LEADR Response to the *Productivity Commission Draft Report on Access to Justice Arrangements*

May 2014

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Introduction

Preamble

LEADR is very pleased to respond to the *Draft Report* by the Productivity Commission on *Access to Justice Arrangements.* Our comments relate mainly to Chapter 8 and to Chapter 9. We also comment on other aspects of the *Report* relevant to LEADR's knowledge and expertise.

LEADR consents to the publication of this *Response* and would be pleased to discuss the matters raised in the *Draft Report* and LEADR's *Response* if this would be of assistance to the Commission.

About LEADR

LEADR currently has more than 2600 members spread across all states and territories of Australia, across New Zealand and in many countries in the Asia-Pacific region, including Indonesia, Malaysia, India, Tonga, Samoa and Micronesia. LEADR members are engaged primarily in mediation and increasingly they practise other ADR processes such as adjudication, arbitration, facilitation, conciliation and conflict coaching. Members are drawn from a wide range of professional backgrounds including law, psychology, human resources, social work, education, finance, accounting, management/business, architecture and engineering.

On a day-to-day basis LEADR:

- delivers training both as public workshops and in-house programs in mediation and associated dispute resolution topics
- accredits mediators under the LEADR Scheme for Accreditation and under the National Mediator Accreditation System (NMAS). LEADR has almost 900 nationally accredited mediators.
- provides services to LEADR members including news and information, continuing professional development and collegiate networking
- facilitates the resolution of complaints about mediator services
- responds to client requests with referrals of suitably qualified dispute resolution practitioners
- responds to inquiries from across the community about ADR
- promotes the practice of ADR in a wide range of settings including for government, business, industry and individuals in commercial, industrial, workplace, community and family matters

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General comments

The *Draft Report* states that:

> *The Commission defines 'legal need' as problems for which a legal remedy exists that parties cannot resolve effectively by their own means. It excludes problems for which parties have sourced appropriate solutions, which may be outside the formal legal system, or that parties have for good reasons chosen not to resolve.* p 90

Implicit in this statement of scope is the recognition that people in dispute are frequently able to and do resolve their own disputes without accessing a formal process. LEADR adds that when people need assistance to resolve disputes, ADR provides a cooperative process that helps build community. ADR is participatory, collaborative, inclusive and future focused.

The *Draft Report* further states that:

> *Consistent with the intention to focus on areas which are likely to generate the greatest benefits for the community, the Commission proposes focusing on legal problems that have, or are likely to have, a moderate or severe impact on a person's everyday life or a business' routine operations or profitability."* p 90

LEADR notes that the intention of the Commission stated in this extract is *"to focus on areas which are likely to generate the greatest benefits for the community".* LEADR believes that encouraging cooperative methods of dispute resolution will have the greatest benefits for the community. Therefore, LEADR anticipates that the Commission in its *Final Report*, will place greater emphasis on developing processes that encourage people who need assistance in resolving a dispute, to use ADR as a first resort and to use litigation as a last resort.

Consistent with this, LEADR notes that increasingly the terms *Dispute Resolution* and *DR* are being used instead of *Alternative Dispute Resolution* and *ADR*. It is the adversarial method of litigation which is progressively becoming the alternative to cooperative approaches.

LEADR imagines Australian society in which the norm is to accommodate various perspectives cooperatively and in which the exception is to invoke a process of determination.

