MODEL LITIGANTS, MIGRATION, MERITS REVIEW AND … MEDIATION?

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It is easy to assume that alternative dispute resolution[1] is utterly inappropriate in the context of decisions by federal government agencies, particularly decisions of the Department of Immigration and Citizenship[2] under Australia's migration and citizenship legislation.[3] Federal legislation requiring disputants to take 'genuine steps' to resolve their dispute, prior to commencing litigation, expressly exempts from its scope decisions made pursuant to Australia's migration legislation.[4] Extrinsic material suggests the rationale for this exclusion is that such decisions may have already been exposed to ADR processes and that decisions made under this legislation are generally not amenable to ADR.[5]

However the Commonwealth model litigant policy does not exempt any category of dispute from the requirement that agencies give active consideration to the use of ADR, both prior to the commencement of and throughout the life of proceedings.[6] Similarly, the Administrative Appeals Tribunal[7] does not generally exempt decisions made under migration legislation from its conferencing procedure, which is regarded as an ADR process. How then, is DIAC to best promote the 'resolution culture' endorsed in 2008 by the (then) Commonwealth Attorney General, [8] within the particular framework and constraints of migration law?

It is argued that, provided the special characteristics of disputes arising out of government decisions in the migration jurisdiction are properly appreciated, and ADR processes tailored accordingly, utilising ADR techniques is likely to have positive outcomes, including better primary decision making and better definition of disputed issues.[9]

The passages that follow will:

- Outline the requirements imposed on Commonwealth government agencies when dealing with claims and litigation;
- Examine the challenges for ADR when one of the parties is a federal government agency, focussing in particular on DIAC; and
- Analyse how ADR methods and techniques may be, and already are, used in both merits review and judicial review proceedings involving DIAC.

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1 'ADR'.

2 'DIAC'.

3 Hereafter referred to generally as 'migration legislation', unless expressly indicated otherwise.

4 *Civil Dispute Resolution Act 2011* (Cth), discussed further below.

5 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth).

6 *Legal Services Directions 2005* (Cth) Appendix B, discussed further below.

7 'AAT'.

8 Robert McLelland, 'Australian Institute of Administrative Law Forum' (Speech delivered at the Australian Institute of Administrative Law Forum, Melbourne, 7 August 2008) <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_7august2008-AustralianInstituteofAdministrativeLawForum> at 4 February 2009, 1.

9 Robert McLelland, 'The Obligation to Assist' (Speech delivered at the Administrative Appeals Tribunal Seminar: The Obligation to Assist Model Litigants in AAT Proceedings, Canberra, 26 August 2009).

I THE COMMONWEALTH AS A LITIGANT

The special position and thus responsibility of the Commonwealth as a litigant has long been recognised at common law[10] and is reflected in the model litigant policy. The model litigant policy is found in the *Legal Services Directions,*[11] issued by the Attorney General pursuant to the *Judiciary Act*.[12] The Directions are binding on Commonwealth agencies.[13] The model litigant obligation requires that Commonwealth agencies handle claims and litigation with honesty and fairness, and consistently with the highest professional standards.[14] The obligation applies to all aspects of litigation, which is defined broadly and includes proceedings before tribunals and ADR processes.[15]

On 1 June 2008 the Directions were significantly amended to introduce various obligations on agencies relating to the use of ADR. The amendments include a requirement on agencies to consider ADR and not to commence legal proceedings unless satisfied that litigation is the most appropriate method of resolving the dispute.[16] As Commonwealth agencies are more often respondents than applicants, it is questionable how much of a direct impact this particular requirement has in practice. However agencies are also required to make an early assessment of their prospects of success,[17] keep litigated proceedings under review for potential opportunities to utilise ADR[18] and to participate in ADR where appropriate.[19]

The model litigant obligation applies not only to judicial review but also to merits review proceedings.[20] The obligation requires an agency to 'use its best endeavours to assist the tribunal to make its decision' and closely parallels the duty to assist in section 33(1AA) of the *Administrative Appeals Tribunal Act*.[21] Section 33(1AA) obliges agencies to assist the AAT to reach the correct or preferable decision, and not simply to defend their original decision at all costs.[22]

Responsibility for enforcement of the Directions is held by the Attorney General.[23] The model litigant policy is administered by the Office of Legal Services Coordination, which undertakes various functions including monitoring compliance.[24]

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10 Ian Govey, 'Issues of Consistency, Standards and Compliance' (Speech delivered at the Administrative Appeals Tribunal Seminar: The Obligation to Assist Model Litigants in AAT Proceedings, Canberra, 26 August 2009), 3; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ).

