Challenges and Opportunities: ADR in the Global Recession

The Hon Robert McClelland MP[1]

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.

Introduction

It's a pleasure to be here this afternoon. And I think we can agree that the theme for this year's conference could not have come at a better time. The current economic climate is tough. We are in the grip of a global economic recession, and we are not immune from its effects.

We can expect to see increased numbers of commercial and financial disputes – all of which will require cost-effective, fast and innovative resolutions.

For example, we have already seen an increase in shareholder class actions. And investors may also find themselves in disputes with national and international corporations, many of which have complex corporate structures.

This is why court reform and increasing the use of alternative dispute resolution are so important.

Today, I want to outline what the Government is doing on this front.

This is particularly important given the prospect that the current economic situation will lead to increased numbers of commercial and financial disputes.

Importance of alternative dispute resolution

Resolving such commercial disputes can not only be complicated and time consuming – it can also be expensive.

When I launched the NSW Bar Dispute Resolution Centre in Sydney late last year, I spoke about several recent cases, including the C7 litigation in the Federal Court and the Bell Group litigation in Western Australia.

These cases demonstrate the challenges large-scale litigation poses to governments, the legal profession and the parties involved.

Large scale cases use significant amounts of the courts' time. This inevitably reduces the ability of other litigants to access the justice system.

These cases also have an impact on the public purse.

For example, cost estimates provided by the WA Department of Justice shows that in the recent

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Bell litigation that ran for 400 days parties contributed only around $900,000 to the cost of the court cases. However, the full cost to the taxpayer of the case was around $6.19 million. Of the $3.72 million in hearing fees, actual hearing fees collected totalled only $490,000.

Overall, parties to the case paid less than 15 per cent of the actual cost of running the case. This is money that could have been better used in many other areas of the justice system, not least legal aid.

Such lengthy disputes tie up considerable capital and managerial time – this is money and time that commercial parties could better use in more productive endeavours, particularly in periods of economic downturn.

There must be better ways to resolve these disputes.

ADR is one such way.

But if ADR is to be an attractive option it needs to be more effective, more flexible and cheaper than commercial litigation.

That's why the Government is committed to promoting and developing ADR.

Arbitration law reform

Arbitration is one type of ADR that offers the potential for expeditious, confidential and less expensive determination of commercial disputes.

But it must be acknowledged that commercial arbitration has not always reached this potential.

That's why I'm pleased the Standing Committee of Attorneys-General has reinvigorated its efforts to reform Australia's uniform domestic arbitration Acts.

My State and Territory colleagues and I have agreed to draft a new model commercial arbitration Bill based on the UNCITRAL Model Law on International Commercial Arbitration.

It will be supplemented by additional provisions as required.

Importantly, we also agreed that the Bill should be drafted to give effect to certain fundamental principles.

One of these is that the Bill's overriding objective should be the fair and final resolution of disputes by an impartial tribunal, in a *quick and cost-effective manner*—and that the tribunal should conduct the proceedings accordingly.

These principles are critical to improving the way arbitrations are conducted, and in the ways courts supervise arbitration.

It is also important that the Bill be drafted consistently with the Commonwealth *International Arbitration Act.*

This is fundamental to creating genuinely harmonised regimes for international and domestic arbitration in Australia.

Unquestionably the alternative—the inconsistent adoption of the UNCITRAL Model Law for international and domestic arbitration—would create real confusion. It would create a fragmented and inconsistent system for resolving disputes.

Reform of the uniform Acts is long over-due. Reform will help ensure an effective domestic arbitration system to assist parties resolve disputes fairly and efficiently. It will facilitate the development of national expertise based on best practice.

But reform of the Commonwealth International Arbitration Act is also over-due.

That's why the Government is currently reviewing the International Arbitration Act.

The Government's review has been widely welcomed.

Reform will improve the legislative framework for international arbitration in Australia, promoting certainty in the process as well as encouraging arbitration to be more timely and cost effective.

We greatly value the submissions we have received and thank all contributors.

The submissions will assist the Government in establishing the best regulatory framework to support both clients and arbitrators.

A regional hub for commercial dispute resolution

The Government's review of the International Arbitration Act will help ensure that the Act works best for the commercial parties using it.

So too will reform of the uniform domestic Commercial Arbitration Acts.

These reforms will help meet the objective, which I have previously stated, that arbitral proceedings should be both just and efficient, *and* both fair *and* economical.

These reforms will also help promote Australia as a regional hub for commercial dispute resolution.