Comments on recommendations and information requests relating to alternative dispute resolution

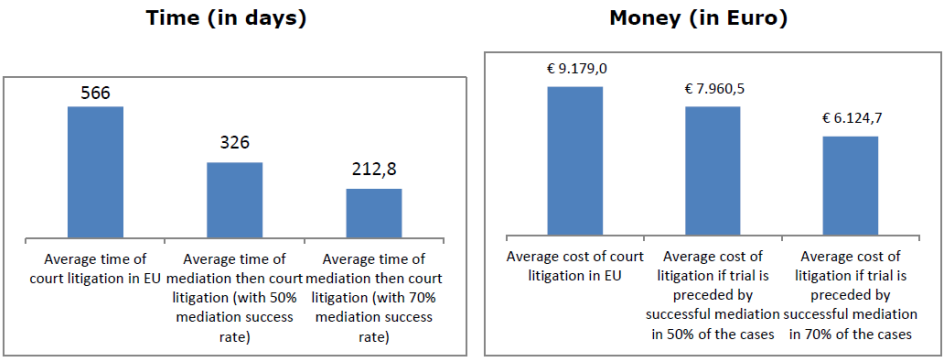
Draft recommendation 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

LEADR supports the intent of this draft recommendation to increase the use of ADR. LEADR notes that where possible, people in dispute should be encouraged to resolve their disputes before commencing legal proceedings. To be referred to ADR only after proceedings have already been instigated generally incurs additional costs and time.

LEADR refers the Commission to the following charts (p9) included in the recently published report for the European Parliament prepared by Prof Giuseppe De Palo et al.[1] These charts show that less time and money is expended even in cases where mediation is followed by litigation, than when litigation alone is used.

Figure C: Comparing the Average Time and Money Savings of Litigation Only versus Mediation then Litigation (at different mediation success rates)



LEADR would prefer that processes be reformed such that the need to file in court occurs only when matters are not solved through ADR.

[1] European Parliament: Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs: Legal Affairs *'Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU* January 2014

Information request 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to $50 000).

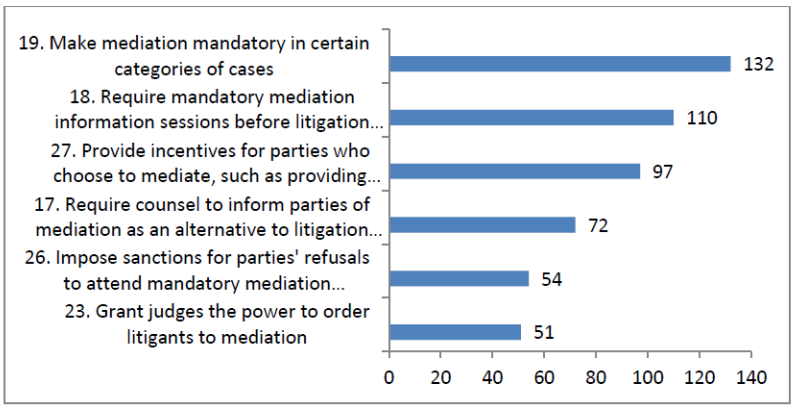
What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

LEADR believes that attempts to resolve matters using ADR should be the default for all contested disputes. *The European Parliament Report* states that it is only some degree of compulsion to mediate which increases the number of mediations as summarised in the following extract and in the charts (p10) below.

> *"A thorough comparative analysis of the legal frameworks of the 28 Member States, combined with an assessment of the current effects of the Mediation Directive in terms of its produced results throughout the EU, shows that only a certain degree of compulsion to mediate (currently allowed but not required by the EU law) can generate a significant number of mediations (Figure D).[5] In fact, all of the other pro-mediation regulatory features mentioned in the study's terms of reference, such as strong confidentiality protection, frequent invitations by judges to mediate and a solid mediator accreditation system, have not generated any major effect on the occurrence of mediations. Compelling evidence of this comes by comparing the number of mediations in Member States where one or more of these features are present and, even more so, have been present for a long time."* *p 9*

Figure D: Top-Ranked, Most Effective Legislative Measure to Increase Mediation Use (by number of preferences expressed)



The European Parliament Report also reports that mandatory mediation increases voluntary mediation. This conclusion draws particularly on the experience in Italy where there have been periods of mandatory (or mitigated mandatory) and non-mandatory mediation.