11 *2005* (Cth) ('the Directions') at Appendix B.

12 *1903* (Cth) s 55ZF.

13 Govey, above n 10; National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, Report to the Attorney-General (September 2009), [8.2].

14 *Legal Services Directions 2005* (Cth) Appendix B, [2], especially Note 2. See discussion in Govey, above n 10, 5.

15 *Legal Services Directions 2005* (Cth) Part 4, [15].

16 Ibid Part 1, [4.2]; Appendix B, [2(d)]; [5.1].

17 Ibid Appendix B, [2(aa)(i)].

18 Ibid Appendix B, [(2)(e)(iii)]; see discussion in National Alternative Dispute Resolution Advisory Council, above n 13, [8.3]; McLelland, above n 9.

19 *Legal Services Directions 2005* (Cth) Appendix B, [2(d)].

20 Ibid Appendix B, [3]; see discussion in Govey, above n 10, 4.

21 *1975* (Cth).

22 Govey, above n 10, 5.

23 Michelle Taylor-Sands and Camille Cameron, 'Regulating parties in dispute: Analysing the effectiveness of the Commonwealth Model Litigant Rules monitoring and enforcement processes' (2010) 21 *Public Law Review* 188, 189; *Judiciary Act 1903* (Cth) s 55ZG(2).

The model litigant policy is largely aspirational and it is perhaps for this reason that it does not exempt any particular category of dispute. However the *Civil Dispute Resolution Act*[25] expressly excludes from its requirements, including the obligation to file a 'genuine steps' statement,[26] 'proceedings that relate to a decision of, or a decision that has been subject to review by' bodies including the AAT, the Migration Review Tribunal[27] and the Refugee Review Tribunal.[28] The Explanatory Memorandum to the Civil Dispute Resolution Bill states that, in cases where the decision in issue is that of an external merits review tribunal, there is no need for a requirement to take genuine steps because the parties will already have been presented with opportunities to take genuine steps to resolve the dispute.[29] This is the case, generally, in relation to the AAT. It is not the case in relation to the RRT and MRT, as discussed below.

Section 16 of the *Civil Dispute Resolution Act*[30] excludes altogether proceedings under certain Acts, including the *Australian Citizenship Act*[31] and the *Migration Act*.[32] The rationale behind such exclusion is that disputes under these Acts are not generally amenable to ADR, at least as required by the Act.[33]

II CHALLENGES FOR COMMONWEALTH AGENCIES

Particular features of disputes where one of the parties is a government agency must be borne in mind when considering the appropriateness of ADR and how ADR techniques may be implemented. These features include:

- The need for *fairness and transparency*.[34] A government agency must be consistent in its application of law and policy and must consider how its position in a particular case might impact on other cases.[35] The need to ensure fair and consistent treatment of individuals will often prevent a sympathetic approach being taken in an individual case.[36] The model litigant policy includes a requirement for agencies to act consistently.[37]
- The fact that much Commonwealth litigation is *driven by policy*.[38] The Commonwealth, consistently with the model litigant policy, is not concerned with success at all costs. It often pursues litigation consistently with policy objectives or a particular view as to the construction of a statutory provision.[39]

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24 Ibid, 190. The authors generally critique the effectiveness of the monitoring and enforcement process.
25 *2011* (Cth).
26 See *Civil Dispute Resolution Act 2011* (Cth) Part 2.
27 'MRT'.
28 'RRT'. *Civil Dispute Resolution Act 2011* (Cth) s 15(c).
29 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth) [54(c)].
30 *2011* (Cth).
31 *2007* (Cth).
32 1*958* (Cth). *Civil Dispute Resolution Act 2011* (Cth) s 16(a) and 16(f).
33 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth) [55]; [56(a)]; [56(a)].
34 Serena Beresford-Wylie, 'Alternative Dispute Resolution and Government Disputes; the Administrative Review Experience' (1999) 92 *Canberra Bulletin of Public Administration* 52, 56.
35 See PM Meadows, 'Disputes Involving the Commonwealth: Observations from the Outside; a Solicitor's View' (1999) 92 *Canberra Bulletin of Public Administration* 41, 42.
36 J Daryl Davies, 'Disputes Involving the Commonwealth: Observations from the Outside; a Judge's View' (1999) 92 *Canberra Bulletin of Public Administration* 34, 37.
37 *Legal Services Directions 2005* (Cth) Appendix B, [2(c)].
38 Davies, above n 36, 36.
39 See Meadows, above n 35.