Australia is an attractive venue for international arbitration and Australian arbitrators and arbitration practitioners are internationally renowned.

However, as you will all be aware, both Hong Kong and Singapore have put considerable work in to building their reputations as international centres. They are now reaping the benefits of that work.

This means there is much work to be done to enable Australia to compete with those centres.

This is not a new challenge. Back in 1999, the Hon Michael Kirby detailed the challenges to be confronted to make Australia a centre for international commercial arbitration. In his paper *"Do Australians Have a Future In International Commercial Arbitration"* delivered to an event co-sponsored by this very organisation, he outlined the problems of geography and tradition that worked against Australia.

Much good work has been done since then, including by members of this organisation, to promote Australia as a leading centre for commercial dispute resolution.

Developing Australia as a regional hub for commercial dispute resolution is also conducive to promoting Australia's involvement in international trade and commerce.

Arbitration is a widely accepted way of resolving disputes and developing expertise here gives foreign companies greater confidence with not only our legal system but in the availability of a cost-effective, fair and efficient mechanism to resolve disputes.

The current global economic climate makes it all the more imperative that we get this right.

Greater use of ADR

While I have spent much of this speech talking about private ADR, I should add that the Government is also committed to encouraging more court-based ADR. As Chief Justice Robert French has said, there will be instances where courts are best placed to resolve matters. Their expertise and power to control proceedings may be more than useful – those powers may be essential.

We must develop a civil justice system where disputants can resolve their disputes quickly and efficiently, either privately through ADR processes, or where that is not successful or is inappropriate, through streamlined court and tribunal processes.

I am keen to explore whether ADR techniques can be applied as an intrinsic part of the courts and tribunal processes.

Most court cases settle before they are heard. In fact, many courts already adopt some ADR techniques, such as directed discussion, to assist parties to resolve their matters earlier and well before the court-room door.

At the same time, parties should be given every opportunity to reach a resolution privately if that is possible.

For that reason courts and tribunals it is useful for courts to be empowered and have the facilities to refer matters to private ADR processes where appropriate.

While judges were once reluctant to order ADR without the parties' consent, I believe that thinking is increasingly changing as it is realised that ADR may be successful even where the parties initially oppose it.

Justice Hamilton observed in *Remuneration Planning Corp Ltd v Fitton: Fitton v Costello* [2001] NSWSC 1208 the attitude of courts has changed radically in a short period of time.

> *"It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered."*

Success in part can often significantly reduce time and cost. However, reforms will have to balance many interests.

As a result, I asked the National Alternative Dispute Resolution Advisory Council to look at strategies to ensure greater use of ADR.

NADRAC is looking at what incentives to ADR could be introduced along the litigation pathway and what barriers to ADR could be removed.

Another area that NADRAC has been looking at is for there is potential for greater use of private and community-based ADR services. They are also looking at how to ensure that those services are of a high quality.

I understand that NADRAC's chair, Justice Murray Kellam AO, will be addressing you on Sunday about this inquiry.

NADRAC has been consulting widely with key stakeholders and has received an encouraging number of submissions in response to the comprehensive Issues Paper it released in March.

I look forward to receiving its report in September.

However, ADR processes must not become new venues for adversarial game playing – and with that, too expensive for disputants.

Clearly, that would defeat the purpose of ADR.

Conclusion

In the current economic climate, it is all the more vital that we resolve disputes in a better way.

We must have a justice system that is flexible and accessible.

And that delivers timely, effective and affordable outcomes.

ADR is a key to achieving this.

The Prime Minister recently remarked:

> *'As we confront the reality of a global economic recession, we must as a nation reaffirm the great strengths that we have…'*

The depth of Australian expertise in arbitration and mediation is one such strength. It has an important role to play in ensuring that Australian business is able to quickly and cheaply resolve disputes and is able to remains focussed on keeping our national economy strong.

So I would like to congratulate the IAMA for developing this conference program.

IAMA does great work in supporting arbitration and mediation in Australia.

This conference is part of this.

I'd also applaud IAMA's initiative to develop links with similar bodies overseas.

I understand that the Mr David Carden President of Arbitrators' and Mediators' Institute of New Zealand, will shortly be signing a cooperation agreement with IAMA—and that his Honour Michael Kirby will shortly be reciprocating in New Zealand.

There is a great deal that we can learn from each other.

I'm sure the next two days will offer stimulating discussion and excellent learning opportunities.

I wish you all the best in your deliberations.

And I look forward very much to hearing the outcomes.

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