December 2009 page 43

Common ground on access to justice reforms

By STEVE LANCKEN and CYMBELINE JOHNSON

Steve Lancken is an accredited specialist in mediation and commercial litigation and a member of the Law Society's Dispute Resolution Committee and the National Alternative Dispute Resolution Advisory Council. Cymbeline Johnson is a Communications/Laws graduate from the University of Technology, Sydney and a trained mediator.

The Attorneys General of Australia are presently considering weighty policy advice about the way civil justice is delivered. Recent reports from the Attorney General's Departments of NSW[1] and the Commonwealth,[2] the Law Reform Commission of Victoria[3] and the National Alternative Dispute Resolution Advisory Council (NADRAC)[4] contain remarkably consistent policy recommendations that additional responsibilities should be placed on parties in civil disputes.[5]

None of the reports criticise the basic function of courts or tribunals,[6] nor do they seek to change the fundamental obligation of government to provide a safe, independent, fair and affordable final arbiter of disputes. However, their recommendations show movement to impose obligations on potential litigants to make real efforts to resolve their disputes *before* they commence court proceedings.

The reports advise that as far as possible, disputants should exhaust their ability to resolve a dispute before they seek the assistance of courts and tribunals. If this policy direction is pursued, obligations will be placed on disputants that require alternative methods of dispute resolution to be explored before and during the conduct of court or tribunal proceedings.

The recommendations of the four reports suggest that;

- Access to justice does not mean access to only that type of justice that involves a court or tribunal deciding a case. It includes access to the very broad range of processes that are used to resolve conflict. There is growing concern to ensure that everyone can participate in appropriate dispute resolution processes.
- The Attorneys General want to ensure that access to courts and tribunals is affordable with limited restrictions,
- Ensuring that courts and tribunals are properly resourced is a priority objective of government.[7]
- Addressing the cost of dispute resolution is a fundamental aspect of improving access to justice. As the Chief Justice of NSW said, "the principal focus of attention for those of us involved in the administration of justice must now be the costs of the process. By costs I do not refer to legal costs in the sense of the system of billing. What I am concerned with is the overall costs imposed upon the parties by the entire process of dispute resolution."[8]
- The Attorneys have been advised that court and legal resources are being expended on cases that are going to settle in any event, and complex litigation that engages vast amounts of court resources.
- Case management and alternative dispute resolution will continue to be important elements of the access to justice equation.
- Resolution of disputes by negotiation and mediation is not intended to replace independent determination by a court or tribunal. ADR is an addition to determination by state- sponsored courts and tribunals.
- Negotiation and mediation will not result in outcomes that mirror what a court or tribunal would decide and they do not need to. There is no policy or practical reason that they should.

Following the release of the NADRAC report on 4 November 2009 the Commonwealth Attorney-General requested that NADRAC undertake some further work, including the preparation of a statement of national ADR principles and a model dispute management plan for government agencies, and investigation of the issues of confidentiality, non-admissibility and conduct obligations for participants and practitioners in different ADR processes.

The emphasis on the use of non-judicial processes to assist parties to resolve their disputes will increase. The road to court-imposed resolution will be signposted with diversionary ADR opportunities, warnings, advice and information about alternatives to

how disputes can be resolved. Courts and tribunals will be at the end of the road, the last resort when all other opportunities have been exhausted.

The opportunity for lawyers is the promise that the promotion of ADR will improve access to justice and case management, and will result in an increase in the overall number of disputes that enter the justice system. There is evidence that offering easy and affordable ways to resolve disputes actually increases the volume of cases that present to the system.[9]

The Law Society has been asked to make submissions about the NSW and Commonwealth reports, and the Society's Litigation Law and Practice, Dispute Resolution, Arbitration Liaison, and Family Issues Committees are working on responses.

Consistent recommendations

- Improved provision of legal information to consumers
- Statement of principles/ ADR protocols
- Pre action protocols
- ADR education for lawyers
- Case management and dispute resolution education for judges
- Use of ADR by governments
- Legal obligation to advise of alternatives to judicial resolution
- Collection of data to inform future policy decisions.

ENDNOTES

1. Department of Justice and Attorney General, *ADR Blueprint: Pre-Action Protocols and Standards*, August 2009 and *ADR Blueprint: ADR in Government*, September 2009.
2. Attorney-General's Department of Australia, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009.
3. Victorian Law Reform Commission, *Civil Justice Review*, March 2008.
4. National Alternative Dispute Resolution Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, November 2009.
5. See boxed summary of consistent recommendations and proposals.
6. As Spigelman CJ has said, "The judicial system is the exercise of governmental function, not the provision of a service to litigants as consumers. The enforcement of legal rights and obligations is a core function of government" in French CJ, "The State of the Australian Judicature" (speech delivered at the 36th Australian legal Convention, Perth, 18 September 2009).
7. This sentiment was reflected by the Commonwealth Attorney-General when he said "The judiciary administers justice and is the cornerstone of our system of justice", Attorney-General Robert McClelland MP, (Judicial Conference of Australia Colloquium Dinner, Gold Coast, 11 October 2008).
8. Spigelman CJ, "Access to Justice and Access to Lawyers" (35th Australian Legal Convention, Sydney, 24 March 2007).
9. When the US Postal Service introduced a comprehensive transformative mediation process to deal with employment disputes, the number of reported disputes initially increased as a result of easier access to dispute resolution processes. See, for example, Bingham L.C. and Novac M.C., 2001, *Mediation's impact on formal complaint filing: Before and after the REDRESS program at the United States Postal Service*, Washington D.C., American Bar Association.