Agencies - as opposed to self-interested 'one off' litigants - are concerned with the establishment of precedents. Further, ADR outcomes may lead to a loss of educative effect, in that they generally provide no information to assist the original decision maker in understanding why his or her decision was set aside.[40]

- The Commonwealth as a litigant must be *publicly accountable*.[41] When statutory office holders sacrifice a right or interest in negotiated settlement, they do not lose anything personally. Rather, they potentially sacrifice the agency's position on a point of principle or a public entitlement.[42] When disputes are settled using ADR there is no ability for public scrutiny of the conduct of persons involved in the dispute resolution process.[43]
- An individual disputant in opposition to a government agency is at *significant disadvantage* in terms of power, resources, experience in litigation and knowledge.[44] In circumstances where procedures before courts and tribunals are generally highly regulated, there is a need to ensure that any ADR methods utilised are cognisant of this power imbalance and that the process is fair to the individual.[45]

A *DIAC claims and litigation*

The challenges for agencies engaged in disputes are often more acute in disputes involving DIAC. For example, the power disparity between DIAC and the individual is likely to be greater, as many applicants do not speak English fluently. Many applicants before the RRT and MRT are also not represented.[46]

The requirement for consistency in decision making is particularly significant in the context of migration law. Australia's migration system must, if it is to retain its integrity, be administered in a consistent, transparent and vigorous manner. DIAC is involved in a very large number of disputes, and it must ensure that it adopts a consistent and centralised national approach.[47]

Decisions under migration legislation generally involve a determination as to whether or not a person is entitled to a benefit, such as a visa or Australian citizenship.

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40 Administrative Review Council Report to the Minister for Justice, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (14 September 1995), [3.147]; Denis O'Brien, 'Review on the merits of migration and refugee decisions - reflections on the operation of the Migration Review Tribunal and Refugee Review Tribunal in an interconnected world', (Speech delivered at the Australian Institute of Administrative Law Forum, Canberra, 18-19 July 2013), 4.

41 Niamh Kinchin, 'Mediation and administrative merits review: An impossible goal?' (2007) 18 *Australian Dispute Resolution Journal* 227, 230.

42 GT Pagone, 'The Model Litigant and Law Clarification' (ATP Leadership Workshop, 17 September 2008) <http://www.austlii.edu.au/au/journals/VicJSchol/2008/17.pdf> at 29 October 2010, 10.

43 Kinchin, above n 41, 230.

44 Ibid 231; Administrative Review Council, above n 40, [3.142]; see, further, Govey, above n 10, 2; *Moline v Comcare* [2003] AATA 827, [6].

45 Beresford-Wylie, above n 34, 56.

46 Migration Review Tribunal and Refugee Review Tribunal, *Annual Report* 2008-2009 <http://www.mrt-rrt.gov.au/Publications/default.aspx> at 29 October 2010, 21; Migration Review Tribunal and Refugee Review Tribunal, Annual Report 2011-2012 <http://www.mrt-rrt.gov.au/getattachment/Forms-and-publications/Annual-Reports/MRTRRTAR201112.pdf.aspx> at 10 August 2013, 28.

47 Andrew Metcalfe, 'Issues Concerning Legal Advice and Representation' (Speech delivered at the Administrative Appeals Tribunal Seminar: The Obligation to Assist Model Litigants in AAT Proceedings, Canberra, 26 August 2009), 3.

A person who does not meet the criteria for the grant of the visa cannot be granted that visa. It is not a question of discretion or negotiation. Decisions of the RRT and MRT are ' "all or nothing" '.[48] This is likewise the position in relation to the grant of Australian citizenship.

The legislative scheme, as well as being complex, is particularly rigid. As Australia's migration law and policy has developed, there has been a shift from a highly discretionary regime, to one in which there is almost a complete absence of discretion. The way in which primary decision makers and the tribunals[49] must approach their decision making is highly codified. This regimented procedure leaves little, if any, room for negotiated settlements.[50] A further significant difficulty in utilising ADR before the MRT and RRT is that DIAC is not a party to the review proceedings.[51]

However these special difficulties do not mean that disputes of this nature are incapable of benefiting from the use of ADR techniques. Rather, these difficulties should inform the way ADR is approached and used, and the cases which are selected as potentially suitable.[52]

III HOW CAN ADR BE USED IN MIGRATION DISPUTES?

