33] of CP 18 is correct. First, the current drafting of Model Provision 5 does not expressly state that a settlement agreement that does not comply with Model Provision 5 requirements could still otherwise operate as an agreement that could be enforced apart from Model Provision 5. As a result, the Court may well construe Model Provision 5 as implying that a non-complying agreement should not be enforced. Secondly, the current drafting does not state that an agreement (even one that satisfies what the Bar Association suggests are the overly rigorous requirements of Model Provision 5) would ever be “registered” as a Court order.

22 Even more fundamentally, the existing willingness of NSW Courts to uphold and enforce mediation settlement agreements by applying well-established contract law principles (including if necessary by ancillary orders for specific performance), recently exemplified in *Petronaitis v Petronaitis* [2016] NSWSC 765 (7 June 2016) highlights why there is now no need for a provision like Model Provision 5. In *Petronaitis*, Black J, applying long-established contract law principles, readily enforced an agreement reached during a private mediation of a probate dispute (when an offer made by counsel for the plaintiff was accepted by counsel for the defendant and the mediation agreement required the parties to set out in writing any settlement agreement reached) and granted a declaration that there was an enforceable agreement to settle proceedings and ancillary orders for specific performance.

23 The reasons in *Petronaitis* do not refer to there having been any express referral by the Court under s 26 of the *Civil Procedure Act 2005,* so the operation of s 29 was not considered and the Court exercised the general jurisdiction of NSW courts under s 73 of the *Civil Procedure Act 2005* to determine any question in dispute between parties to proceedings as to whether, and on what terms, the proceedings had been compromised or settled between the parties.

24 Accordingly, the primary submission of the Bar Association is that there is no need for any provision along the lines of Model Provision 5 to enable enforcement of mediated agreements where the mediation was not ordered by a court or tribunal.

25 If that primary submission is not adopted, then the drafting problems identified below are such that, at the very least, Model Provision 5(3) and 5(4)(b)(ii) and probably Model Provision 5(2)(c) should be deleted. Further, there should be an express new provision (similar to that in s 29(3) of the *Civil Procedure Act 2005*) making it explicit that Model Provision 5 *"does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session"*.

26 Model Provision 5(2)(c) provides that a party can only apply to the Court for orders enforcing a mediated settlement agreement if the "*party against whom the applicant seeks to enforce the settlement agreement has explicitly consented to such enforcement*". It is not clear why this requirement has been imposed. Why is it not sufficient for the settlement agreement to provide that it is legally binding on the parties?

27 Model Provision 5(3), as noted above, requires a mediator to "*draw the attention of the parties to the effect of Model Provision 5(2) before the mediated settlement agreement is signed*". If the mediator fails to do this then, under Model Provision 5(4)(b)(iii), the Court may refuse to give orders under Model Provision 5(2).

28 It is submitted that Model Provision 5(3) should be deleted, for at least two reasons: ***first***, a mediator should not be giving the parties legal advice and certainly should not have a statutory obligation to do so. To do so would undermine the predominant model of mediation, which is facilitative - the mediator does not offer opinions on the outcome of disputed legal or factual matters but, rather, encourages the parties to rely on advice from their legal advisors on these matters. The ***second*** reason why Model Provision 5(3) should be deleted is that it exposes the mediator to claims from which he or she may not have immunity - see the comments above regarding Model Provision 3(1).

29 If the Commission is of the view that enforceability in Court of a mediated settlement agreement should turn on the parties having been advised, before they sign the agreement, of the effect of Model Provision 5(2), then Model Provision 5(3) should be redrafted to provide that each party's legal advisor (rather than the mediator) has that obligation with respect to his or her client. While that might be thought to provide problems where parties do not have legal advisors, requiring the mediator to in effect be a legal advisor would impose far greater problems and undermine the facilitative model of mediation.

30 Model Provision 5(4)(b)(iii) provides that the Court may not enforce a mediated settlement agreement if "*the mediator failed to draw the parties' attention to the binding*

nature of the agreement before it was signed". This is a reference to the mediator's obligation under Model Provision 5(3) to "*draw the attention of the parties to the effect of Model Provision 5(2)*". But the two provisions do not match each other - to draw the parties' attention to the binding nature of the agreement is not the same thing as to draw their attention to the effect of Model Provision 5(2).

31 Again, the simple solution to the problem is to delete Model Provision 5(3). If this is done, Model Provision 5(4)(b)(iii) becomes unnecessary.

32 If, however, Model Provision 5(3) is retained, then Model Provision 5(4)(b)(iii) should be redrafted to match it. A simple way to do this would be for it to provide "*(iii) the mediator failed to comply with Model Provision 5(3)"*.

33 *Model Provision 5(4)(b)(i)* provides that the Court may refuse to give orders under Model Provision 5(2) if "***any*** *of the terms of the agreement cannot be enforced as an order of the Court*" (emphasis added). It is submitted that "*any*" would have the effect that, if a mediated settlement agreement contained a single term that was not enforceable, the Court might not enforce any of the agreement. For example, a settlement agreement might be quite clearly enforceable except that a single term in it could be construed as an agreement to agree. The normal approach of a Court would be to sever that term (if possible) and then enforce the rest of the agreement. Model Provision 5(4)(b)(i) would have the effect that the entire agreement might not be enforced.

34 This would be unfortunate. The observation of several very experienced accredited mediators who are members of the Bar Association, based on many years of acting as mediators, is that mediated settlement agreements are often, indeed, usually, drafted at the end of the mediation. (There are many good reasons why the agreement should be drafted and signed before the mediation concludes.) The drafting of the agreement thus often occurs quite late at night, when all the participants are tired (sometimes exhausted) from the effort required to achieve agreement, and want to go home. For this reason, mediated settlement agreements sometimes are less than paragons of precise drafting. Model Provision 5(4)(b)(i) fails to have regard to this reality.

35 It is submitted that the solution to the problem is to delete Model Provision 5(4)(b)(i) or, at least, to redraft it to provide that the Court may refuse to enforce parts of a settlement agreement that are not enforceable - but surely that is merely to state the obvious.

36 However, the best solution to the range of problems identified above would be to delete all of Model Provision 5 in any new statutory provisions.

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