The introduction in Australia of the *Civil Dispute Resolution Act 2011(Act)* to ensure as far as possible that people take genuine steps to resolve their disputes before

filing proceedings in court was a significant achievement. The *Draft Report* comments that this *Act* is under review and that at least some state jurisdictions are waiting for the outcome of the review before deciding whether to introduce (or re-introduce) similar legislation.

LEADR hopes for an outcome from the review that maintains or even strengthens the intent of the *Act*:

- "to change the adversarial culture often associated with disputes;
- to have people turn their minds to resolution before becoming entrenched in a litigious position; and
- where a dispute cannot be resolved, ensuring that if a matter does progress to court, the issues are properly identified, ultimately reducing the time required for a court to determine the matter."[2]

LEADR believes that it is a better use of resources to attempt to resolve matters before filing. Referral by a court or tribunal after filing is an inefficient use of the expensive resources of the formal legal system.

LEADR anticipates that a continuance of the current *Act* would provide practice in taking *"genuine steps"* and enable people in dispute and their advisers to experience cooperative means of resolving disputes. This would lay the groundwork for a later more robust definition of what might be considered 'genuine steps' or pre-action protocols tailored to specific areas of practice.

If the outcome from the review of the *Act* is to lessen or remove the "*genuine steps*" requirement, then LEADR supports the introduction of other measures to encourage the development of a less adversarial culture and to provide court users with the opportunity and encouragement to resolve their matters through ADR.

In addition to or in the absence of pre-filing protocols, courts and tribunals should wherever possible refer matters to a triage process for assessment of suitability for ADR, including identification of which among the ADR processes is appropriate.

The value of a matter is only one variable to be considered in the triage process. Some low dollar value cases are extremely complex and may be of very significant importance to those involved; the converse may be true of high dollar value matters. Other variables include safety, access to advisers, willingness and ability to cooperate, public interest, risk of damage and likelihood of undue cost.

Existing targeted referral and ADR processes include most notably Family Dispute Resolution and services offered by both Commonwealth and state based administrative tribunals and small business commissions, as well as various state ADR services in health and disability, discrimination and human rights, retail tenancy, strata, workers compensation and farm debt schemes.

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[2] Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth) 4

Consistent with the points we have made above, LEADR favours ADR being used more extensively in the area of family law.

Draft recommendation 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

LEADR strongly supports this draft recommendation. LEADR notes that the *Legal Services Directions 2005* (including the 2008 amendments) prescribes use of ADR wherever possible as part of commonwealth agencies' obligations to be model litigants. LEADR would prefer that these obligations required agencies to be "model dispute resolvers" rather than model litigants. This would emphasise the expectation that agencies should aim to resolve disputes as early and as quickly as possible, using litigation as a final rather than first resort. LEADR also notes that NADRAC published in 2010 *Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan NADRAC 2010* and the accompanying *A Toolkit for developing Dispute Management Plans*. It is therefore disappointing that the *Draft Report* records that only a small number of commonwealth government agencies have developed plans that enable them to fulfil these obligations comprehensively.

Given that six years have elapsed since the 2008 amendments and 4 years since the very practical NADRAC publications, the development and release of dispute resolution management plans should be given priority. LEADR considers that the start date of 30 June 2015 recommended in the *Draft Report* for annual publication on progress of these plans seems very reasonable and should not be further delayed.

LEADR believes that dispute resolution management plans at all levels of government should include whole of agency commitment and strategies:

- to prevent disputes
- to develop high standards of ADR practice
- to use ADR before commencing legal proceedings and then if litigation is commenced, to continue to explore, support and facilitate the use of ADR at all stages in the dispute; and
- to improve dispute resolution practices by those involved in litigation and legal services (which will require education about and training in ADR.)

Draft recommendation 8.3

Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.

LEADR supports this draft recommendation. LEADR notes that currently people in dispute, and their advisers, may not be aware of the range of potential benefits from mediation and as a result, may dismiss it too readily.