DIAC regularly deals with disputes involving, broadly:

- Monetary claims;[53]
- Merits review applications before the AAT, RRT and MRT; and
- Applications for judicial review of tribunal decisions.[54]

It is easy to see how ADR processes can be used in the context of monetary claims, for example, claims for damages for wrongful detention. These types of dispute are not discussed in this article.

A *Merits review: the AAT, RRT and MRT*

The task of a merits review tribunal is to reach the correct or preferable decision. If there is more than one lawful decision, then the tribunal has discretion as to which decision is preferable. In these circumstances, there is scope for the use of ADR processes and techniques.[55] By incorporating elements of ADR practice into the proceedings of merits review tribunals, it may also be possible to enhance the effectiveness of the procedures and the satisfaction of the disputants.[56]

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48 Administrative Review Council, above n 40, [3.150].

49 The RRT and MRT are together referred to as the 'tribunals'.

50 Beresford-Wylie, above n 34, 54; Kinchin, above n 41, 227.

51 See discussion in Administrative Review Council, above n 40, [3.149].

52 NSW Government Justice and Attorney General, *ADR Blueprint Draft Recommendations Report 2: ADR in Government* (September 2009) <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/250909_updated_adr_recommendations_report2.pdf/$file/250909_updated_adr_recommendations_report2.pdf > at 24 October 2010, 4.

53 Including, for example, contractual disputes and claims for compensation based on breach of duty of care or defective administration.

54 And subsequent appeals.

55 Beresford-Wylie, above n 34, 52.

56 NSW Government Justice and Attorney General, *ADR Blueprint Draft Recommendations Report 2: ADR in Government*, above n 52, 4.

Most migration merits review is done by the RRT and MRT.[57] However, in particular cases, merits review is by the AAT. Such cases include business visa cancellations, freedom of information decisions, visa cancellations and refusals on character grounds, Australian citizenship refusals and migration agent sanction decisions.

B *The AAT*

The AAT's guidelines state that '[a]s a general principle, all disputes are potentially suitable for referral to ADR'.[58] It is common for most migration disputes to proceed to a conference shortly after an application to the AAT is filed.[59]

A conference is not held where an applicant who is in Australia seeks review of a decision to cancel his or her visa or to refuse his or her visa application on character grounds under section 501 of the *Migration Act*.[60] ADR processes, including conferencing, are not appropriate in such cases, which must be decided by the AAT within 84 days of the date of the primary decision.[61] At the end of the 84 days, the AAT is taken to have affirmed the primary decision to cancel or refuse the applicant's visa. Onshore character cancellations and refusals are a prime example of 'all or nothing' decisions which involve no scope for a negotiated settlement unless one party is prepared to concede. That is almost never the case.

In other AAT review proceedings under Australian migration and citizenship legislation, conferences are conducted early in the proceedings by a Registrar. The Registrar takes a relatively active role in the discussion. The Registrar may ask the government representative to explain to the dissatisfied review applicant the reasons for the primary decision. The Registrar may comment on the merits of the case,[62] and may suggest potential additional evidence of relevance that a party might pursue. The AAT conferencing procedure is useful in that it:

- Allows the Minister's solicitor to explain to the applicant, in plain language, the reasons for the primary decision including the relevant legislative framework, and to explain the Minister's position in relation to the review proceedings.
- Permits exploration of whether there is any opportunity for the case to settle.[63]
- Enables clarification of the issues that are in dispute.[64]
- Provides an opportunity for discussion of where further evidence from the applicant may be relevant. Generally, cases that settle before the AAT do so on the basis of additional evidence provided by the applicant, which was not before the primary decision maker. Conferences allow such evidence be identified and submitted early.[65]

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57 Metcalfe, above n 47, 2.

58 Administrative Appeals Tribunal, 'Alternative Dispute Resolution (ADR) Guidelines' (June 2006) <http://www.aat.gov.au/docs/ADR/ADRGuidelines.pdf> at 29 October 2010.

59 See the definition of conference in the *Administrative Appeals Tribunal Act 1975* (Cth) s 3(1).

60 *1958* (Cth).

61 *Migration Act 1958* (Cth) s 500(6L).

62 Beresford-Wylie, above n 34, 54; Administrative Review Council, above n 40, [3.139].

63 Garry Downes, 'Alternative Dispute Resolution at the AAT' (Speech delivered at the New South Wales Law Week, Sydney, 1-2 April 2008).

