ATTORNEY-GENERAL – Hon. ROBERT McCLELLAND, MP

SPEECH TO THE GOVERNMENT LAW GROUP FORUM - 'UTILISING ADR – THE EVOLVING LANDSCAPE'

Canberra

Monday, 15 February 2010

[CHECK AGAINST DELIVERY]

First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

- Mr Tom Howe QC, Chief Counsel Litigation, Australian Government Solicitor;
- Simon Daley;
- Ladies and gentlemen.

It is a pleasure to be here at the first Government Law Group event for the year and to speak to you about alternative dispute resolution (ADR) in the federal justice system.

It is also my pleasure to launch the AGS/LEADR training program *'ADR and the Commonwealth'*.

The National Alternative Dispute Resolution Advisory Council's (NADRAC) recent inquiry into the use of ADR in the civil justice system found that while ADR has 'expanded into a large, highly diverse and innovative field, it is still significantly under-utilised in many areas.'

The Federal Government is considering a range of initiatives for promoting greater use of ADR in the civil justice system.

As the biggest single litigator in the federal justice system, the Commonwealth and its agencies play an important leadership role in increasing the use of ADR in Australia.

Today I want to talk to you about how Commonwealth agencies can fulfil this role.

Alternative Dispute Resolution

ADR has many benefits when utilised within the context of litigation, as well as an alternative to litigation.

It often ensures earlier and speedier resolution of disputes, and offers parties more privacy, confidentiality and cost saving benefits.

Resolving disputes through ADR also allows parties to have an element of control on the process and a say in the outcome. As a result, they are more likely to feel satisfied and empowered.

Even if a dispute is not resolved in an ADR process, the process itself can help draw out facts, identify issues and explore new options. This means that even if litigation is

ultimately commenced, its duration, cost and potential distress upon parties can be reduced.

These are just some of the benefits of ADR – and for these reasons, the Australian Government strongly encourages the greater use of ADR.

Indeed, ADR plays an important role in ensuring better access to justice in the federal civil justice system.

ADR should not be seen as a 'soft touch' approach to resolving disputes. For example, cost penalties can be imposed for failing to take an opportunity to resolve a dispute such as failing to entertain a reasonable offer of settlement.

As many of you may be aware, the Government passed amendments last year to the *Federal Court Act 1976* to ensure that ADR is taken seriously by parties, lawyers and judges.

Access to Justice

Access to justice is not just about access to a court or a lawyer. It is about providing practical, affordable and easily understood information and options to assist people to avoid or resolve their disputes.

This point is made in the Access to Justice Taskforce report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*. Its central recommendation is a Strategic Framework for Access to Justice to guide the consideration of future civil justice reforms.

The Strategic Framework has been adopted by the Government and is based on the principles of: Accessibility, Appropriateness, Equity, Efficiency and Effectiveness.

The Framework emphasises a number of themes including early intervention, ensuring costs are proportionate, and providing pathways to fair and equitable outcomes whether it be through better access to information, resolution with the assistance of a Court or ADR.

Consistent with the Framework, the Government is pursuing several measures to boost the use of ADR in the civil justice system.

In November last year, the *Access to Justice (Civil Litigation Reforms) Amendment Bill* passed the Parliament and created a new overarching obligation on the Federal Court that requires the Court, litigants and legal practitioners to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

This provision will enable judges to employ a number of case management powers, including:

- referring parties to ADR;
- requiring parties to narrow the issues in dispute;
- limiting the length of submissions or the number of witnesses; or
- setting time limits for the completion of part of a proceeding.

Over time I believe these changes will encourage a cultural shift in the approach taken to resolving disputes.

ADR in Government

In 2008 I asked NADRAC to look into strategies to ensure greater use of ADR in civil proceedings.

In September last year NADRAC delivered its report, entitled *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, which contains 39 recommendations including proposed legislative amendments and policy initiatives for the legal profession, courts and tribunals, government agencies and the public.

Several of the recommendations relate to increasing both public and professional awareness of ADR as well as ways for Governments to engage in greater use of ADR.

As the biggest single litigator in the federal civil justice system, the Commonwealth and its agencies are well placed to play a leadership role in moving from a culture of litigation to a culture of dispute resolution.

Commonwealth agencies are required by the Legal Services Directions to act as 'model litigants' which means acting with complete propriety, fairness and to the highest professional standard. This obligation, despite its title, applies not just to the conduct of court-based litigation, but to all ADR processes.

Further, agencies are required to consider ADR before initiating legal proceedings and to keep the costs of litigation to a minimum, using appropriate methods such as ADR. Agencies are also required to participate 'fully and effectively' in ADR processes.

In its 2009 report, NADRAC recommended that the Legal Service Directions be amended to require agencies to develop and regularly review dispute management plans that require appropriate use of ADR.

Accordingly, I have asked NADRAC to prepare a model dispute management plan that could be used by agencies to comply with their obligations under the Directions. As part of this reference, NADRAC conducted a roundtable with lawyers and decision makers from Commonwealth agencies last week.

A dispute management plan is not just a litigation plan – it is a practical approach to resolving disputes involving communication, openness to other views, negotiation and reasonableness.

These factors are the essence of ADR – and should be part of the professional toolkit of any lawyer.

The Government also supports NADRAC's recommendation to amend the Directions to require Commonwealth agencies to use mediators accredited under the National Mediator Accreditation System.

ADR and Government Lawyers

Government agencies are obliged to ensure that Commonwealth resources are expended lawfully and are protected from unjust claims. This obligation should not prevent Commonwealth agencies from doing all that they can to resolve Government disputes without necessarily having to go to court.

Government lawyers will play a key role in effecting the cultural shift from litigation as the only tool to resolve disputes to much greater use and incorporation of ADR.

Government lawyers need to consider ADR and obligations contained in the Directions as part of their wider, whole-of-government approach to the provision of Commonwealth legal services.

The feedback that I have received from lawyers, courts and tribunals has been that too frequently legal officers that attend ADR are not sufficiently on top of the issues and/or do not have the authority to negotiate and settle a matter.

In my view, ADR is as much a management issue as a legal practice. This means that effective ADR requires management to empower the participating legal officers to negotiate effectively and as early in the proceedings as possible.

It is important that they view themselves as lawyers for the Commonwealth, not just their agency. The use of ADR as part of a whole-of-government approach will ensure the effective and efficient resolution of disputes involving the Commonwealth.

The Office of Legal Services Coordination can assist government lawyers with queries they may have regarding the procurement and provision of legal services, and their awareness of and compliance with the Legal Service Directions.

In considering how to better inform and encourage government lawyers to use ADR, I recognise that appropriate training and education are crucial. Education about ADR processes is essential in equipping the profession with adequate understanding and relevant skills, and in improving ADR culture.

Both the Access to Justice Taskforce and NADRAC made specific recommendations about improving legal education which the Government will be progressing.

'ADR and the Commonwealth' Course

Given the growing importance of ADR in the resolution of Commonwealth disputes, there is a need for agency staff to better understand how different processes can be used.

I commend AGS and LEADR for taking the initiative to develop the *'ADR and the Commonwealth'* training program for Commonwealth agencies.

I have no doubt that participants will find the program worthwhile and beneficial to their work.

I would also like to again thank NADRAC for their ongoing work in promoting ADR as a key part of the federal civil justice system.

It is now my great pleasure to launch the *'ADR and the Commonwealth'* program.

Thank you.