LEADR also notes that for educational materials to be effective, they must, among other things, be written in ways that are accessible to their target audiences. LEADR commends the work of NADRAC in producing *Your Guide to Dispute Resolution (2012)* and suggests that this is an existing resource that could be widely promoted and used as a reference for developing organisational specific ADR materials.

Draft recommendation 8.4

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

LEADR supports this recommendation. LEADR notes that those conducting triage must be appropriately skilled through suitable training and must have triage proformas that support effective and consistent decision making.

Draft recommendation 8.5

Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.

Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.

LEADR supports this draft recommendation.

LEADR notes that frequently discussions about promoting greater use of ADR, focus on education of lawyers and of law students. LEADR is pleased to note that the *Draft Report* recognises the value of extending knowledge about ADR to other areas of tertiary studies. LEADR believes that the recommendation could be strengthened to encourage other faculties incorporate ADR components into their courses. For example, architects may be well served by understanding the potential of Dispute Resolution Boards in preventing disputes and in mediation helping to get projects back on track; psychologists and social workers may find it directly useful in their roles to learn mediation skills and to be aware of dispute resolution options for clients; and doctors may anticipate the value of mediation for assisting families in making difficult decisions about their loved ones and for resolving complaints that arise about medical care. LEADR notes with interest anecdotal reports that

unpublished NADRAC data indicates that engineering faculties throughout Australia teach ADR more commonly than any other faculty other than law.

With reference to legal education, LEADR notes that the *Draft Report* acknowledges the contribution by NADRAC. While continuing to emphasise the importance of dispute resolution for tertiary students in general, LEADR endorses the views expressed by NADRAC in its publication *Teaching Alternative Dispute Resolution in Australian Law Schools 2012:*

> *"It is NADRAC's view that the amount of ADR teaching that currently occurs in the majority of Australian law schools is not sufficient in light of the increasing role that lawyers will play in advising clients about and assisting them in ADR processes. Clients, professional bodies and courts/tribunals expect that lawyers will be knowledgeable about ADR options and will also understand interest based negotiation."*
>
> *"NADRAC considers that teaching law students ADR knowledge and skills is important not just for those who go on to practise law, but also for those who seek employment in other areas. Conflict management and resolution knowledge and skills are critical in many professional roles. Teaching ADR knowledge and skills to law students will assist them to handle conflict and disputes in all aspects of their life, such as preventing and managing disputes that arise in the workplace and in the commercial sector." p12*

In addition to the reasons described above for including ADR in legal education, LEADR notes that there is also some evidence that the psychological distress of law students can be ameliorated by undertaking ADR studies. [3] LEADR wonders whether promoting their wellbeing may help to encourage those graduates most aligned with collaborative rather than adversarial approaches to dispute resolution to continue to the practice of law.

Draft recommendation 8.6

Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

LEADR supports the intent of this recommendation to encourage standards of ADR practice and accreditation of ADR practitioners.

LEADR believes that this intent could be strengthened by recommending that:

- When providing or engaging in mediation and conciliation, government agencies be required to use practitioners with current accreditation under the National

[3] Field, Rachael M. & Duffy, James (2012) Law student psychological distress, ADR and sweet-minded, sweet-eyed hope. *Australasian Dispute Resolution Journal*, *23*(3), pp. 195-203.

Mediator Accreditation System (NMAS). (In relation to conciliation, a separate voluntary standard may emerge, as there is currently industry discussion about developing such a standard for conciliators to acknowledge the specific competencies that are different from those required by mediators.)

- When providing or engaging in other ADR services, government agencies be required to use practitioners accredited by a reputable ADR organisation.
- ADR organisations be encouraged to collaborate on developing national industry based standards (as has already been done in relation to mediation) and that the Commonwealth government provide funding to assist in this process (as was provided to assist in the development of NMAS.)