64 Ibid.

65 Metcalfe, above n 47, 4; see, further, Kinchin, above n 41, 227.

- Provides an opportunity for the dissatisfied review applicant to 'have their say', and also to ask questions where the reasons for decision might be unclear, or where the applicant otherwise does not understand why his or her application has not succeeded at the primary stage.

In merits review proceedings, DIAC will necessarily be faced with an argument that its primary decision maker made the wrong decision. In these circumstances, it is critical to be receptive to the applicant's arguments and open to a reconsideration of the primary decision on the merits. Sometimes the evidence is ambiguous, and sometimes further evidence comes to light. Sometimes an applicant has a legitimate complaint. Given the inherent subjectivity of the merits review process, there is more uncertainty as to outcome for DIAC than there generally is in judicial proceedings before the courts. This uncertainty provides an incentive to settle the dispute.

Two types of cases in respect of which the AAT has jurisdiction are particularly amenable to an application of ADR techniques.

The first is migration agent sanction decisions, which are made by the Office of the Migration Agents Registration Authority.[66] These cases can be expensive and complex to run. Given the serious allegations involved, MARA must establish its case to a high evidentiary standard. However it often faces difficulty in meeting this burden by virtue of the unwillingness or unavailability of the initial complainants. Migration agents, at risk of losing their livelihood, will fight these cases tirelessly.

In these circumstances, MARA must be focussed on achieving the best realistic outcome consistent with the objective of the regulatory regime, namely the protection of the section of the public that deals with migration agents. Provided that cases are selected appropriately, there is considerable scope in the legislation for negotiation on sanctions to occur. The range of sanctions available includes, for example, cautions, conditions on the lifting of suspensions (such as completion of further training or professional development) and supervised practice. [67] The stakes are high for the migration agent, and so there is a strong incentive for them to reach an agreed outcome.

The second category of disputes often settled, by way of a withdrawal by either party, is those under the *Australian Citizenship Act*.[68] The Act is drafted such that, in many cases, an applicant is statutorily barred from the grant of citizenship at a particular point in time.[69] Once this bar is explained to an applicant, he or she will often see the futility in proceeding. Another class of citizenship case that often settle are those in which an applicant fails to provide a penal certificate from a particular country, where such a certificate is required. In many of these cases either the applicant was not afforded sufficient time to produce the certificate to the primary decision maker, or did not understand that it was required. That citizenship disputes of the kind outlined even reach the stage of merits review before the AAT casts a question over the efficacy of the primary decision making process, and, in particular, whether decision makers are sufficiently engaging with applicants to ensure they comprehend the statutory requirements.

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66 'MARA'.

67 See *Migration Act 1958* (Cth) Part 3 - Migration Agents and Immigration Assistance.

68 *2007* (Cth).

69 For example, because he or she has spent insufficient time in Australia as a permanent resident or is the subject of pending criminal proceedings or a good behaviour bond: *Australian Citizenship Act 2007* (Cth) ss 22 and 24(6), respectively.

C *The RRT and MRT*

While the Minister for Immigration, Multicultural Affairs and Citizenship is a party to proceedings before the AAT, neither the Minister nor DIAC is a party to review proceedings before the MRT or RRT. [70] An important feature of the tribunals is their independence from DIAC.[71] Although the tribunals have the power to set aside and substitute a new decision in place of the primary decision, they also have the power to remit the matter to the primary decision maker with directions and for consideration of outstanding requirements for the grant of the visa.[72] If the Minister is a party to tribunal proceedings and actively argues in support of the primary decision, his independence may be called into question in the event of any remitter. The tribunals also have investigative powers exercised via DIAC, for example, the power to request examination of documents by DIAC's document examination unit.[73] The exercise of this inquisitorial power is likely to be regarded as improper if the Minister is also a party to the proceedings.

The absence of representation by DIAC before the tribunals makes it impracticable for ADR to be used to settle review applications.[74] This may be contrasted with the approach of the Immigration Appeals Division[75] of the Canadian Immigration and Refugee Board. The IAD uses an ADR process in relation to a particular class of dispute, being those concerning sponsorship appeals. These cases involve a Canadian citizen or permanent resident seeking to sponsor a close relative overseas.[76] The appellant to the IAD is the sponsor, who has already had his or her application refused by a primary decision maker. The respondent Minister for Immigration is a party and is represented in the IAD proceedings.[77] ADR is mandatory for five particular classes of sponsorship appeal,[78] but there is provision to opt out.[79] If an applicant is successful in persuading the Minister's counsel of their merits of his or her case, a recommendation will be made that the sponsorship application continue to be processed at the primary decision making level.[80]

The process itself is a blended model, referred to as a conference, which incorporates facilitative and advisory techniques. The ADR practitioner, referred to as

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70 Migration Review Tribunal and Refugee Review Tribunal 2008-2009, above n 46, 21.

