22 May 2009

Ms Serena Beresford-Wylie
Director
NADRAC Secretariat
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National Circuit
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By e-mail: nadrac@ag.gov.au

Dear Ms Serena Beresford-Wylie

Alternative Dispute Resolution in the Civil Justice System

About PIAC

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

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General Comments

PIAC has experience of alternative dispute resolution (**ADR**) processes as a result of acting for clients in a range of matters, both before and after commencing litigation.

PIAC is pleased that the Federal Attorney-General, the Hon Robert McClelland, has requested that NADRAC inquire into and identify strategies to remove barriers and provide incentives for greater use of ADR as an alternative to civil proceedings and during the court or tribunal process. ADR is an important way of resolving or managing disputes without a judicial decision.

The availability of ADR processes may produce better access to justice by, for example, preventing costly and traumatic litigation and promoting earlier settlement of disputes. ADR processes can, if effectively designed and resourced, occur at relatively short notice, procedures can be tailored to suit particular disputes and parties can generally exercise more control over the process. Parties may also be more likely to preserve their relationship and ADR can offer more creative solutions to disputes than most remedies arising from litigation. Further, significant cost savings can be achieved not only for the parties, but also in the justice system more broadly if reduced numbers of disputes are litigated in the courts.

ADR issues

While ADR can achieve the benefits identified above, PIAC considers that ADR should not be used as a substitute for other dispute resolution options simply because it is more cost effective. ADR should be used where it is appropriate for the circumstances of the case and not at the expense of fundamental rights and obligations such as the right to a fair trial and public hearing by a competent, independent and impartial tribunal: Article 14(1) of the *International Covenant on Civil and Political Rights* to which Australia is a State Party.

ADR is inappropriate if it fails to address power disparities between the parties. Power disparities between parties may be exacerbated in an informal setting. Certain types of disputes, such as between a consumer against a large corporation, are characterised by unequal bargaining power. Some consumers may accept a negotiated settlement in order to avoid the risk of adverse costs orders and the stress of litigation, yet through doing so do not have their rights fully realised or the merits of their case properly assessed. It may also be in the interests of an organisation to pay an individual a confidential settlement rather than risk having a test case judgement made against them that would be costly if applied to a large volume of consumers.

Such settlements have a detrimental effect on other similarly affected consumers as each much take separate legal action, whereas a court determination would provide a clear precedent and would be likely to result in a change in policy or conduct without the need for further legal action. This, in turn, has consequences in terms of costs to the justice system: if further claims are lodged by similarly affected consumers, each has resource implications not only for the individual litigant but also for the justice system.

Any requirement to participate in ADR processes must consider these kinds of power inequalities, preferably through court oversight. Any reforms should ensure that more powerful parties cannot exploit ADR to the detriment of less powerful parties who may be afraid of incurring court costs and the ongoing stress of litigation. A court could consider the benefits of ADR in both the individual case as well as the wider social justice context. A jurist who once faulted ADR for promoting a legal sub-culture at odds with existing legal principle, Sir Gerard Brennan CJ QC, later became Chief Justice of Australia and addressed the conference of the Australasian Institute for Judicial Administration, Wellington, New Zealand, September 20-22, 1996, stating:

> ... mediation and arbitration will continue to be familiar and prominent features of the system of dispute resolution in the future. There is no reason why, in the vast majority of cases, mediation should not be compulsory in the sense of being a condition of the right of any party to have the dispute brought on for trial. But let it be court-attached mediation. [cited in Justice P W Young, 'Current Issues' (1996) 70 *Australian Law Journal* 870-871.]

Parties participating in ADR processes must ideally have access to independent legal advice. In court proceedings, the disadvantage experienced by unrepresented parties can at least be partially compensated for by judges and by the procedural and substantive safeguards built into the litigation process. Unfortunately, many potential litigants are unlikely to have the funds to engage a solicitor for ADR processes.

In contrast to court hearings, ADR processes are usually conducted in private and resolutions are confidential. Neither the reason for a dispute nor the basis upon which it is resolved need be made public. Disputes settled through ADR thus do not allow for laws to be tested and have less capacity to achieve legal precedents or significant public interest outcomes. This does not mean that there is no place for ADR. It just means that ADR will not be appropriate for every dispute or for achieving broad-based public interest outcomes.

It is important that people do not have to choose ADR because of the inadequacies of the court system or the availability of legal assistance, but rather because of the benefits of ADR. Thus the court system must deliver a cost-effective, expeditious and fair resolution of disputes and ADR should not be viewed as a less costly and more efficient substitute. The costs and time associated with litigation continue to rise beyond the reach of many members of the community. This issue must be addressed separately, and not simply through increased reliance on ADR.

Lastly, if lawyers are to be involved in ADR processes, they must be adequately trained for the task. The principles of dispute resolution and the skills required to act for a party in ADR are different to those needed in an adversarial contest between two parties in court. ADR training should be included as a compulsory component of law degrees and of mandatory continuing legal education (MCLE).

ADR processes in the federal discrimination jurisdiction

One jurisdiction in which PIAC regularly acts for clients in ADR processes is in the federal discrimination jurisdiction. In this jurisdiction, discrimination complaints are made to the Australian Human Rights Commission (**AHRC**), whose role it is to attempt to conciliate complaints. If the parties do not settle, the complainant has the right to file an application in the Federal Court or Federal Magistrates Court.

This is a jurisdiction in which the issue of imbalance of power can be of particular concern and in which it is important to ensure that the processes are designed to counter to the greatest extent possible the effects of that imbalance.

In PIAC's experience, the AHRC conciliation process is often overly protracted and conciliators, while trained in conciliation, sometimes lack the required degree of experience, skill and gravitas to deal effectively with unco-operative conduct by parties and their legal representatives. This can seriously impair the capacity of the AHRC to deliver an effective ADR process and fail to effectively address the power imbalances.

In 2007-2008, the complaint handling section of the AHRC finalised 93% of matters within 12 months, 77% within nine months and 51% within six months (http://www.hreoc.gov.au/about/publications/annual_reports/2007_2008/chap4.html). This means it took more than six months for 49% of complaints to be finalised. While this is an improvement on previous years and on the section's stated performance standard of 80% of complaints to be finalised within 12 months, ideally complaints should be dealt with more expeditiously. The AHRC needs additional resources for conciliation so that at least 80% of complaints are finalised within six months. For some complainants, conciliation is only the first stage in seeking redress for unlawful discrimination. When the time taken

to litigate in the Federal Court or Federal Magistrates Court is taken into account, claims can take years to reach a final determination.

PIAC considers that AHRC conciliators need to engage more actively with the parties in the conciliation process by assisting them to identify the strengths and weaknesses of their positions, suggesting appropriate ways of resolving conflicts and educating parties about their rights and obligations pursuant to anti-discrimination legislation. AHRC conciliators should be trained in creative methods of facilitating dispute resolution. Consideration should be given to how to strengthen the authority of the conciliator in the process and better deal with power imbalances between the parties.

Please do not hesitate to contact us regarding the above.

Yours sincerely

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