Comments on recommendations and information requests relating to ombudsmen and other complaint mechanisms

Draft recommendation 9.1

Governments and industry should raise the profile of ombudsman services in Australia. This should include:

- *more prominent publishing of which ombudsmen are available and what matters they deal with*
- *the requirement on service providers to inform consumers about avenues for dispute resolution*
- *information being made available to providers of referral and legal assistance services.*

LEADR supports this draft recommendation.

LEADR agrees with the comments in the *Draft Report* about the significant contribution of free and accessible Ombudsmen services to consumer protection. To maximize this contribution, LEADR endorses recommendation 9.1. In the *"more prominent publishing"* that is recommended, LEADR encourages using language that addresses the experience of the consumer. By this we mean that consumers generally perceive that they want to make a complaint; they don't usually think in terms of needing an ombudsman.

Draft recommendation 9.1

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

LEADR supports the intent of this recommendation. LEADR notes that industry ombudsmen are not funded by government, so would not be subject to this recommendation. LEADR believes that ombudsmen services should only be rationalised where it leads both to improved efficiency, as noted in the recommendation, and also to improved effectiveness. Effectiveness may be better achieved in some cases where an ombudsman specialises in a particular area, rather than offering services across a range of areas.

Draft recommendation 9.1

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

While LEADR cannot comment on whether current funding is appropriate, LEADR supports that funding should be appropriate in the future.

In considering what is appropriate, LEADR referred to the ANZOA website which includes this information:

> *"'Ombudsman' is a particular model of alternative dispute resolution …*

Ombudsmen use a range of methods to resolve complaints. These include negotiation, conciliation, investigation, providing opinions and recommendations, and (in the case of industry-based Ombudsmen) making decisions that bind service providers."

LEADR's information about ombudsman services is that they are effective in delivering timely, accessible and effective services. LEADR believes that this is in part because their staff usually have appropriate training to deliver their *"particular model of ADR."* In line with other commentary in this *Response,* about the importance of training for those delivering any form of ADR service, LEADR would like to see included recommendations that "appropriate funding" be understood to include funding that enables government funded ombudsmen services to provide appropriate ADR training for their staff members. There could be a parallel recommendation that encourages industry ombudsmen to provide similar training.

Suggested additional recommendation

LEADR believes that there should be an additional recommendation included in the *Final Report* that relates to the naming of services.

LEADR understands an ombudsman to be an independent office which primarily provides complaint handling and investigation services and does not provide any advocacy, regulatory or disciplinary functions. This aligns with the six essential criteria of an ombudsman service identified by the Australian and New Zealand Ombudsman Association (ANZOA) and included in the *Draft Report*.

LEADR does not have information about whether all existing services that identify themselves currently as ombudsman services comply with these criteria. LEADR is nonetheless aware that the Commonwealth Department of Treasury in April 2014 issued a discussion paper about the creation of a *Small Business and Family Enterprise Ombudsman.* One of the potential functions of this proposed Ombudsman is as an advocate for small business. An advocacy role is inconsistent with the independence required of an ombudsman. LEADR believes that using the title of 'ombudsman' for an agency with the proposed functions of the *Small Business and Family Enterprise Ombudsman* could lead to confusion for the particular groups for which it is being established to serve and to the wider community.

To this end, LEADR believes that a recommendation about ensuring that government provided services in particular are named in accordance with published and/or accepted criteria would contribute to greater clarity for agencies, businesses and consumers alike.

Comments on other recommendations and information requests

Information request 5.1

The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

LEADR does not have information on the effectiveness and efficiency of legal health checks. The *Draft Report* comments that health checks *"enable legal and non-legal professionals to identify a client's legal issues and direct the client to an appropriate response." p 155*

If information provided to the Productivity Commission supports future use of legal health checks, LEADR considers that what is considered an appropriate response should include referral to ADR. Many of LEADR's members currently provide pro-bono mediation services. LEADR is looking at ways to extend the availability and accessibility of pro bono mediation services. Referrals from agencies that undertake health checks would contribute to accessibility.