71 See ibid 22; Migration Review Tribunal and Refugee Review Tribunal, 'Memorandum of Understanding between the Department of Immigration and Multicultural and Indigenous Affairs and the Migration Review Tribunal and the Refugee Review Tribunal' (25 November 2005) <http://www.mrt-rrt.gov.au/About-the-tribunals/default.aspx> at 29 October 2010, [1.1]-[1.2].

72 *Migration Act 1958* (Cth) ss 349 and 415.

73 See, generally, Migration Review Tribunal and Refugee Review Tribunal, 'Memorandum of Understanding between the Department of Immigration and Multicultural and Indigenous Affairs and the Migration Review Tribunal and the Refugee Review Tribunal', above n 71, [5.2]-[5.3].

74 Beresford-Wylie, above n 34, 54.

75 'IAD'.

76 Immigration and Refugee Board of Canada, 'Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board; Final Report by Leslie Macleod' (March 2002) <http://www.irb.gc.ca/eng/tribunal/iadsai/adrmar/Pages/sum.aspx> at 16 October 2010.

77 Ibid.

78 Ibid.

79 Ibid.

80 Immigration and Refugee Board of Canada, 'Immigration Appeal Division (IAD) Alternative Dispute Resolution (ADR) Program Protocols' (13 January 2003) <http://www.irb.gc.ca/eng/brdcom/references/legjur/iadsai/adrmarl/Pages/protoc.aspx> at 16 October 2010.

a 'dispute resolution officer', provides an evaluation of the strengths and weaknesses of the parties' cases if requested to do so,[81] but does not give legal advice.[82] The conference procedure generally involves the making of an opening statement by the dispute resolution officer, questions being asked of the applicant, caucusing, and the provision by the dispute resolution officer of an assessment of the merits.[83] Assuming that, at this stage of the proceedings, the Minister's counsel does not agree to the appeal being allowed, he or she leaves the conference. [84] The dispute resolution officer then provides the applicant with an objective assessment of his or her case. The applicant may elect to withdraw or proceed to a hearing (at a future date).[85]

The Canadian approach has some similarities with the AAT conferencing model (except for the final advisory stage involving the applicant alone). It is very different to the inquisitorial[86] review proceedings before the RRT and MRT, at which there is no agency contradictor. It is primarily for this reason that such an approach could not practically work in proceedings before the tribunals.[87]

However this does not mean that ADR techniques cannot be used to enhance the review proceedings before the tribunals.[88] For example:

- Applicants and their representatives should be permitted to have greater involvement in the review process. This is likely to assist the tribunal in ascertaining and weighing relevant material and to enhance the applicant's satisfaction with the review process. The legislation governing the tribunals is highly rigid and allows for virtually no discretion by the tribunals in managing their procedures to suit the nature of the dispute or the needs of the applicant.[89] There is presently no entitlement for applicants before the tribunals to question witnesses.[90] There is also limited scope for participation by representatives in tribunal hearings, and the degree to which they are permitted to be involved is a matter for the discretion of the tribunal member.[91]
- Applicants should be encouraged and specifically invited, at an early stage in the proceedings, to address the concerns of the primary decision maker and to submit evidence relevant to their application. Both review tribunals have the power to invite an applicant to submit information or to comment or respond to adverse information.[92] A favourable decision for an applicant, 'on the papers' (that is, without a hearing) is incredibly rare.[93] While the set aside rate of decisions by the tribunals is not insignificant,[94] an applicant is unlikely to achieve a successful outcome

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81 Ibid.
82 Ibid.
83 Immigration and Refugee Board of Canada, above n 80.
84 Ibid.
85 Ibid.
86 Migration Review Tribunal and Refugee Review Tribunal, above n 46, 40.
87 Cf Peter Condliffe, 'ADR and immigration: looking at Canada' (2005) 7(8) *ADR Bulletin* 143, 143.
88 See discussion in Beresford-Wylie, above n 34, 55.
89 See, generally, Administrative Review Council, above n 40, [3.178].
90 *Migration Act 1958* (Cth) ss 427(6)(b) and 366D, respectively.
91 See Administrative Review Council Report to the Minister for Justice, above n 40, [3.171].
92 *Migration Act 1958* (Cth) ss 359, 359A, 359AA, 424, 424A, 424AA.
93 Migration Review Tribunal and Refugee Review Tribunal 2008-2009, above n 46, 40; Migration Review Tribunal and Refugee Review Tribunal 2011-2012, above n 46, 28.
94 In 2008-2009 the MRT set aside 48% of primary decisions and the RRT set aside 19%: Migration Review Tribunal and Refugee Review Tribunal 2008-2009, above n 46, 25. In

unless he or she adduces additional relevant evidence in support of the application. In this respect it is also relevant to note that applicants must be clearly notified, by way of comprehensible statements of reasons and face to face communication, if necessary, of the basis for the primary decision refusing their application.

- The tribunals need to address whether their procedures are sufficiently able to be navigated by self-represented applicants. A large proportion of applicants before the tribunals are self represented,[95] and the discrepancy between the 'set aside' rates for represented and self-represented applicants is significant. In 2008-2009, the overall set aside rate for represented applicants was 48%, compared to 27% for self represented applicants.[96] Before the RRT, the set aside rate for represented applicants was 32% compared to 8% for self represented applicants.[97] In 2011-2012, this trend continued, with the difference in set aside rates most apparent for RRT applicants. The set aside rate for represented applicants before the RRT was 37%. For self-represented applicants it was 11%.[98] For the period 2011-2012, only 65% of self-represented applicants attended their RRT hearing,[99] virtually assuring themselves an unfavourable decision.[100]

D *Judicial review*

In judicial review proceedings the court is confined to reviewing the legality of tribunal decisions and cannot engage in a review of the merits.[101] In 2011-2012, the number of judicial review applications lodged with respect to RRT decisions increased in comparison to previous years, and the number of applications lodged with respect to MRT decisions remained relatively constant.[102] In 2011-2012, the courts set aside 0.2% of MRT decisions made and 0.8% of RRT decisions made.[103] That equated to 11.9% of MRT decisions set aside as a percentage of judicial review applications resolved, and 9.9% of RRT decisions set aside as a percentage of judicial review applications resolved.[104]

It is difficult, but not impossible, to utilise ADR methods in judicial review of tribunal decisions. Practical difficulties of using ADR stem from the fact that:

2011-2012 the MRT set aside 36% of primary decisions and the RRT set aside 27%: Migration Review Tribunal and Refugee Review Tribunal 2011-2012, above n 46, VII.

95 Migration Review Tribunal and Refugee Review Tribunal 2008-2009, above n 46, 21; Migration Review Tribunal and Refugee Review Tribunal 2011-2012, above n 46, 30.

96 Migration Review Tribunal and Refugee Review Tribunal 2008-2009, above n 46, 41.

97 Ibid.

98 Migration Review Tribunal and Refugee Review Tribunal 2011-2012, above n 46, 30.

99 Ibid.

100 *Migration Act 1958* (Cth) ss 360(1) and 425(1). The obligation to invite an applicant to attend a hearing does not apply where the tribunal is able to make a favourable decision on the material before it. Thus where an applicant is invited to a hearing, the tribunal is not able to make a favourable decision on the material before it.

101 See, e.g., *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

102 Migration Review Tribunal and Refugee Review Tribunal 2011-2012, above n 46, 31.

103 Ibid 31-32.

104 Ibid 32.

- The applicant has little or no incentive to participate in ADR. His or her objective is to have the case remitted for reconsideration, in the hope of a favourable outcome.
- There is generally no room to move on the determinative issue for the court, being whether the decision under review is affected by jurisdictional error.
- There is limited ability for the decision maker to unilaterally revoke his or her own decision and make it afresh.[105]
- There is a general public interest served by judicial rulings on precedential points of law.

Indeed, the Federal Circuit Court has observed the existence of 'real doubts' as to the appropriateness of offers of compromise in public law proceedings such as those under the *Migration Act*,[106] holding '[t]hese are not proceedings that lend themselves readily to compromise. This is particularly so when the final word lies not with the parties but with the Court.'[107]

Nevertheless, it remains appropriate for DIAC to constantly assess its prospects of success, with a view to considering withdrawing from a review application if appropriate, with a direction to the tribunal as to the nature of the error conceded. One situation that may warrant consideration of ADR in a judicial review context is a case in which a significant error of fact is made by the tribunal. It is well settled that an error of fact does not amount to jurisdictional error vitiating the tribunal's decision.[108] However it may be that ADR can be utilised, first, to reach agreement as to whether a factual error has been made and, second, with a view to agreeing that an applicant withdraw his or her application with an undertaking being given by the Minister to exercise his statutory discretion to either permit a fresh visa application to be lodged[109] or to substitute a favourable decision.[110]

This approach is not without its difficulties. The Minister's discretion is non-compellable and there may be some reticence to agree to its exercise. Further, if a new visa application is permitted, there remains uncertainty for the applicant because he or she cannot be assured that the visa will be granted. However this position is not substantially different from the position the applicant would be in if his or her application to the court is upheld and the matter remitted to the tribunal for reconsideration.