Draft recommendation 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

LEADR supports the intent of this draft recommendation. LEADR recommends that the recommendation in the *Final Report* include explicit reference to ADR as follows:

> "*The service should be responsible for providing telephone and web-based legal and ADR information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal and ADR services."*

In line with our commentary elsewhere in the *Response* LEADR urges that staff providing this contact point service are provided with suitable triage tools and have the appropriate training to provide referral to assessment for suitability of ADR.

Draft recommendation 7.1

The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:

- *the appropriate role of, and overall balance between, each of the three stages of legal education and training*
- *the ongoing need for the 'Priestley 11' core subjects in law degrees*
- *the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education*
- *the relative merits of increased clinical legal education at the university or practical training stages of education*
- *the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.*

LEADR supports this draft recommendation. As expressed in our commentary relating to draft recommendation 8.5, LEADR is keen to expand the focus of education about legal dispute resolution options to other areas of tertiary professional studies.

In the context of this proposed expansion, LEADR believes that it is essential that students graduating from legal studies have been educated in the *"full range of legal dispute resolution options"*. These options include ADR. Any review and re-organisation of legal education should include ADR in a comprehensive and meaningful way. Only with such an approach is the introduction of ADR likely to be effective in helping to transform the adversarial culture which is prevalent in some, and not all, areas of legal practice. LEADR commends to the Commission for further consideration and inclusion in the *Final Report* the preferences for ADR education expressed by NADRAC in its publication *Teaching Alternative Dispute Resolution in Australian Law Schools 2012:*

> *"NADRAC's preference would be for ADR to be introduced to students in an introductory ADR focussed subject, with ADR electives offered later in the degree to top-up knowledge for interested students. NADRAC considers that, at a minimum, students who study undergraduate and postgraduate law degrees should have a proper understanding of:*
>
> - *how ADR infuses Australia's justice system*
> - *the many different types of ADR processes*
> - *the theory, philosophy and principles behind different ADR processes*
> - *how ADR processes and outcomes differ from court-adjudicated decisions and the benefits and disadvantages of ADR and litigation*

- *legal, professional and other responsibilities with respect to ADR (on the part of lawyers representing clients in ADR processes, ADR practitioners, and disputants)*
- *legal issues arising from, or related to, ADR processes such as confidentiality, admissibility of evidence, immunity of practitioners etc*
- *the role of ADR in the overall justice system and how it contributes to access to justice and a fair and just society*
- *the role ADR has in contributing to a less adversarial culture in relation to dispute resolution*

NADRAC would also prefer that the teaching of ADR not be confined to 'hard' data, but would give students:

- *the ability to evaluate the different ADR processes so they can identify the best process for their clients*
- *a basic knowledge of the skills needed in an ADR process, both from the perspective of an ADR practitioner and a lawyer participating in ADR (both as a representative or a support person) an understanding of how ADR infuses Australia's justice system*
- *an understanding of the theory or philosophy behind ADR processes – how an ADR outcome differs from a court-adjudicated decision and the benefits and disadvantages of ADR and litigation*
- *an appreciation of ADR as an integral element of a shift in dispute resolution culture, the role of the justice system, and of lawyers and judges, not only in Australia but worldwide."*

Information request 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

LEADR supports the use of ADR in tribunal settings. One approach is to require participation in ADR before the matter is dealt with by a Tribunal. The NSW Office of Fair Trading offers a low cost service to mediate strata scheme issues under the *Strata Schemes Management Act 1996* and the *Community Land Management Act 1989.* The Office employs a small group of mediators and contracts to external mediators to provide this service. Under certain circumstances, agreements made in mediation may be referred to an adjudicator to be made into an enforceable order. If agreement is not reached or an agreement breaks down, a participant can apply for an order by an Adjudicator or the NSW Civil and Administrative Tribunal (NCAT).