Such approach was unsuccessfully attempted in at least one migration case, involving an appeal before the Federal Court. The presiding Judge referred the parties to mediation, it having been found by the (then) Federal Magistrates Court that the MRT had made a factual error in its reading of financial documents submitted by the visa applicant. [111] The Court suggested the matter proceed to mediation so that factual disputes could be resolved and the matter potentially remitted by consent to the MRT. Ultimately this was a costly endeavour and the matter failed to settle. The Court

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105 Cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

106 1958 (Cth); *SZMJQ v Minister for Immigration and Citizenship (No 2)* [2009] FMCA 1137, [20].

107 *SZMJQ v Minister for Immigration and Citizenship (No 2)* [2009] FMCA 1137, [20].

108 *MZWBW v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 94, [28]; *Applicant A169 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 8, [31]; *NAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 76, [37].

109 *Migration Act 1958* (Cth) s 48B. See for example as occurred in *MZYWX v Minister for Immigration and Citizenship* [2007] FMCA 269.

110 *Migration Act 1958* (Cth) ss 351, 417.

111 *Kaluthanthirige v Minister for Immigration and Citizenship* [2007] FCA 1783, [7].

dismissed the appellant's appeal, with costs, finding that the MRT made an error of fact within jurisdiction.[112]

One example in which an ADR technique, drawing on case appraisal, is already widely used in the Federal Circuit Court is the 'panel advice' scheme. The scheme provides free legal advice to self represented applicants seeking judicial review of decisions by the RRT. The scheme is funded by DIAC, via the NSW Bar Association, which pays the panel lawyers a flat rate for providing advice.[113] Participation in the panel advice scheme is voluntary. The scheme involves the provision to the applicant of written advice and potentially an amended application. It does not cover the cost of an appearance at the hearing. [114]

The panel advice scheme allows self-represented RRT review applicants to receive advice concerning their prospects of success early in the proceedings, when significant costs are yet to be incurred by the Minister's lawyers. [115] Where arguable grounds of review exist, the panel advisor may be expected to prepare an amended application for the applicant. This facilitates better definition of the issues, which are otherwise not identified at all by the initiating pleading filed by the applicant.

An example of the panel advice scheme working well is *SZOES v Minister for Immigration and Citizenship*,[116] in which an amended application prepared by a panel advisor properly particularised the issues arising on the review.[117] The Minister thus knew the grounds he had to respond to, and was prepared to do so at the hearing without the necessity of an adjournment, had the point been identified for the first time by the Court. Ultimately the RRT's decision was set aside. SZOES is an illustration of the capacity of the panel advice scheme to clarify the issues and lead to a more efficient court hearing.[118]

III CONCLUSION

An organisation which has a culture of resolution values early resolution of disputes and the narrowing of issues. It is an organisation with an open mind, receptive to evidence and arguments presented on behalf of individual citizens. These values are consistent with the objectives of ADR. The Commonwealth, as a significant litigant in the federal jurisdiction, has considerable power to change community attitudes concerning the approach to civil litigation and the use of ADR.[119] In the context of migration law, ADR techniques must be used selectively.[120] However the fact that there is a relatively limited scope for the utilisation of ADR means agencies and their representatives must be even more astute and constantly keep cases under review for opportunities to apply ADR techniques.

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112 Ibid [24].

113 Information brochure 'RRT Review Cases; Information on Legal Advice Scheme (NSW)'.

114 However it is not unknown for a panel advice lawyer to represent an applicant at the hearing if he or she considers that the applicant has a strong case.

115 Information brochure, above n 113.

116 [2010] FMCA 686 ('SZOES').

117 *SZOES v Minister for Immigration and Citizenship* [2010] FMCA 686, [18]-[21].

118 See, generally, the objectives described in the Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth) [15].

119 Meadows, above n 35, 41; National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, above n 13, [8.4].

120 Beresford-Wylie, above n 34, 55.