Draft recommendation 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

LEADR supports this draft recommendation. LEADR recommends that the development of pre-action protocols should be undertaken collaboratively by judges, lawyers and ADR practitioners. This would bring together the diverse expertise and knowledge that is likely to result in workable protocols. As well, LEADR suggests consideration be given to tailoring protocols to specific areas of practice and to designing them both to limit early costs and to encourage resolution before court or tribunal proceedings are commenced.

Information request 12.2

The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.

LEADR considers that Family Law has paved the way for targeted pre-action protocols throughout the justice system. LEADR further considers that disputes have more in common than to distinguish among them. The substantive aspects of a dispute, while used to characterise the dispute, can risk exaggerating the differences and minimising the similarities among disputes and appropriate processes for resolving them. LEADR therefore considers that the Dispute Resolution approach of the Family Law System is a suitable starting point for all disputes.

LEADR notes that particularly in matters that come before Children's Courts it is highly important to require that young people have the opportunity for ADR before a dispute escalates in an adversarial approach.

Draft Recommendation 12.2

Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

LEADR supports the intent of this draft recommendation. LEADR prefers the development of 'model dispute resolver guidelines'. As stated in our commentary on Draft Recommendation 8.2, this would emphasise the expectation that agencies should aim to resolve disputes as early and as quickly as possible, using litigation as a final rather than first resort.

Information request 12.3

The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?

LEADR believes that local governments should be subject to model dispute resolver rules for the same reasons as commonwealth and state and territory governments. Implementation of these rules is most likely to lead to the most efficient use of local government resources including ratepayer fees.

Local government has close connection and ongoing relationships with many of its constituents and stakeholders so using ADR wherever possible to resolve disputes helps to maintain and build those relationships as well as providing a cost effective approach. Many issues particular to local government are highly suitable to resolution by ADR as they directly involve those in dispute and where appropriate can seek input from other stakeholders to develop creative responses particularly in relation to planning and delivery of services. In addition, consensual dispute resolution aligns with the consultative and engagement processes which many Councils now use as part of their approach to planning.

Information request 12.4

The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?

Current model litigant rules require that government agencies meet their obligations as a model litigant, in part, by:

> *"endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate"*
>
> *Appendix B, Legal Services Direction 2005*

Being required only to give consideration to ADR means that litigation continues to be seen and to function as the default option. LEADR supports amendment to create model dispute resolver obligations that require ADR be used as the default and agencies having to provide an explanation and to be held accountable when ADR is not used.

Information request 23.1

Would there be merit in exploring further options for expanding the volunteering pool for Community Legal Centres (CLCs)? For example, are there individuals with specialised knowledge that could provide advice in their past area of expertise such as retired public servants or retired migration agents that CLCs could draw on in the relevant area? Are there currently any barriers to prevent this?

This information request suggests that retired public servants or migration agents may be able to expand the volunteering pool for CLCs. LEADR suggests that retired

ADR practitioners or ADR practitioners willing to offer pro bono services may also be considered as providers of such services.

Draft recommendation 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- *adopting common definitions, measures and collection protocols*
- *linking databases and investing in de-identification of new data sets*
- *developing, where practicable, outcomes based data standards as a better measure of service effectiveness.*

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

LEADR supports this draft recommendation. LEADR notes that efforts should also be made to encourage the collection of data from dispute resolution undertaken outside the formal legal system. LEADR anticipates that data about costs, time taken to reach an outcome and satisfaction of participants will be persuasive in encouraging greater usage of ADR.

Conclusion

LEADR appreciates the opportunity to have commented on the *Draft Report* by the Productivity Commission on *Access to Justice Arrangements.*

As can be seen in our comments, LEADR is in the main supportive of the recommendations in relation to ADR and congratulates the Commission on including recommendations in the *Draft Report* that if adopted, could lead to increased use of ADR, resulting in improved resource allocation and efficiency and in outcomes more frequently decided by dispute participants themselves.

LEADR affirms its willingness to engage in discussions and to respond to future papers and proposals.

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LEADR